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Dismissing the Foster Children

THE ELEVENTH CIRCUIT'S MISAPPLICATION AND IMPROPER EXPANSION OF THE YOUNGER ABSTENTION DOCTRINE IN *BONNIE L. V. BUSH**

I. INTRODUCTION

In June of 2000, a class action suit was filed on behalf of all children statewide in the custody of Florida's child welfare system.¹ The suit alleged that the governor of Florida, the secretary of Florida's Department of Children and Families, and administrators of the state's foster care system violated the plaintiffs' constitutional and federal statutory rights by maintaining a foster care system riddled with "widespread deficiencies."² Specific allegations against the defendants

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¹ *Bonnie L. ex rel. Haddock v. Bush*, 180 F. Supp. 2d 1321 (S.D. Fla. 2001), *rev'd sub nom.* 31 *Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), *cert. denied*, *Reggie B. v. Bush*, 540 U.S. 984 (Nov. 3, 2003).

² 31 *Foster Children v. Bush*, 329 F.3d 1255, 1260 (11th Cir. 2003). The amended complaint contains six counts, alleging that the defendants' practices deny and threaten the plaintiffs' claimed rights to:

- (1) safe care that meets their basic needs, prompt placements with permanent families, and services extended after their eighteenth birthdays, as guaranteed by substantive due process (Count I); (2) procedural due process in determining the services they will receive (Count II); (3) family association with siblings as guaranteed by the First, Ninth, and Fourteenth Amendments (Count III); (4) prompt placement with permanent families and to have their medical and educational backgrounds provided to their caregivers, as guaranteed by 42 U.S.C. §§ 675(5)(D) and (E), which are provisions of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 516 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-628 and §§ 670-679a ("the Adoption Act")) (Count IV); (5) health screening and follow-up under schedules established pursuant to the Medicaid Act, 42 U.S.C. §§ 1396a(a)(43)(B), 1396a(a)(43)(C), and 1396(r) (Count V); and (6) in the case of the black plaintiff foster children, freedom

included claims that the child welfare agency engaged in a “pattern and practice” of placing children in “dangerous, abusive, neglectful, overcrowded or inappropriate” foster care settings; failed to “screen, oversee, monitor, and visit” foster homes; and ignored complaints of abuse or neglect in foster homes.³

Despite the pressing need for reform of Florida’s Department of Children and Families (DCF or the Department), the suit’s constitutional claims—violations of substantive due process and the First, Ninth, and Fourteenth Amendments—were dismissed⁴ on the basis of Younger abstention,⁵ a doctrine developed in the 1971 case of *Younger v. Harris*.⁶ The doctrine provides that federal courts should abstain from adjudicating a case, over which the federal court otherwise has proper jurisdiction, when the relief sought in federal court would interfere with an ongoing state court proceeding and when the litigant has an adequate opportunity to raise his constitutional claims in the ongoing state proceeding.⁷ The federal court in *Bonnie L. v. Bush* determined that an order of injunctive relief from federal court directed at improving Florida’s foster care system “ha[d] the potential for an unseemly conflict between a state judge and [itself].”⁸ On appeal, the Eleventh Circuit affirmed the dismissal on Younger

from racial discrimination in the provision of care and services, as guaranteed by Title VI of the 1964 Civil Rights Act (Count VI).

Id. at 1261.

³ See Plaintiff’s Amended Complaint ¶¶ 140-43, *Bonnie L. v. Bush* (S.D. Fla. 2001) (No. 00-2116) available at http://childrensrights.org/PDF/legal/florida_complaint.pdf (last visited Dec. 14, 2004). This online copy of the amended complaint is linked to the website of Children’s Rights, Inc., the national children’s advocacy organization that represented plaintiffs in *Bonnie L.*

⁴ *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1338 (S.D. Fla. 2001).

⁵ *Id.* at 1338. In addition to abstention grounds, the District Court dismissed the case also on grounds of Eleventh Amendment Immunity and lack of private right of enforcement, under 42 U.S.C. §1983, of the Adoption Assistance and Child Welfare Act. See *id.* at 1331, 1344.

⁶ *Younger v. Harris*, 401 U.S. 37 (1971).

⁷ *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982) (holding that the federal court properly abstained from hearing litigant’s federal constitutional challenge seeking to enjoin a pending state bar disciplinary proceeding because of the important state interest in the pending state proceeding and because the litigant had opportunity to raise his claim in the state proceeding).

⁸ *Bonnie L.*, 180 F. Supp. 2d at 1335.

abstention grounds,⁹ agreeing that the federal lawsuit would interfere with juvenile court proceedings in the state court system in which foster children are regularly involved.¹⁰ Disregarding the merits of the claim and the critical need for the sought-after reform, the Eleventh Circuit asserted that the plaintiffs could, and therefore should, raise their constitutional claims in the state's juvenile system.¹¹ Even with what the Supreme Court has characterized as the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them,"¹² the Eleventh Circuit declined to exercise jurisdiction and ignored its duty to protect and enforce the plaintiffs' constitutional rights.

This Note challenges the Eleventh Circuit's decision to dismiss the case of *Bonnie L. v. Bush* on grounds of Younger abstention.¹³ Part II of this Note begins with a brief description of Florida's child welfare system, highlighting the system's deficiencies and outlining the improvements sought by the plaintiffs in *Bonnie L.* Part III sketches the evolution of the Younger abstention doctrine, the expansion of the doctrine over the last twenty years, and the current standard in applying Younger abstention. Part IV then closely examines the Eleventh Circuit's decision in *Bonnie L. v. Bush*, arguing that the court's decision relies on an unwarranted expansion and incorrect application of the Younger abstention doctrine. Part V asserts that federal courts have an obligation to exercise their proper jurisdiction to protect the constitutional rights of foster children. This section also proposes that federal courts are the only viable forum in which remedial schemes to improve Florida's child welfare system can be accomplished. And finally, this Note ends with a plea to federal courts to live up to their responsibility to protect the rights of U.S. citizens,

⁹ *31 Foster Children*, 329 F.3d at 1282.

¹⁰ *Id.* at 1278. State juvenile courts are required to conduct periodic review proceedings for every child in state custody, generally once every 6 months. *See, e.g.*, FLA. STAT. ch. 39.701(1)(a) (2003). On appeal, the Eleventh Circuit did not address the issue of dismissal based on Eleventh Amendment Immunity because the Circuit Court dismissed on abstention grounds and lack of enforceable right. *See 31 Foster Children*, 329 F.3d at 1268 (citation omitted).

¹¹ *31 Foster Children*, 329 F. 3d at 1279-80.

¹² *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (involving dismissal of a suit brought in federal court by the United States on its behalf and on behalf of two Indian tribes seeking declaratory judgment of rights over water and tributaries of the Colorado River).

¹³ Note that on appeal, the name of the case was changed from *Bonnie L. v. Bush* to *31 Foster Children v. Bush*. Throughout this note, however, I will refer to the Eleventh Circuit case as "Bonnie L." despite the case name modification.

especially ones as vulnerable as foster children, in the hopes that child welfare institutions in this country can be effectively reformed before any more children are unnecessarily harmed or killed.

II. THE FAILURE OF FLORIDA'S CHILD WELFARE SYSTEM AND THE FILING OF *BONNIE L. V. BUSH*

Child welfare systems are created to protect children who cannot be adequately cared for by their biological families.¹⁴ These systems remove abused and neglected children from their parents' custody and place them in the custody of the state.¹⁵ The state, in turn, has a constitutional obligation to provide adequate care for these children.¹⁶ The state must provide them with services and make efforts either to return them to the custody of their biological families, or to facilitate the adoption process with an alternative family.¹⁷

The Florida system, like many large child welfare systems across the country, has failed its children.¹⁸ From July

¹⁴ See Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620-629, 670-679 (codified as amended by the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 (1997) [hereinafter ASFA]).

¹⁵ See, e.g., FLA. STAT. chs. 409, 39 (2003) (the two chapters of the Florida statutes which govern the obligations of the state in providing a child welfare system). The Federal Government provides federal grants to states, and states are required to create a state department to provide foster care and foster services in compliance with federal law.

¹⁶ See *Youngberg v. Romeo*, 457 U.S. 307, 312, 322 (1982) (finding that a mental patient involuntarily committed to a state institution had a constitutionally protected liberty interest under the Due Process clause to reasonably safe conditions of confinement); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (in § 1983 action brought by foster child against state child welfare system for injuries suffered while in custody of foster parents, the court stated that "the state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment."); see also *Deshaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989) (noting that foster care may be "sufficiently analogous" to institutionalization to give rise to an affirmative duty to protect children in custody).

¹⁷ See ASFA, Pub. L. No. 105-89 §§ 101, 103, 308 (1997).

¹⁸ See Carolyn A. Kubitschek, *Justice for Abused Foster Children: Suing State Agencies as Third Parties Under the Civil Rights Act Can Provide Relief for Children Placed in Harmful Circumstances*, TRIAL, Oct. 2003, at 42; Tim Padgett, *Is Florida Bad for Kids? Another tragedy—the killing of a 2-year-old—stokes the furor over the state's broken child-welfare system*, TIME, July 22, 2002, at 27; U.S. Department of Health and Human Services, Administration for Children and Families, *Child Welfare Outcomes 2000: Annual Report*, available at <http://www.acf.hhs.gov/programs/cb/publications/>

2000 to July 2001, ninety-five children died of abuse or neglect after the Department began an investigation into each child's circumstances.¹⁹ In the following year, there were eighty-seven to ninety such deaths.²⁰ Nonetheless, it was only after the disappearance of 5-year old foster child, Rilya Wilson, that Florida's troubled system received national attention.²¹ In that case, state caseworkers became aware that the young girl was missing in April 2002, at which point she had been missing, wholly unbeknownst to the agency, for over fifteen months.²²

The severe shortcomings of Florida's Department of Children and Families are undisputed. In August 2003, the federal government conducted the first Child and Family Service Review, a test created to measure a state's "ability to protect children from child abuse and to find permanent homes for kids who often languish in foster care."²³ The review covered seven categories. Florida's system failed six of those seven categories, displaying the Department's inadequacies in each of the following areas: protecting children from abuse and neglect; maintaining children in the home as opposed to placing them in foster care when possible and appropriate; providing permanency and stability in children's living situations; supporting families' ability to provide for children's needs;

cwo00/index.htm (assessment of state efforts to provide safety and permanency for children in state custody), with data for the state of Florida available at <http://www.acf.hhs.gov/programs/cb/publications/cwo00/statedata/fl.htm>. See also Mark Hollis & Shana Gruskin, *Year of Reform at DCF Leaves Goals Unmet: Agency chief sees mixed results, more work ahead*, SOUTH FLORIDA SUN SENTINEL, Sep. 17, 2003, at 1B (a year after efforts began to reform Florida's troubled child welfare system, it "continues to fail many of the 49,000 children in the state's care"); Douglas Kalajian, *Sharing the Shame*, PALM BEACH POST, Sep. 19, 2002, at 1E (comparing Florida's child welfare system to those of other states and concluding that Florida's failings are the norm across the country). For discussion of the failures of other state child welfare systems, see, e.g., David Van Biema, *Abandoned to her Fate: Neighbors, teachers and the authorities all knew Elisa Izquierdo was being abused. But somehow nobody managed to stop it*, TIME, Dec. 11, 1995, at 32; Leslie Kaufman & Richard Lezin Jones, *Misplaced Trust: Child Welfare in Crisis; Cradle to Grave in Flawed New Jersey Foster Care*, N.Y. TIMES, April 6, 2003, at A1.

¹⁹ Hollis & Gruskin, *supra* note 18.

²⁰ *Id.*

²¹ See, e.g., Dana Canedy, *Case of Lost Miami Girl Puts Focus on Agency*, N.Y. TIMES, May 3, 2002, at A19.

²² Diana Marrero, *Missing Birthday Girl Rilya Turns 7; State Senator Calls For More Responsive State Program For Children*, SUN SENTINEL (Fort Lauderdale, Fl.), Sep. 30, 2003, at 1B.

²³ Laura Meckler, *No States Pass Rigorous U.S. Test to Halt Child Abuse, Find Homes; Florida Fails Six of Seven Care Categories*, THE MIAMI HERALD, Aug. 19, 2003.

ensuring children's educational needs are met; and securing the physical and mental well-being of children.²⁴

In response to the failure of Florida's child welfare system, and in the hopes of protecting thousands of abused and neglected children in the state of Florida's care, *Bonnie L. v. Bush*²⁵ was filed in federal district court in the Southern District of Florida. The suit was brought under 42 U.S.C. § 1983²⁶ and sought declaratory and injunctive relief to improve the embattled system.²⁷ Specifically, the plaintiffs sought to have the court declare unconstitutional and unlawful various practices of Florida's Department of Children and Families; to enjoin DCF and the other defendants from violating the plaintiffs' constitutional rights; to order appropriate remedial relief in compliance with the Constitution and federal laws; to appoint a panel of child welfare experts to "develop and oversee the implementation of a plan for reform"; and finally, to appoint an ombudsman or child advocate to meet with the defendants regularly and advocate on behalf of children in the system.²⁸

Avoiding the merits of the *Bonnie L.* complaint, both the District Court and the Eleventh Circuit improperly abstained from entertaining the case altogether.²⁹ Under the doctrine of

²⁴ *Id.* The only category Florida passed was in preservation of continuous family relationships and connections.

²⁵ *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321 (S.D. Fla. 2001).

²⁶ *Id.* at 1325. 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, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (2000).

²⁷ *Id.*

²⁸ See 31 *Foster Children v. Bush*, 329 F.3d 1255, 1261-62 (11th Cir. 2003). The alleged unconstitutional and unlawful practices of DCF and the defendants included, among others, the following: failure to provide for the plaintiffs' basic needs, safety, freedom from harm, freedom from unreasonable restraints on liberty, freedom from being placed into unnecessary state-created danger, and freedom from arbitrary and capricious actions and decisions that deprive plaintiffs of benefits to which they are entitled; deprivation of state-created entitlements without an adequate and fair procedure; and unnecessary separation of siblings and denial of visitation among them. *Id.* at 1261.

²⁹ *Bonnie L.*, 180 F. Supp. 2d at 1326; 31 *Foster Children*, 329 F.3d at 1282.

Younger abstention, federal courts are permitted to abstain only when the federal suit and the relief sought would interfere with an ongoing state proceeding and there is a sufficient opportunity for the litigant to raise his constitutional claims in the state proceeding at issue.³⁰ In the case of *Bonnie L.*, the relief sought would not have affected state court proceedings in any manner that would have run afoul of the Younger doctrine. The injunctive relief sought in *Bonnie L.* was aimed at improving Florida's Department of Children and Families to make the agency live up to its constitutional obligations to protect Florida's abused and neglected children.³¹ Contrary to the court's determination, such system-wide reformation of Florida's foster care system in no way interferes with the juvenile court dependency proceedings of Florida's foster children.³² The Eleventh Circuit was only able to justify its dismissal of *Bonnie L.* by incorrectly and inappropriately expanding the scope of interference upon which Younger abstention jurisprudence has always been based. Furthermore, the juvenile courts of Florida do not provide an adequate forum for the plaintiff children in *Bonnie L.* to raise their constitutional claims.³³ Indeed, procedural and practical barriers to bringing a statewide class action, institutional reform case such as *Bonnie L.* in juvenile court dictate that abstention was not warranted.³⁴

³⁰ *Middlesex County Ethics Comm.*, 457 U.S. at 432.

³¹ *31 Foster Children*, 328 F.3d at 1261-62.

³² *Cf. Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003) (finding that reform of child welfare system analogous to reform sought in *Bonnie L.* did not interfere with dependency proceedings and further could only have helped the juvenile court proceedings by relieving stresses on caseworkers so that they could better represent children's interests).

³³ See FLA. R. JUV. P. 8.000-8.735. (containing no provision for class actions suits).

³⁴ See *Dep't of Children and Family Servs. v. I.C.*, 742 So. 2d 401, 404 (Fla. Dist. Ct. App. 1992) (State courts conducting periodic reviews of foster children have "no general jurisdiction over [the Department of Children and Family Services] to monitor and evaluate its functioning."); See also *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1323 (D.C. Cir. 1993) (holding that juvenile court proceedings did not provide an adequate forum for plaintiff class of foster children "to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law").

III. HISTORY AND EVOLUTION OF THE YOUNGER ABSTENTION DOCTRINE

A. *Background*

In the case of *Younger v. Harris*, the Supreme Court developed the abstention doctrine which came to be known as Younger abstention.³⁵ In defining the doctrine, the Court relied on notions of comity, equity, and federalism.³⁶ The basic principle articulated in *Younger* was that a federal court cannot enjoin a pending state court proceeding absent extraordinary circumstances.³⁷ Although *Younger* is considered the first explicit declaration of this doctrine, it is based on an ideal born long before the historic 1971 case.³⁸

The foundation of the abstention principle came from English law, where it was impermissible for courts of equity to interfere with criminal proceedings.³⁹ In 1888, the United States Supreme Court refused to intrude in a forthcoming criminal proceeding in the case of *In re Sawyer*.⁴⁰ In that case, the Court determined, based on long-standing principles of English jurisprudence, that a court of equity "has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers."⁴¹ To intervene in criminal matters, the Court said, would be to "invade the domain of the courts of common law . . ."⁴² The *Sawyer* decision also cited the Anti-Injunction Act⁴³ as a basis for non-intervention.⁴⁴ Passed in 1793, the Anti-Injunction Act instructs that no United States Court has authority to grant an injunction of state court proceedings "except as authorized by an act of Congress or

³⁵ *Younger v. Harris*, 401 U.S. 37, 41 (1971).

³⁶ *Id.* at 43-44.

³⁷ *Id.* at 45.

³⁸ See Matthew D. Staver, *Balancing Federal Court Intervention with State Sovereignty*, 22 OKLA. CITY U.L. REV. 1143, 1156 (1997).

³⁹ *Id.*

⁴⁰ *In re Sawyer*, 124 U.S. 200 (1888).

⁴¹ *Id.* at 210.

⁴² *Id.*

⁴³ 28 U.S.C. § 2283 (1997).

⁴⁴ *Sawyer*, 124 U.S. at 219-20.

where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”⁴⁶ The foundation of the Anti-Injunction Act, like the decision in *Sawyer*, concerns the relationship between federal and state court, and the tensions therein.⁴⁶ The case of *Younger v. Harris* raised those same concerns.

B. *Younger v. Harris*

The plaintiff in *Younger v. Harris*, John Harris, was indicted in California state court under California’s Criminal Syndicalism Act for distributing political pamphlets.⁴⁷ Following his indictment and unsuccessful attempts in the California trial and appellate courts to have the case dismissed, Harris filed suit in federal district court, seeking an injunction to enjoin the Los Angeles County District Attorney, Evelle Younger, from further prosecution.⁴⁸ Harris alleged that the Syndicalism Act violated his constitutional rights guaranteed to him by the First and Fourteenth Amendments of the Federal Constitution. The District Court for the Central District of California granted the injunction enjoining further prosecution and held that California’s Act was void for vagueness and overbreadth.⁴⁹ The Supreme Court reversed, holding that the lower court decision “must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.”⁵⁰ In its decision, the Supreme Court outlined the “precise reasons” for the “longstanding” federal non-intervention policy.⁵¹ The first reason the Court cited was that courts of equity, under the “basic doctrine of equity jurisprudence,” ought not restrain criminal prosecutions when the complainant has an adequate remedy at law and will not

⁴⁶ *Id.* In *Mitchum v. Foster*, the Supreme Court held that civil rights actions brought under 42 U.S.C. § 1983 were exempt from the Anti-Injunction Act because Congress explicitly provided in § 1983 for federal courts to have authority to issue injunctive relief. 407 U.S. 225, 242-43 (1972).

⁴⁷ See *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940) (noting that the intent of the Anti-Injunction Act was to avoid “needless friction between state and federal courts”).

⁴⁸ *Younger*, 401 U.S. at 38.

⁴⁹ *Id.* at 38-39.

⁵⁰ *Harris v. Younger*, 281 F. Supp. 507, 517 (C.D. Cal. 1968).

⁵¹ *Younger*, 401 U.S. at 41.

⁵¹ *Id.* at 43.

suffer irreparable harm from denial of equitable relief.⁵² The opinion continues:

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.⁵³

The Court referred to this second principle as "Our Federalism."⁵⁴ Our Federalism, as a concept, the Court explained, "does not mean blind deference to 'States' Rights,'" but rather a system which is sensitive to "the legitimate interests of both State and National Governments."⁵⁵

In applying the principles of equity, comity, and federalism to Harris's case, the Supreme Court found abstention proper.⁵⁶ Harris had a pending proceeding in state court in which he was afforded the opportunity to raise his constitutional claims.⁵⁷ Moreover, the Court determined that Harris's prosecution was not brought in bad faith; the only injury facing Harris was "solely 'that incidental to every criminal proceeding brought lawfully and in good faith.'"⁵⁸ Thus, Harris's case did not give rise to exceptional circumstances warranting federal intervention.⁵⁹

With this ruling, Younger abstention was born. At its creation, the doctrine was relatively restricted: it forbade a federal court from enjoining a pending state criminal proceeding unless the complainant was not afforded an adequate remedy at law or he would be immediately and

⁵² *Id.* at 43-44.

⁵³ *Id.* at 44.

⁵⁴ *Id.*

⁵⁵ *Younger*, 401 U.S. at 44.

⁵⁶ *Id.* at 53.

⁵⁷ *Id.* at 49.

⁵⁸ *Id.* (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943)). The *Younger* decision continued: "[T]herefore under the settled doctrine we have already described he is not entitled to equitable relief 'even if such statutes are unconstitutional.'" *Id.* (quoting *Watson v. Buck*, 313 U.S. 387, 400 (1941)).

⁵⁹ *Id.* at 53.

irreparably injured if denied equitable relief.⁶⁰ However, the doctrine was quickly expanded, further limiting litigants' access to federal courts to vindicate federal constitutional rights.⁶¹

C. *Expansion of the Younger Abstention Doctrine*

On the same day the Supreme Court decided *Younger*, it also decided *Samuels v. Mackell*,⁶² an almost factually analogous case, in which the plaintiffs sought not only an injunction against further criminal proceedings, but also declaratory relief. The plaintiffs in *Samuels*, indicted under New York's criminal anarchy statutes, requested the district court to enter a declaratory judgment stating that the challenged laws were unconstitutional.⁶³ The Supreme Court relied on the same principles it did in *Younger* in determining that abstention was proper with respect to declaratory relief as well as injunctive relief.⁶⁴ The opinion states:

[I]n cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily

⁶⁰ Three years after *Younger*, the Supreme Court held that *Younger* abstention was not applicable in cases where there is no state criminal proceeding pending at the time the federal complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

⁶¹ See, e.g., Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 267 (1976-77) (stating that "even though the *Younger* doctrine as properly understood reflects the sound policy of avoiding unnecessary federal interference with state proceedings, some courts have extended the doctrine to situations in which the potential interference is minimal and federal court action is essential to the vindication of the complainants' constitutional rights."); Bryce M. Baird, *Federal Court Abstention in Civil Rights Cases: Chief Judge Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501 (1994).

⁶² *Samuels v. Mackell*, 401 U.S. 66 (1971).

⁶³ *Id.* at 68.

⁶⁴ *Id.* at 72. However, the Court did note that:

There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief. Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction.

Id. at 73.

a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid.⁶⁵

The *Samuels* Court also relied on the Declaratory Judgment Act to support its decision of non-intervention.⁶⁶ The Declaratory Judgment Act provides that a district court, after issuing a declaratory judgment, may grant "further necessary or proper relief" based on that judgment.⁶⁷ Thus, the court reasoned, once a declaratory judgment is entered, a subsequent injunction could follow in order to uphold the declaratory relief.⁶⁸ In that situation, the injunction, and thus the declaratory judgment which preceded it, would interfere with pending state proceedings and run afoul of *Younger* abstention principles.⁶⁹

Following the extension of *Younger's* application from injunctive to declaratory relief, in 1975 the Court further expanded the doctrine in the case of *Huffman v. Pursue*.⁷⁰ This case began in state court in Ohio, where prosecutors attempted to close a movie theater under Ohio's public nuisance statute.⁷¹ The theatre owner lost at the trial level in state court.⁷² In lieu of appealing the decision within the state system, he filed suit under 42 U.S.C. § 1983 in district court seeking injunctive and declaratory relief based on the claim that Ohio's public nuisance statute was unconstitutional.⁷³ The district court, without considering *Younger* abstention, found in favor of the theatre owner and issued a permanent injunction against

⁶⁵ *Id.* at 72.

⁶⁶ Federal Declaratory Judgment Act of 1934, 48 Stat. 955 (current version at 28 U.S.C. § 2201 (2000)).

⁶⁷ 28 U.S.C. § 2202 (2000).

⁶⁸ *See* 28 U.S.C. § 2283 (2000).

⁶⁹ *See Samuel*, 401 U.S. at 72.

⁷⁰ *Huffman v. Pursue*, 420 U.S. 592 (1975).

⁷¹ OHIO REV. CODE ANN. §§ 3767.01-3767.99 (1971). The alleged nuisance violation was based on the theatre's showing of pornographic movies. Under the statute, any establishment in violation could be closed for up to one year, and any items determined to be "obscene" could be subject to forced sale. *Huffman*, 420 U.S. at 595-97.

⁷² *State ex rel. Huffman v. Dakota*, No. 72 CIV 0326 (Ct. Com. Pleas, Allen County, Ohio, Nov. 30, 1972) (*cited in Huffman*, 420 U.S. at 598).

⁷³ *Huffman*, 420 U.S. at 598.

closing the theatre.⁷⁴ On appeal the Supreme Court addressed only the Younger abstention issue and dismissed the case.⁷⁵

Although the Younger doctrine would not have applied in this case⁷⁶ because it was civil in nature and not criminal,⁷⁷ the Supreme Court expanded the boundaries of the doctrine, holding that Younger abstention applied and was proper in *Huffman*.⁷⁸ For one, the Court disapproved of the owner's attempt to bypass the state appellate process.⁷⁹ It explained that the theater owner could have continued with an appeal in the state court system and could have ultimately reached the U.S. Supreme Court by traveling that road.⁸⁰ In addition, the Court reasoned that the nuisance proceeding in Ohio could be likened to criminal prosecution.⁸¹ The critical contribution of *Huffman*, therefore, is that Younger abstention was expanded to apply to civil proceedings which are "both in aid of and closely related to criminal statutes."⁸² In other words, Younger abstention was extended to apply to proceedings that are "quasi-criminal" in nature.⁸³

Then, in *Ohio Civil Rights Commission v. Dayton Christian School*,⁸⁴ the Younger doctrine was further expanded to include "quasi-judicial" proceedings.⁸⁵ In *Dayton Christian School*, a pregnant teacher's contract at a religious school was terminated because of a religious policy requiring mothers to stay home with their young children.⁸⁶ In response, the Ohio Civil Rights Commission began administrative proceedings

⁷⁴ *Id.* at 599.

⁷⁵ *Id.*

⁷⁶ See *Younger*, 401 U.S. at 43-44.

⁷⁷ *Huffman*, 420 U.S. at 603, 606.

⁷⁸ *Id.* at 607, 611-12.

⁷⁹ *Id.* at 609.

⁸⁰ *Id.* at 609-10.

⁸¹ *Huffman*, 420 U.S. at 604. The opinion states:

[W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.

Id.

⁸² *Id.* at 604.

⁸³ See *Staver*, *supra* note 38, at 1169.

⁸⁴ *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986).

⁸⁵ See *Staver*, *supra* note 38, at 1169.

⁸⁶ *Ohio Civil Rights Comm'n*, 477 U.S. at 623. When the teacher prepared to sue, the school rescinded its decision, but then fired the teacher on grounds that she had violated the school's internal dispute resolution policy. *Id.*

against the school based on the teacher's discharge.⁸⁷ Seeking an injunction against the pending administrative process, the school filed suit in federal district court claiming that any sanctions imposed would constitute violations of the Establishment and Free Exercise of Religion clauses of the First Amendment.⁸⁸ The Supreme Court held that abstention was proper in this case.⁸⁹ Justice Rehnquist, writing for the majority, reasoned that because the administrative proceeding provided the school the opportunity to raise its constitutional claims, abstention was appropriate and warranted.⁹⁰ With this holding, *Younger* abstention doctrine expanded to also encompass quasi-judicial proceedings.

The *Younger* theory has now also been applied to prohibit federal intervention in more traditional civil proceedings.⁹¹ With this, a shifting analysis in the *Younger* line of cases has occurred.⁹² The origins of *Younger* abstention, as we have seen and as the *Younger* opinion itself decries, lie in notions of equity, comity, and federalism.⁹³ As the *Younger* doctrine has expanded, however, the analysis has developed into an inquiry of the sufficiency of the state interest in its proceedings and, ultimately, has evolved into an analysis of the adequacy of the state forum.⁹⁴ A brief sketch of the following cases highlights this evolution.

⁸⁷ *Id.* at 623-24.

⁸⁸ *Id.* at 624-25.

⁸⁹ *Id.* at 625.

⁹⁰ *Id.* at 626-27.

⁹¹ See *Staver, supra* note 38, at 1170-71; *Juidice v. Vail*, 430 U.S. 327 (1977); *Moore v. Sims*, 442 U.S. 415 (1979).

⁹² See, e.g., *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987).

[C]oncern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.

Id.

⁹³ See *Younger*, 401 U.S. at 44.

⁹⁴ See, e.g., *Baird, supra* note 61 (arguing that Rehnquist has played a critical role in expanding the federalism element of the *Younger* abstention doctrine beyond the bounds contemplated by the *Younger* decision, in abrogation of 28 U.S.C. § 1343, which grants access to federal courts to civil rights plaintiffs).

In *Juidice v. Vail*,⁹⁵ the Supreme Court took an exceedingly expansive view of the notion of comity and held that abstention was proper in a case where the pending state proceeding was civil, but neither quasi-criminal nor quasi-judicial.⁹⁶ In this case, the plaintiff, Harry Vail, had disobeyed subpoenas and was held in contempt by state court judges.⁹⁷ He then brought a class-action suit on behalf of a class of judgment debtors in federal court, under 42 U.S.C. § 1983,⁹⁸ seeking to enjoin the use of statutory contempt procedures as unconstitutional violations of the Fourteenth Amendment.⁹⁹ The Supreme Court held that Younger abstention was proper in this case because abstention under *Younger* was not limited to state action akin to criminal proceedings.¹⁰⁰ In its decision, the Court relied on the language of *Huffman* and *Younger*, noting that “the “more vital consideration” behind the Younger doctrine of nonintervention lay not in the fact that the state criminal process was involved, but rather in “the notion of ‘comity.’”¹⁰¹ The opinion emphasized that *Younger* mandated deference not only to state judicial proceedings, but also to state functions, such as the contempt power, which lie “at the core of the administration of a State judicial system.”¹⁰² Labeling the state proceeding as civil, quasi-criminal, or criminal in nature was not the “salient fact” in Younger analysis, the Court declared.¹⁰³ Rather, the critical factor was the federal court interference with the State’s interest in enforcing its contempt power.¹⁰⁴

In *Juidice v. Vail*, the abstention analysis focused on a state’s interest in litigating in its own state judicial system.¹⁰⁵ Two years later, the Supreme Court again modified the

⁹⁵ *Juidice v. Vail*, 430 U.S. 327 (1977).

⁹⁶ See Baird, *supra* note 61, at 536.

⁹⁷ *Juidice*, 430 U.S. at 328-29. Vail was a judgment debtor who had defaulted on a credit arrangement, for which a default judgment was entered against him in City Court of Poughkeepsie, NY. He then disobeyed a subpoena to attend a deposition, and subsequently failed to appear at a hearing to show cause why he should not be held in contempt for missing the deposition. *Id.* at 329.

⁹⁸ *Id.* at 327.

⁹⁹ *Id.* at 330.

¹⁰⁰ *Id.* at 333-34.

¹⁰¹ *Juidice*, 430 U.S. at 334 (quoting *Huffman v. Pursue*, 420 U.S. 592, 601 (1975) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971))).

¹⁰² *Juidice*, 430 U.S. at 335.

¹⁰³ *Id.* at 335-36.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 335.

Younger analysis¹⁰⁶ in the case of *Moore v. Sims*.¹⁰⁷ There, a Texas couple's three children were removed from their custody because of suspected child abuse pursuant to a state court proceeding. The children were held in state custody for six weeks without a hearing.¹⁰⁸ The couple filed a federal suit challenging the constitutionality of certain statutes of the Texas Family Code, seeking a preliminary injunction enjoining any further prosecutions under the statutes at issue.¹⁰⁹ The District Court held that abstention was inappropriate in this case.¹¹⁰ The Supreme Court, however, reversed.¹¹¹ In its analysis, the Court not only looked to Texas's interest in litigating this matter in its own courts, but more importantly, to the fact that the state proceedings provided the federal plaintiffs the opportunity to raise their constitutional claims.¹¹² Justice Rehnquist, writing for the majority, wrote:

The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. In sum, the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers.¹¹³

The strong language used in this passage, asserting that the “only pertinent inquiry” is the adequacy of the state forum, marks a significant shift in the Supreme Court's Younger abstention analysis. The *Moore* opinion suggests that the State interest is secondary, the merits of the claim itself are no longer even considered, and that the only way comity concerns will be outweighed in favor of federal courts exercising their jurisdiction is when the state forum is inadequate.¹¹⁴ This standard is quite disparate from the original foundations of abstention laid down in *Younger v. Harris* only eight years

¹⁰⁶ See Baird, *supra* note 61, at 540.

¹⁰⁷ *Moore v. Sims*, 442 U.S. 415 (1979).

¹⁰⁸ *Id.* at 419-20.

¹⁰⁹ *Id.* at 421-22.

¹¹⁰ *Id.* at 422. The decision was also in part based on the fact that the state litigation was “the product of procedural confusion in the state courts.” *Id.*

¹¹¹ *Id.* at 423, 435.

¹¹² *Moore*, 442 U.S. at 430.

¹¹³ *Id.* (internal citation omitted).

¹¹⁴ See Baird, *supra* note 61, at 540-41.

earlier. In *Younger*, the Court explicitly stated that their holding in that case did “not mean blind deference to ‘States’ Rights,” but only a “sensitivity” to the interests of both the state and the federal government, and an endeavor on the part of the federal courts not to interfere when unwarranted.¹¹⁵

D. *Younger Abstention Today: The Three-Prong Middlesex Test*

The Supreme Court constructed a three-prong standard for cases implicating *Younger* abstention in 1982 in the case of *Middlesex County Ethics Committee v. Garden State Bar Association*.¹¹⁶ The Middlesex test is recognized as the current standard for *Younger* abstention, and is most often characterized as follows: *Younger* abstention is proper when (1) the state action is an ongoing state proceeding (2) that implicates important state interests, and (3) the plaintiff has an adequate opportunity to raise his constitutional claims in the state proceeding.¹¹⁷ Since the establishment of this three-part standard, however, questions concerning the precise boundaries of *Younger* abstention have persisted, and the Supreme Court has not provided a great deal of guidance in clarifying the doctrine’s exact limits and parameters.¹¹⁸

¹¹⁵ *Younger*, 401 U.S. at 44.

¹¹⁶ *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423 (1982). At issue in this case was the constitutionality of disciplinary rules of a New Jersey county ethics committee. The federal plaintiff, an attorney who was charged with violating the New Jersey Code of Professional Conduct, was involved in a disciplinary proceeding before the Ethics Committee when he filed his federal suit. The Supreme Court held abstention warranted in this case, relying on the precedent of *Judice v. Vail* and *Moore v. Sims*. *Id.* at 432-33, 436.

¹¹⁷ *Middlesex County Ethics Comm.*, 457 U.S. at 432.

The question in this case is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id.

¹¹⁸ See, e.g., Charles R. Wise & Robert K. Chistensen, *Sorting Out Federal and State Judicial Roles in State Institutional Reform: Abstention’s Potential Role*, 29 *FORDHAM URB. L.J.* 387, 389 (2001) (“The ambiguity surrounding the abstention doctrine in institutional reform cases hinders the effective reform of state and local institutions.”); *Green v. Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001) (characterizing the abstention doctrine as an “oversimplification” of complex issues, leading to “a tendency for the district courts, and this court, to lose their way in the maze of various abstention doctrines, with the consequence that litigants who had properly invoked federal court jurisdiction are improperly relegated to an exclusive state court remedy for claimed violations of their federal constitutional rights”).

E. *Curtailment of the Younger Doctrine*

In order to acquire a full understanding of where Younger abstention stands today, and thus why it should not have been applied in the *Bonnie L.* case, there is one final case which must be discussed. This case, *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, known as "*NOPSI*,"¹¹⁹ is significant because in its decision the Supreme Court limited the extent to which abstention applies in civil cases. To briefly summarize the complicated facts, the New Orleans City Council brought suit in state court seeking a declaration to establish a rate order. NOPSI, a local utility company, then filed suit in federal court seeking an injunction against the council and challenging the constitutionality of the rate order.¹²⁰ The U.S. Supreme Court, reversing the rulings of the district court and the Fifth Circuit, held that a federal court should not abstain when the ongoing state proceeding at issue involves a state court engaged in an "essentially legislative act."¹²¹

The *NOPSI* opinion is essential in analyzing the Eleventh Circuit's ruling in *Bonnie L.* *NOPSI* stresses the importance of federal courts exercising the jurisdiction granted to them in protecting and enforcing individuals' rights. The opinion states: "Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."¹²² While

¹¹⁹ *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) [hereinafter *NOPSI*].

¹²⁰ *Id.* at 353-58. *NOPSI* was held liable by the Federal Energy Regulation Commission (FERC) for costs associated with constructing a nuclear power plant. The New Orleans City Council denied NOPSI's request for a rate increase to cover the construction costs, determining that NOPSI has incurred some of the costs through its own negligence. *Id.* at 352.

¹²¹ *Id.* at 371.

¹²² *Id.* at 358. To support this statement, the *NOPSI* opinion cites the following cases: *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case in which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."); *Wilcox v. Consolidated Gas. Co.*, 212 U.S. 19, 40 (1909) ("When a federal court is properly appealed to in a case over which it has by law

recognizing that there are certain situations where federal courts should abstain, the Court stated that it has "carefully defined" the areas in which abstention is appropriate; the Court reiterated that abstention remains "the exception, not the rule."¹²³ With this principle in mind, the Court determined that the rate making at issue in *NOPSI* was a legislative act,¹²⁴ and therefore that Younger abstention was unwarranted because the challenge was not within the scope of abstention defined by *Younger v. Harris* and its progeny.¹²⁵ Following the reasoning of the *NOPSI* decision, and bearing in mind the origins and evolution of the Younger abstention doctrine generally, the Eleventh Circuit's decision to abstain in the case of *Bonnie L.* is erroneous.

IV. THE ELEVENTH CIRCUIT'S MISAPPLICATION OF YOUNGER ABSTENTION IN *BONNIE L.*

In *Bonnie L. v. Bush*, the Eleventh Circuit misapplied the doctrine of Younger abstention, inappropriately extending it beyond the boundaries proscribed by the Supreme Court. As precedent, this incorrect decision in favor of abstention could adversely affect hundreds of thousands of children in foster care throughout this country.¹²⁶

The three-prong Middlesex test, the current standard for the application of Younger abstention, authorizes federal abstention in favor of the state proceeding when the following three conditions are met: (1) the state action is an ongoing state proceeding (2) that implicates important state interests, and (3) the plaintiff has an adequate opportunity to raise his constitutional claims in the state proceeding.¹²⁷ In the case of *Bonnie L.*, both parties conceded that the second prong of the Middlesex test was met, agreeing that the safety and well-

jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.") (citations omitted). *NOPSI*, 491 U.S. at 358-59.

¹²³ *NOPSI*, 491 U.S. at 359 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976))).

¹²⁴ *NOPSI*, 491 U.S. at 371.

¹²⁵ *Id.* at 373.

¹²⁶ See generally Kubitschek, *supra* note 18; Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988) (arguing that foster children require federal judicial protection for constitutional violations).

¹²⁷ *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

being of children in state custody is an important state interest.¹²⁸ Additionally, both parties also agreed that state juvenile court dependency proceedings, held periodically for every child in Florida's custody, constitute an ongoing state proceeding implicating the first prong of the *Middlesex* test.¹²⁹ Thus, the contested issues in *Bonnie L.* were (1) whether the federal suit and the relief it sought would interfere with the state proceedings in juvenile court, and (2) whether the state dependency proceedings provide the plaintiff children "with an opportunity to raise and vindicate [their] federal constitutional claims. . . ."¹³⁰ The Eleventh Circuit answered both questions incorrectly.

A. *The Ongoing State Court Proceeding: A Foster Child's Periodic Review in Juvenile Court*

As the Eleventh Circuit emphasized in the *Bonnie L.* decision, to properly conduct a *Middlesex* analysis, an understanding of the features of the ongoing state proceeding with which there is alleged interference is important.¹³¹ Thus to analyze the abstention issue in *Bonnie L.*, a cursory understanding of the features of Florida's foster care system is required.¹³² A child in Florida enters the foster care system when he or she is removed from his or her home and placed into state custody.¹³³ Florida's Department of Children and Families is responsible for conducting, supervising, and administering a "program for dependent children and their families" with the following goals: (a) prevention of separation

¹²⁸ 31 *Foster Children v. Bush*, 329 F.3d 1255, 1275 (11th Cir. 2003) ("The parties also agree . . . that important state interests are involved.")

¹²⁹ *Id.* at 1275 ("The parties agree . . . that continuing state dependency proceedings involving each of the plaintiffs are ongoing state proceedings for the purposes of *Middlesex* analysis.") (citing *J.B. v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999) (holding that continuing jurisdiction of juvenile court and six month periodic review hearings constitute an ongoing state judicial proceeding)).

¹³⁰ 31 *Foster Children*, 329 F.3d at 1275.

¹³¹ *Id.* at 1277 ("Whether the effect of the federal court injunctive relief the plaintiffs seek in this lawsuit will interfere with ongoing state dependency proceedings depends in part on the nature and extent of those proceedings.")

¹³² The Eleventh Circuit opinion gives a chronological outline of Florida's foster care system along the same lines as the one which follows. See *id.* at 1277-78.

¹³³ See FLA. STAT. ch. 409.145 (2003). Children can also be voluntarily placed into foster care by their parents or guardians. *Id.*

of children from their families; (b) reunification of families who have had children placed in foster homes or institutions; (c) permanent placement (i.e. adoption) of children who cannot be reunited with their families or when reunification would not be in the best interest of the child; and (d) protection of dependent children or children alleged to be dependent, including provision of emergency and long-term alternate living arrangements.¹³⁴

A child is involuntarily brought into the foster care system either by the Department or by law enforcement officers.¹³⁵ Once brought in, the Department must immediately consider whether probable cause exists to detain the child.¹³⁶ If probable cause exists, the Department must conduct a shelter hearing within 24 hours of removal of the child to retain custody.¹³⁷ Next a determination of dependency is made. A child is deemed dependent when he or she has been abused, neglected, or abandoned, or suffers from or is in "imminent danger of illness or injury as a result of abuse, neglect, or abandonment."¹³⁸ If deemed necessary, the Department files a petition for dependency against the parents or legal guardians of the abused, neglected, or abandoned child.¹³⁹

Once that occurs, the Florida state juvenile court system is given jurisdiction to proceed with determinations in the best interest of the child.¹⁴⁰ An adjudicatory hearing in the juvenile court, with the purpose of either decreeing the child dependent or returning the child to its home, must be held "as soon as practicable after the petition for dependency is filed."¹⁴¹ The child is adjudicated dependent at this hearing if the facts alleged in the dependency proceeding regarding the abandonment, neglect, or abuse are found to be true.¹⁴² The court must follow-up within 30 days of the dependency determination with a dispositional hearing.¹⁴³ At the child's

¹³⁴ FLA. STAT. ch. 409.145(1) (2003).

¹³⁵ FLA. STAT. ch. 39.401(1)(b) (2003.).

¹³⁶ FLA. STAT. ch. 39.401(3) (2003).

¹³⁷ *Id.*

¹³⁸ FLA. STAT. ch. 39.402(1)(a) (2003).

¹³⁹ *See* FLA. STAT. ch. 39.401 (2003).

¹⁴⁰ *See* FLA. STAT. ch. 39.507 (2003).

¹⁴¹ FLA. STAT. ch. 39.507(1)(a) (2003).

¹⁴² FLA. STAT. ch. 39.521(1) (2003) ("A disposition hearing shall be conducted by the court, if the court finds that the facts alleged in the petition for dependency were proven in the adjudicatory hearing. . . .").

¹⁴³ FLA. STAT. ch. 39.507(7) (2003). ("At the conclusion of the adjudicatory hearing, if the child named in the petition is found dependent, the court shall schedule the disposition hearing within 30 days after the last day of the adjudicatory hearing.").

dispositional hearing, the court resolves in whose custody the child will remain.¹⁴⁴ Only after the court determines that it is not in the best interest of the child's safety and well-being to be placed with a parent, relative, or other non-licensed placement will the court "commit the child into the temporary legal custody of the department."¹⁴⁵ The governing statute describes this transfer of custody as follows:

Such commitment invests in the [D]epartment all rights and responsibilities of a legal custodian. The [D]epartment shall not return any child to the physical care and custody of the person from whom the child was removed, except for court-approved visitation periods, without the approval of the court. The term of such commitment continues until terminated by the court or until the child reaches the age of 18.¹⁴⁶

When a child is placed into legal custody of the Department, a written case plan, which follows the child until he or she leaves the system, is required to be submitted and approved by the court.¹⁴⁷ Among other items, the case plan for a child in state custody must include the following: a description of the permanency goal for the child; a description of the type of placement in which the child is placed; a description of the visitation rights of the parents; a discussion of the safety and appropriateness of the child's placement; a discussion of the department's plans to carry out the judicial determination made by the court; a description of the plan to facilitate either the safe return of the child to the home or the permanent placement of the child; and a description of the plan to address the needs of the child.¹⁴⁸

While a child is in state custody, the state court maintains continuing jurisdiction over the dependency case, and the court reviews the status of the child in a dependency

¹⁴⁴ See FLA. STAT. ch. 39.521 (2003).

¹⁴⁵ FLA. STAT. ch. 39.521(3)(d) (2003).

¹⁴⁶ *Id.*

¹⁴⁷ FLA. STAT. ch. 39.521(1)(a) (2003); FLA. STAT. ch. 39.601 (2003). The case plan is defined as a document "prepared by the department with input from all parties. The case plan follows the child from the provision of voluntary services through any dependency, foster care, or termination of parental rights proceeding or related activity or process." FLA. STAT. ch. 39.01(11) (2003).

¹⁴⁸ See FLA. STAT. chs. 39.601(1)-(3) (2003) (providing an exhaustive list of all required items in a child's case plan).

proceeding at least once every six months.¹⁴⁹ At a dependency hearing, the court considers “the child’s situation, including whether there has been compliance with the case plan, the appropriateness of the child’s current placement, and whether the child is in a setting that is family-like and consistent with the child’s best interests and special needs.”¹⁵⁰ The court determines at a dependency hearing whether the child is to remain in foster care, be returned to the parent or guardian, or if termination of parental rights hearings should be initiated against the parent to free the child for adoption.¹⁵¹ Additionally, if the court finds that the Department is not in compliance with the case plan, it can hold the Department in contempt for its failure to comply.¹⁵²

It is this periodic dependency hearing (or review hearing) that is at the heart of the abstention dispute in *Bonnie L.* It is the “ongoing state court proceeding” over which the Eleventh Circuit claims potential federal court interference that runs afoul of Younger abstention.¹⁵³ In *Bonnie L.*, the Eleventh Circuit resolved that “the plaintiffs are seeking relief that would interfere with the ongoing state dependency proceedings by placing decisions that are now in the hands of the state courts under the direction of the federal district court.”¹⁵⁴ The court of appeals concluded that the declaratory judgment and injunctions requested by plaintiffs could result in impermissible interferences with state court adjudications because the federal court and state court could issue “conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family.”¹⁵⁵ The circuit court also concluded that the federal court could “effectively require an amendment to a child’s case

¹⁴⁹ FLA. STAT. ch. 39.701(1)(a) (2003).

¹⁵⁰ 31 *Foster Children v. Bush*, 329 F.3d 1255, 1277 (11th Cir. 2003) (referencing FLA. STAT. chs. 39.701(7)(d),(g) (2003)).

¹⁵¹ FLA. STAT. ch. 39.701(9)(a) (2003).

¹⁵² FLA. STAT. ch. 39.701(9)(c) (2003).

If, in the opinion of the court, the social service agency has not complied with its obligations as specified in the written case plan, the court may find the social service agency in contempt, shall order the social service agency to submit its plans for compliance with the agreement, and shall require the social service agency to show why the child could not be safely be returned to the home of the parents.

Id.

¹⁵³ 31 *Foster Children*, 329 F.3d. at 1278.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

plan that the state court would not have approved” when state law gives the state courts authority to make such amendments.¹⁵⁶

Both of these conclusions are unsupported and incorrect. The court did not explain how such interferences would occur as a result of the declaratory and injunctive relief sought in *Bonnie L.* The relief sought was aimed specifically at the executive branch officials of Florida’s Department of Children and Families. It was not directed in any way against the state court system, its procedures, the actions of its judges, or the dependency proceedings conducted therein.¹⁵⁷ The plaintiffs sought a declaration that certain practices of the Department were unconstitutional and unlawful; an injunction against the Department to end continued constitutional violations; remedial relief to ensure compliance with the Constitution and laws of the United States; and the appointment of a panel of experts to supervise the implementation of a plan to reform the Department of Children and Families.¹⁵⁸ In more concrete terms, the plaintiffs sought relief such as increased funding for the Department, improved training for Department employees and foster families, and better supervision, visitation and monitoring of children in foster care. None of this relief would affect the nature or jurisdiction of the juvenile court, nor would it interfere with dispositions made in that court with respect to individual children in the foster care system.

Moreover, the Eleventh Circuit made an egregious mistake in its incorrect reading of the mission of the expert panel that plaintiffs sought to have created. The court of appeals asserted that the plaintiffs sought the appointment of a panel “to implement a systemwide plan to revamp and reform dependency proceedings in Florida.”¹⁵⁹ The directive of the

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* at 1261-62 (outlining the relief sought).

¹⁵⁸ *31 Foster Children*, 329 F.3d at 1261-62.

¹⁵⁹ *Id.* at 1279. Plaintiffs sought panel rehearing of the Eleventh Circuit’s abstention ruling, in particular of the Court’s reliance on an incorrect interpretation of the nature and purpose of the proposed expert panel. The hearing was denied by summary per curiam order. Petition for Writ of Certiorari at *14, *Reggie B. v. Bush*, 540 U.S. 984 (2003) (No. 03-351), available at 2003 WL 22428949.

panel was completely unrelated to dependency proceedings. Rather, the panel's explicit objective was to develop and oversee reform of the executive agency only. As the following two sections detail, this mischaracterization is but one of many errors made by the Eleventh Circuit in finding abstention proper in *Bonnie L. v. Bush*.

B. Inappropriate Extension of the Younger Abstention Doctrine

1. First Middlesex Prong: No Interference with State Court Proceedings

It is in its analysis of the first Middlesex prong that the Eleventh Circuit Court of Appeals inappropriately extended the scope of Younger abstention beyond its proscribed bounds. The court relied on several cases to support its finding of impermissible interference, none of which provide persuasive justification for abstention. Most notably, the court relied on the Tenth Circuit decision in *Joseph A. v. Ingram*.¹⁶⁰ In that case, factually analogous to *Bonnie L.*, a class action civil rights claim was filed in 1980 against New Mexico's child welfare system on behalf of children in New Mexico's custody, alleging systemic deficiencies in that state's foster care system in violation of the constitutional rights of the plaintiff foster children.¹⁶¹ A settlement was reached in the suit three years after filing, with both parties agreeing to enter into a consent decree.¹⁶² In 1999 plaintiffs brought a contempt proceeding in federal district court against the defendant Department for failure to comply with the decree.¹⁶³ In response, the defendants moved for dismissal on grounds of Younger abstention, which the district court granted.¹⁶⁴ The Tenth Circuit vacated the district court's Younger abstention dismissal, determining that while some provisions of the consent decree may warrant

¹⁶⁰ *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002). It should be noted that the Tenth Circuit's first opinion, decided in August of 2001 and reported at 262 F.3d 1113, was withdrawn and superseded on rehearing (in January 2002) by the opinion cited *infra*.

¹⁶¹ *See Joseph A.*, 275 F.3d at 1257.

¹⁶² *Id.*

¹⁶³ *Id.* In 1988, the initial consent decree was vacated and replaced with a second decree. The contempt proceeding brought in 1999 was actually for failure to comply with the second decree. *Id.*

¹⁶⁴ *Id.* The defendants also sought dismissal based on Eleventh Amendment sovereign immunity, which the court rejected. *Id.*

Younger abstention, not all necessarily do.¹⁶⁵ The Circuit Court remanded the case, ordering that the district court conduct a “provision-by-provision” analysis of the consent decree to conclude which provisions, if any, run afoul of *Younger*.¹⁶⁶

While the Tenth Circuit did not rule that any of the consent decree provisions warranted Younger abstention, its discussion of the possibility of abstention articulates an inappropriate expansion of the doctrine. The court of appeals conceded that the issue before it was dissimilar to most abstention cases: “[W]e recognize that this is not the typical *Younger* case in which a federal court is asked either to enjoin an action from proceeding in state court, or to issue a declaratory judgment that would have essentially the same effect as an injunction.”¹⁶⁷ The court, nonetheless, found that Younger abstention would be applicable, noting that “[e]nforcement of the [decree] . . . requires interference with the operations of the Children’s Court in an *insidious* way in that the [decree] expressly prevents the Department’s employees from recommending a range of planning options for children who are in the Department’s custody.”¹⁶⁸ The Tenth Circuit admitted that this was not the type of interference *Younger v. Harris* and its progeny contemplated, and yet refused to reject the abstention argument. Instead the Court created a new type of interference, which it deemed “insidious” interference, to which Younger abstention would apply. The Court stated that enforcement of the consent decree would have “an effect not unlike that of an injunction or declaratory judgment.”¹⁶⁹

In *Bonnie L.*, the Eleventh Circuit looked to the Tenth Circuit’s decision in *Joseph A.* to support its own ruling.¹⁷⁰ Use of the *Joseph A.* decision as support is misguided and inapt. For one, the *Joseph A.* decision is based on an unwarranted expansion of the abstention doctrine. Moreover, on remand, the

¹⁶⁵ *Id.* at 1274.

¹⁶⁶ *Joseph A.*, 275 F.3d at 1272 (stating that although “one provision may not be enforceable in light of *Younger*” . . . that “does not necessarily warrant voiding the entire consent decree . . . or dismissing the entire action”) (internal citations omitted).

¹⁶⁷ *Id.* at 1268 (internal citations omitted).

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ *Joseph A.*, 275 F.3d at 1268.

¹⁷⁰ See 31 *Foster Children v. Bush*, 329 F.3d 1255, 1278 (11th Cir. 2003).

district court, instructed by the Tenth Circuit to do a provision-specific analysis pursuant to the fictitious *insidious* interference standard,¹⁷¹ found that only one provision of the entire consent decree called for Younger abstention.¹⁷² In light of the remand decision, the precedential value of *Joseph A.* is extremely weak.¹⁷³

Additionally, the Eleventh Circuit's finding of interference with state court proceedings sufficient to satisfy the first prong of the Middlesex test is discredited by the Supreme Court's holding in *NOPSI*,¹⁷⁴ where the Supreme Court explicitly restrained the expansion of Younger abstention in the civil sphere.¹⁷⁵ The opinion states:

Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecution, to civil enforcement proceedings, and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions, it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement 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.¹⁷⁶

It is clear then that abstention is improper when the state court proceeding reviews legislative or executive action. The case of *Bonnie L.* falls squarely into this category. The suit challenges wholly executive conduct, that of the Department of Children and Families, and its inability to effectively run a child welfare system in compliance with the U.S. Constitution. The defendants in the suit are all executive officials and administrators of an executive agency,¹⁷⁷ and the relief sought is aimed directly at their actions and inactions.¹⁷⁸

Furthermore, only three months after the Eleventh Circuit's decision in *Bonnie L.*, the District Court for the Northern District of Georgia, upon which the Eleventh Circuit provides binding authority, rejected Younger abstention in a

¹⁷¹ See *Joseph A.*, 275 F.3d at 1272-73.

¹⁷² *Joseph A. ex rel. Wolfe v. Ingram*, No. CIV 80-623 JC/DJS (Jan. 16, 2003).

¹⁷³ See, e.g., *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 287-88 (N.D. Ga. 2003) (distinguishing *Bonnie L.* and noting that, on remand, abstention was found unwarranted in *Joseph A.*).

¹⁷⁴ *NOPSI*, 491 U.S. 350 (1989); see *supra* text accompanying notes 119-25.

¹⁷⁵ See *NOPSI*, 491 U.S. at 367-69, 373.

¹⁷⁶ *Id.* at 367-68 (internal citations omitted).

¹⁷⁷ See 31 *Foster Children v. Bush*, 329 F.3d 1255, 1260 (11th Cir. 2003).

¹⁷⁸ *Id.* at 1261-62.

case factually analogous to *Bonnie L.*¹⁷⁹ In *Kenny A. v. Perdue*, a plaintiff class consisting of all foster children residing in two of Georgia's counties in the custody of the Georgia Department of Human Resources brought a 42 U.S.C. § 1983 class action suit seeking systemic reform of the two counties' child welfare systems.¹⁸⁰ As in *Bonnie L.*, the plaintiffs alleged widespread deficiencies in the system in violation of their constitutional and federal statutory rights.¹⁸¹ The district court found that the relief sought did not implicate Younger concerns because it would not interfere in any way with ongoing state court proceedings.¹⁸² The district court stated:

Although plaintiffs all have periodic reviews before the state juvenile courts, the declaratory and injunctive relief plaintiffs seek is not directed at their review hearings, or at Georgia's juvenile courts, juvenile court judges, or juvenile court personnel. Rather, plaintiffs seek relief directed solely at *executive* branch defendants to remedy their alleged failures as plaintiff's custodians.¹⁸³

After detailing the alleged violations of the Georgia child welfare department,¹⁸⁴ the court went on to proclaim that if the allegations were proven to be true, "an order by this Court remedying such failures would not interfere in any way with ongoing juvenile court proceedings."¹⁸⁵ The court determined, in fact, that "[t]o the contrary, the relief sought by plaintiffs would at most simply support and further the juvenile court's own mission of ensuring that children removed

¹⁷⁹ *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003).

¹⁸⁰ *Id.* at 283.

¹⁸¹ *Id.*

¹⁸² *Id.* at 285-86.

¹⁸³ *Id.* at 286 (emphasis in original).

¹⁸⁴ *Kenny A.*, 218 F.R.D. at 286. The alleged failures include the following: assignment of excessive caseloads to inadequately trained and poorly supervised caseworkers; insufficient number of appropriately safe foster homes; lack of identification of possible relative placements as alternative to stranger or institutional placements; failure to provide sufficient support services to foster parents; failure to implement adequate information management systems to ensure expeditious placement of children in homes matching individual needs; failure to provide timely and appropriate permanency planning; placement of children in unsafe, unsanitary, and inappropriate shelters or placements; failure to provide mental, medical health, and educational needs being met for children in state custody; and separation of teenage mothers in foster care from their babies and siblings in foster care from one another without adequate visitation. *Id.*

¹⁸⁵ *Id.*

from their parents' custody because of abuse or neglect are not further harmed when the juvenile court orders them into the custody of the state."¹⁸⁶ For example, the court explained, the "only conceivable effect" of reducing caseworkers' caseloads is that caseworkers would be better prepared to appear in juvenile court.¹⁸⁷

The *Kenny A.* decision is especially informative because of the manner in which the Georgia district court distinguished the facts of *Kenny A.* from *Bonnie L.*, and thereby avoided following the Eleventh Circuit's decision to dismiss in *Bonnie L.*¹⁸⁸ The district court, in *Kenny A.*, determined that "the relief requested in [*Bonnie L.*] went far beyond what [was] sought [in *Kenny A.*]." ¹⁸⁹ In reality, however, the relief sought was for the most part exactly the same. The Northern District of Georgia's proposition that *Bonnie L.* sought more far-reaching relief was based entirely on the Eleventh Circuit's mischaracterization of the relief sought in the Florida case.¹⁹⁰ The Georgia opinion states: "As described by the court of appeals, plaintiffs in [*Bonnie L.*] sought 'to have the district court appoint a panel and give it authority to implement a systemwide plan to revamp and reform dependency proceedings in Florida, as well as the appointment of a permanent children's advocate to oversee that plan.'" ¹⁹¹ However, as previously noted, the plaintiffs in *Bonnie L.* did not seek to create a panel for the purpose of revamping or reforming the dependency proceedings in any way. The panel was meant to monitor reformation of the executive agency controlling the child welfare system. The Georgia district court also distinguished *Kenny A.* from *Bonnie L.* by noting that the Eleventh Circuit found in *Bonnie L.* that

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Younger abstention was ostensibly not applied in *Kenny A.* because the defendants removed the case from state to federal court, and in so doing waived their right to seek abstention.

In this case, however, State Defendants are in federal court only because of their own decision to remove the case from state court. It would be fundamentally unfair to permit State Defendants to argue that this Court must abstain from hearing the case after they voluntarily brought the case before this Court. To do so would permit defendants effectively to prevent plaintiffs from pursuing their federal claims in *any* forum.

Kenny A., 218 F.R.D. at 285. Nonetheless, the court determined that even absent defendants' waiver of the right to seek abstention, Younger abstention would be unwarranted and would not apply in the case. *Id.* at 285-86.

¹⁸⁹ *Id.* at 287.

¹⁹⁰ *Id.*

¹⁹¹ See *Kenny A.*, 218 F.R.D. at 287 (citing *31 Foster Children*, 329 F.3d at 1279).

“the federal and state courts could well differ, issuing conflicting orders about what is best for a particular plaintiff.”¹⁹² The Georgia court asserted:

In this case . . . plaintiffs do not ask the Court to make individualized determinations with respect to particular foster children. Instead, they seek relief mandating, on a system-wide basis, that State Defendants institute reforms to ensure that deprived children’s constitutional and statutory rights are not violated.¹⁹³

Again, the Georgia district court’s determinations are based on mischaracterizations in *Bonnie L.* Plaintiffs in *Bonnie L.* did not seek to have the court make any determinations about individual foster children that could conflict with orders in the child’s dependency proceeding. The relief sought by Florida’s foster children in *Bonnie L.* was exactly the relief described in the above quoted passage: systemic reform of the state’s institution to ensure that plaintiffs’ rights would not be violated.¹⁹⁴ Thus, the Georgia case of *Kenny A.* is effectively indistinguishable from *Bonnie L.*, illustrating that, on the merits, abstention was likewise not warranted in *Bonnie L.* because there was no interference with state court proceedings.

The Eleventh Circuit’s finding of interference necessitating Younger abstention in *Bonnie L.* is also plainly inconsistent with the prior cases in which the U.S. Supreme Court has applied the doctrine. A survey of those cases reveals that Younger abstention has been limited to scenarios where the relief sought is the enjoinder of specific actions of state court judges, prosecutors, and other law enforcement officials, or the enjoinder of a specific proceeding from going forward.¹⁹⁵

¹⁹² *Kenny A.*, 218 F.R.D. at 288 (citing *31 Foster Children*, 329 F.3d at 1278).

¹⁹³ *Id.*

¹⁹⁴ See *supra* text accompanying notes 25-28.

¹⁹⁵ See *Petition for Writ of Certiorari at *18, Reggie B. v. Bush*, 540 U.S. 984 (2003) (No. 03-351), available at 2003 WL 22428949 (noting that “every case in which [the Supreme Court] has applied Younger has involved remedies that would have the effect of putting a halt to state court proceedings”). In support of this proposition, the plaintiffs’ petition for certiorari cites the following cases: *Trainor v. Hernandez*, 431 U.S. 434, 438 (1977) (enjoining clerks and sheriffs from issuing or serving attachments); *Juidice v. Vail*, 430 U.S. 327, 330 (1977) (enjoining state court judges from enforcement of contempt proceedings); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 924 (1975) (granting injunction of town attorney and other law enforcement officials); *Hicks v. Miranda*, 422 U.S. 332, 345 (1975) (enjoining district attorneys and law

In all cases, the effective outcome of the relief sought was to immobilize a state court proceeding.¹⁹⁶ In the case of *Bonnie L.*, the relief sought would have had no affect whatsoever on the state court proceedings, the enforcement of judgments in those proceedings, or the continuance of those proceedings. The relief sought in *Bonnie L.* does not target juvenile court decisions regarding individual children or seek changes to the case plans of those children.¹⁹⁷ Instead the suit seeks systemic reform of the child welfare agency itself, including an increase in the number of caseworkers employed by the agency to decrease the number of cases assigned to each worker; more and better training of caseworkers; recruitment of additional foster homes to serve as placements for foster children; and increased state supervision and control over contract agencies with whom the Department partners to provide foster case service.¹⁹⁸ Thus, the

enforcement personnel and declaring the unconstitutionality of obscenity statute in criminal proceeding); *Kugler v. Helfant*, 421 U.S. 117, 119 (1975) (enjoining attorney general from proceeding with criminal prosecution); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 598-99 (1975) (enjoining sheriff and prosecuting attorney and execution of judgment); *O'Shea v. Littleton*, 414 U.S. 488, 492 (1974) (seeking to enjoin state court judges and law enforcement officials from taking certain actions in future criminal prosecutions); *Perez v. Ledesma*, 401 U.S. 82, 83-84 (1971) (entering suppression order requiring return by law enforcement officials of materials); *Boyle v. Landry*, 401 U.S. 77, 78-79 (1971) (enjoining state court judges and state attorneys from prosecution of intimidation statutes); *Samuels v. Mackell*, 401 U.S. 66, 67-68 (1971) (seeking to enjoin district attorney from proceeding with criminal case and to declare statute underlying prosecution unconstitutional); *Younger v. Harris*, 401 U.S. 37, 38-39, 53-54 (enjoining district attorney from proceeding with criminal case). Certiorari Petition at *19 n.17, *Reggie B.*, (No.03-351).

¹⁹⁶ Petition for Writ of Certiorari at *18-19, *Reggie B. v. Bush*, 540 U.S. 984 (2003) (No. 03-351), available at 2003 WL 22428949. The plaintiffs' petition also distinguishes the remaining four of the Supreme Court's fifteen affirmative applications of *Younger* abstention. The petition asserts that, notwithstanding the fact that the relief sought in those four cases was directed at "administrative bodies, executive agency officials, and even private litigants," it was nonetheless sought to "enjoin the state proceedings themselves or to enjoin a litigant from instituting or continuing with such proceedings." *Id.* The petition cites the following cases in support: *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 8 (1987) (enjoining attempts to enforce state court judgment or obtain lien under state law); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 624-25 (1986) (enjoining civil rights commission from exercising jurisdiction over sex discrimination claim); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 429 (1982) (seeking to enjoin state attorney disciplinary proceeding); *Moore v. Sims*, 442 U.S. 415, 422 (1979) (enjoining juvenile court neglect and abuse proceeding). Certiorari Petition at *19 n.18, *Reggie B.*, (No. 03-351).

¹⁹⁷ See *31 Foster Children*, 329 F.3d at 1261-62.

¹⁹⁸ See *Bonnie L. ex rel. Haddock v. Bush*, No. 00-2116, 2001 WL 1840843, at *7-9 (S.D. Fla. Apr. 20, 2001) (report and recommendation of magistrate judge) (outlining plaintiffs twenty specific allegations of defendants' practices resulting in plaintiffs' violations of rights, as stated in plaintiffs' amended complaint), *motions granted*, 1180 F. Supp. 2d. 1231 (S.D. Fla. 2001), *aff'd in part, vacated in part sub nom.* *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), *cert denied*, 540 U.S. 984

relief sought in the federal suit in no way implicates Younger abstention, and the Eleventh Circuit's application of Younger abstention is an impermissible extension of the doctrine.

2. Third Middlesex Prong Not Satisfied: No Opportunity for Relief in State Court Proceeding

The Eleventh Circuit was also incorrect in its determination that plaintiff had an adequate opportunity in the state court proceeding to raise his constitutional challenges,¹⁹⁹ thereby satisfying the third factor in the Middlesex test.²⁰⁰ The plaintiffs in *Bonnie L.* did not have such an opportunity in their juvenile court dependency proceedings.²⁰¹ To begin, it is clear from statutory and case law that Florida's Juvenile Courts do not have the authority to implement system-wide reform of Florida's Department of Children and Families. There is no provision in Florida's Rules of Juvenile Procedure for bringing class action suits in a foster child's periodic dependency hearing.²⁰² The committee notes accompanying the rules unambiguously state that "the rules governing dependency and termination of parental rights proceedings are self-contained and no longer need to reference the Florida Rules of Civil Procedure."²⁰³ Moreover, the Florida District Court of Appeals has held that "[t]he courts are not given general supervisory power over [the Department] under the statutes."²⁰⁴

(2003).

¹⁹⁹ See *31 Foster Children*, 329 F.3d at 1281-82.

²⁰⁰ *Middlesex County Ethics Comm.*, 457 U.S. at 432.

²⁰¹ See, e.g., *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1323 (D.C. Cir.

1993).

There are three types of Family Division proceedings that may be 'pending' for a child entangled in the District of Columbia's foster-care system: (1) a "neglect proceeding" adjudicating a neglect petition filed by the Corporation Counsel against the child's parents, (2) periodic review hearings, and (3) proceedings adjudicating motions to terminate parental rights. None of these proceedings is an appropriate forum for this multi-faceted class-action challenge to the District of Columbia's administration of its entire foster-care system.

Id.

²⁰² See FLA. R. JUV. P. 8.000-8.735.

²⁰³ FL. R. JUV. P. 8.000, Committee Note to 1992 Amendment.

²⁰⁴ *In re K.A.B.*, 483 So. 2d 898, 899 (Fla. Dist. Ct. App. 1986) (holding that

In limited instances, the Juvenile Court may hold the Department in contempt for its failure to comply with a child's case plan.²⁰⁵ However, the court has been found to have "no general jurisdiction over DCF to monitor and evaluate its functioning."²⁰⁶ In particular, for example, the court does not have jurisdiction to order specific placement or specific treatment for a child in the custody of the Department.²⁰⁷ Furthermore, the state courts do not have authority to implement reform with respect to the number of caseworkers employed by the Department, and thus the number of cases each caseworker covers.²⁰⁸ Nor is the court able to shut down or prohibit the use of a shelter found to be unsafe or unfit for foster children.²⁰⁹ In sum, the juvenile court is empowered only to provide limited, individualized relief for a specific child in its jurisdiction. The court has no authority to initiate systemic

the juvenile court does not have the authority to declare precisely where a dependant child in the custody of the Department of Health and Rehabilitative Services can be placed); see also Florida Dep't of Health and Rehab. Servs., Division of Youth Servs. v. Crowell, 327 So. 2d 115, 116 (Fla. Dist. Ct. App. 1976) ("Nowhere in [the governing Florida] statutes do we find that the court has been given general supervisory authority over the day-to-day operations of Division of Youth Services in the administration of the powers and duties conferred upon it.").

²⁰⁵ See FLA. STAT. ch. 39.701(8)(c) (2003).

²⁰⁶ Dep't of Children and Family Servs. v. I.C., 742 So. 2d 401, 404 (Fla. Dist. Ct. App. 1999) (holding that juvenile court did not have jurisdiction to enter an injunction preventing DCF from housing disabled children who have been rejected from placements at an assessment center).

²⁰⁷ See, e.g., State, ex rel. Dep't of Health and Rehabilitative Servs. v. Nourse, 437 So. 2d 221, 222 (Fla. Dist. Ct. App. 1983) ("[T]he court does not have the jurisdiction to manage the details of how [the Department] will attempt to rehabilitate juveniles."); Henry & Rilla White Found., Inc., v. Migdal, 720 So. 2d 568, 572 (Fla. Dist. Ct. App. 1998) ("a court may not require a child committed to the department to be placed in a specific facility"). But see *In re L.W.*, 615 So. 2d 834, 838 (Fla. Dist. Ct. App. 1993) (holding that the Department could order placement in a therapeutic foster home or residential treatment center and distinguishing *Nourse* on the grounds that the child in that case was a delinquent, and not a dependant); State Dep't of Health and Rehabilitative Servs. v. Brooke, 573 So. 2d 363, 369 (Fla. Dist. Ct. App. 1991) (holding that circuit court did "not facially interfere with the Department's executive discretion concerning the placement of dependent children in derogation of the doctrine of separation of powers by ordering the children to be placed in specific [therapeutic] institutions").

²⁰⁸ See *Lee v. Dep't of Health and Rehabilitative Servs.*, 698 So. 2d 1194, 1197 (Fla. 1997) ("[T]he function of interpreting and implementing the rules governing the number and assignment of employees to supervise and care for the mentally disabled . . . is a discretionary policy-making function for which [the Department of Health and Rehabilitative Services] cannot be held liable because those types of decisions are sovereignly immune.").

²⁰⁹ See *Dep't of Children and Family Servs. v. I.C.*, 742 So. 2d 401, 405 (Fla. Dist. Ct. App. 1992); see also *Henry & Rilla White Found., Inc.*, 720 So. 2d at 568 (finding that trial court has authority to investigate and consider safety concerns arising from placement of a child in a particular facility, but *not* holding that the trial court can shut down an unsafe facility).

reform of the Department's conduct because such actions are deemed "executive agency decisions which implicate policy development and prioritizing of funding," and are thus outside of the scope of the juvenile court's jurisdiction.²¹⁰

The Supreme Court has determined that, in abstention analysis, the federal court plaintiff must provide "unambiguous authority" that the state-court proceedings fail to afford an adequate remedy.²¹¹ In *Bonnie L.*, the Eleventh Circuit affirmed that "in determining whether the state remedies are adequate . . . [t]he relevant question is not whether the state courts can do all that Plaintiffs wish they could, but whether the available remedies are sufficient to meet [the] requirement that the remedy be adequate."²¹² As discussed in the preceding paragraph, the juvenile court is not able to provide an adequate remedy to the plaintiffs. Florida's foster care system is severely deficient, and its deficiencies put children at risk.²¹³ The adequate remedies are what plaintiffs in *Bonnie L.* sought, among them increased funding and the creation of a panel of child welfare experts to develop and oversee institutional reform of the entire troubled system, a remedy that the juvenile court cannot provide.²¹⁴

The juvenile court is further restrained by the fact that the Department is guaranteed the absolute defense of inadequate resources in a juvenile court proceeding.²¹⁵

²¹⁰ See *Dep't of Children and Family Servs.*, 742 So. 2d at 404.

²¹¹ *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 15 (1987) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.")

²¹² *31 Foster Children*, 329 F.3d at 1279 (quoting *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1337 (S.D. Fla. 2001)).

²¹³ See *supra* text accompanying notes 18-24.

²¹⁴ Similar panels of experts to oversee reform were created pursuant to consent decrees arising from settlements in cases analogous to *Bonnie L.* brought on behalf of foster children in New York and New Jersey (with plaintiffs represented by the same advocacy group as plaintiffs in *Bonnie L.*). See Michelle Han, *DYFS Panel Gets Broad Powers*, THE RECORD (New Jersey), June 25, 2003, at A1; Leslie Brody, *New York Panel is Model for DYFS Reforms: Commitment Necessary For Change, Experts Say*, THE RECORD (New Jersey), June 25, 2003, at A12.

²¹⁵ See, e.g., *Dep't of Children and Families v. J.H.*, 831 So. 2d 782, 783 (Fla. Dist. Ct. App. 2002) (holding that the Circuit Court could not require DCF to provide funding for therapy and evaluations for a dependent child, and noting that "the court's order ignores DCF's funding issues"); *Dep't of Health and Rehab. Servs. v. V.L.*, 583 So. 2d 765, 766 (Fla. Dist. Ct. App. 1991) (holding that the Department was not required to

Statutory law provides that the Department of Children and Families shall establish and supervise a foster care program "within funds appropriated."²¹⁶ The Florida Appellate Court itself has articulated this inherent limitation. In the case of *In re L.W.*,²¹⁷ the court explained:

The Legislature has imposed a daunting responsibility on the Department to provide for the needs of the children of this state but apparently has not provided the funds necessary to accomplish the task. On the other hand, it has given the courts the duty to review the actions of the Department to assure the protection of the minor child, but the absence of needed funds has limited the trial court's ability to assure the protection of the child's rights and welfare. The losers in all this are the children like L.W.²¹⁸

The Eleventh Circuit noted in *Bonnie L.* that one reason behind plaintiffs' failure to establish an inadequate remedy in the ongoing state court proceedings was the Florida juvenile court's contempt power in the face of Department non-compliance with an individual child's case plan.²¹⁹ However, this touted contempt power is effectively futile when the Department can plead inadequate funding in its defense. To implement the type of institutional reform plaintiffs in *Bonnie L.* sought requires the expenditure of funds to finance efforts such as hiring more caseworkers and providing improved training for caseworkers and foster families.²²⁰ Indeed, in late 2003, the Secretary of Florida's Department of Children and Families requested from the State Legislature an increase of \$474 million in the Department's budget to initiate effective reform of the system.²²¹ The Department received less than twenty-five percent of that figure.²²² Assuming, arguendo, that the Florida Juvenile Court would even have jurisdiction to

place a dependent child in psychiatric facility until funds were available to do so and that "the legislature's appropriations power is . . . off limits to the courts".

²¹⁶ FLA. STAT. CH. 409.165 (2003).

²¹⁷ *In re L.W.*, 615 So. 2d 834 (Fla. Dist. Ct. App. 1993).

²¹⁸ *Id.* at 839.

²¹⁹ See 31 *Foster Children*, 329 F.3d at 1281.

²²⁰ The recent settlement in the District Court of New Jersey of the *Charlie & Nadine H. v. McGreevey* class action suit illustrates the need for additional funding in the implementation of system-wide reform of state child welfare systems. Under the settlement terms of that case, brought against New Jersey's Division of Youth and Family Services (DYFS) on behalf of foster children in New Jersey's custody, the State was ordered to appropriate an additional \$23.85 million for DYFS's fiscal year 2004 budget. See Michael Booth, *DYFS Monitoring, Additional Funding End Suit Alleging Shoddy Foster Care*, 172 N.J.L.J. 1213 (June 30, 2003).

²²¹ Hollis & Gruskin, *supra* note 18.

²²² *Id.*

order improvements of Florida's child welfare system, those improvements would likely never come about as the court orders would be unenforceable given the Department's defense of inadequate resources.

The federal courts, on the other hand, are not constrained by funding concerns when granting injunctive relief to remedy constitutional violations.²²³ Even if the remedial scheme requires additional funding, federal court orders are fully enforceable. Thus, for all the reasons discussed, the federal courts are the only forum which can provide the plaintiffs in *Bonnie L.* with an adequate remedy for their constitutional violations. The Eleventh Circuit's ruling in favor of abstention, therefore, is misguided as the third Middlesex factor was not satisfied.

V. FEDERAL COURTS' RESPONSIBILITY TO PROTECT THE CONSTITUTIONAL RIGHTS OF FOSTER CHILDREN

The Supreme Court has explicitly affirmed the federal courts' duty to protect citizens from constitutional violations committed at the hands of the State: "The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law . . ."²²⁴ The Eleventh Circuit's decision to abstain in *Bonnie L.* has closed the doors of federal courthouses to a class of children deeply in need of the Court's protections. As one author has put it:

It is difficult to imagine a more powerless group of people than foster children. They are largely unrepresented in the court proceedings that lead to their placements. Living without the protection of their parents, they are completely at the mercy of the persons who may also be responsible for maltreating them. They do not vote; they lack

²²³ See, e.g., *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 90 (1989) ("equitable relief—even 'a remedy that might require the expenditure of state funds'—may be awarded to ensure future compliance by a State with a substantive federal question determination") (citing *Papasan v. Allain*, 478 U.S. 265, 282 (1986)); *Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002) ("simply because the implementation of such prospective relief would require the expenditure of substantial sums of money does not remove a claim from the *Ex Parte Young* exception").

²²⁴ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

the developmental ability to organize. Their voices, assuming they are old enough to speak, cannot be heard.²²⁵

In addition to the inherent helplessness of foster children, many foster care systems in this country, Florida among them, are clearly not succeeding at the job of protecting children.²²⁶ According to a recent study, "national data on child abuse fatalities show that a child is more than twice as likely to die of abuse in foster care than in the general population."²²⁷ And because the number of children in foster care in this country has more than doubled since 1982 (to over half a million children), the rate of abuse in foster care has "increased dramatically over the last 30 years."²²⁸ The following passage depicts several of the major shortcomings of current foster care systems:

As foster care agencies scramble to find more homes for the influx of children, they cut corners and certify foster parents who should not be permitted to care for children. They place children with families who cannot meet their needs, and fail to supervise the children once they are placed in homes.

Other agency deficiencies include failure to recruit a broad range and higher number of foster placements, not having an accurate system for tracking past allegations of abuse and not hiring and training qualified workers who are able to screen homes and monitor children. As a result, some children are sent to live with abusive foster parents, and the abuse may continue unheeded by caseworkers whose caseloads are far too heavy.²²⁹

The need for reform of child welfare agencies is evident. How to achieve successful reform, however, is a difficult question without an easy answer.²³⁰ What is known is that federal courts are the proper forum for attempting to do so.²³¹ Filing a suit seeking redress and reform of a state foster care agency in state court, as opposed to federal court, has several

²²⁵ See Mushlin, *supra* note 126, at 214 (internal citations omitted).

²²⁶ See *supra* text accompanying notes 18-24.

²²⁷ Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW. ENG. L. REV. 129, 137 (2001) (citing U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 1999* viii, 41 (2001)).

²²⁸ Kubitschek, *supra* note 18, at 42.

²²⁹ *Id.* (internal citations omitted).

²³⁰ For a general discussion of past cases seeking to reform child welfare systems and the inconsistency among courts with respect to defining the legal rights of children in state custody, see Arlene E. Fried, *The Foster Child's Avenue of Redress: Questions Left Unanswered*, 26 COLUM. J. L. & SOC. PROBS. 465 (1993).

²³¹ See Mushlin, *supra* note 126, at 256-58.

critical disadvantages.²³² The palpable drawbacks of suing in state court combine with a substantial preference in foster care reform litigation to seek injunctive relief, as opposed to damages, to make federal courts the only appropriate forum.²³³

One major disadvantage to bringing a suit such as *Bonnie L.* in state court is the barrier that can be imposed by the doctrine of sovereign immunity. In states recognizing the doctrine, foster children will be barred from bringing any state tort claim.²³⁴ Another disadvantage to suit in state court is the necessity of overcoming state laws that seal the records of foster children; every state has legislation that makes foster care records confidential.²³⁵ Although the purpose underlying these confidentiality laws is protection of the child's privacy, the laws allow foster care agencies to evade accountability for their actions.²³⁶ In contrast, a civil rights suit filed in federal court avoids these obstacles. For one, sovereign immunity and other state law immunity claims would not apply to a claim brought against a state child welfare agency under 42 U.S.C. § 1983.²³⁷ In addition, confidentiality would not be a concern in a federal civil rights action because federal law would govern confidentiality and trump state privilege statutes.²³⁸ Federal courts' liberal discovery rules would mandate disclosure of all records kept by the agency.²³⁹

²³² See, e.g., Kubitschek, *supra* note 18, at 42 ("Abused foster children . . . already have three strikes against them when they seek redress in state court: state immunity, no adults to sue on their behalf, and sealed records."); Mushlin, *supra* note 126, at 256 ("[State courts] lack the institutional attributes necessary to overcome the bureaucratic and political obstacles to the achievement of a safe foster care system.").

²³³ See Scott J. Preston, Casenote, "Can You Hear Me?": *The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653, 1706 (1996) ("Structural injunctions, by their very nature, are the appropriate mechanism to guarantee [child welfare] reform"); Mushlin, *supra* note 126, at 250 ("Individual damage actions, even if available, are not useful mechanisms for obtaining reform.").

²³⁴ See Kubitschek, *supra* note 18, at 42; Mushlin, *supra* note 126, at 245-46; Karoline S. Homer, Note, *Program Abuse and Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL'Y & L. 177, 218-19 (1993).

²³⁵ See Kubitschek, *supra* note 18, at 42

²³⁶ See *id.* at 42-43.

²³⁷ *Howlett v. Rose*, 496 U.S. 356, 376 (1990); see also Kubitschek, *supra* note 18, at 43.

²³⁸ See Kubitschek, *supra* note 18, at 46.

²³⁹ See *id.*

The federal system is also preferable to the state system in a case seeking institutional reform of a major state agency, such as child welfare, because the lifetime appointment of federal court judges insulates them from pressures that could adversely affect the attainment of effective reform.²⁴⁰ State court judges are elected officials and therefore subject to political pressure, and their “lack of electoral independence” can “dilute their ability to order and supervise reform of state institutions, such as the foster care system.”²⁴¹

The other major component of the argument in favor of federal courts presiding over suits on behalf of foster children, such as *Bonnie L.*, is the preference for injunctive relief over damages. The major drawback to a damage action is its inability to bring about systemic reform of failing systems on an institutional level.²⁴² A damage action addresses the needs of a single child, and in so doing overlooks the “root causes” of the problem from a broader perspective, i.e. the inadequate funding, staffing, and monitoring of child welfare systems.²⁴³ One scholar has aptly described the ineffectiveness of damages actions in achieving system-wide foster care reform as follows:

Child welfare agencies often are inadequately funded, and as a result, violations of federal foster care law often are not caused by recalcitrance, but rather by limited resources. Although permanency planning is the undisputed goal of foster care, achieving a permanent plan for each child is a highly resource-intensive task. Under such conditions, the utility of a damages remedy as the linchpin of reform is questionable, since successful judgments simply diminish the already scarce resources of child welfare agencies. Agencies found liable for damages will be forced to concentrate their resources on remedying the particular problem that created the liability rather than on the more fundamental problems affecting the child welfare system. Finally, when faced with known funding limitations, judges often will be unwilling to compensate just one

²⁴⁰ See Mushlin, *supra* note 126, at 256-57 (“Article III requirement of lifetime appointment for federal judges . . . largely insulates the federal judiciary from the political process, giving federal judges the level of independence needed to counter the majoritarian tendencies—expressed through elected officials—to tolerate a substandard system of foster care.”) (internal citations omitted).

²⁴¹ *Id.*

²⁴² See Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 266-67 (1986) (“[T]here is a real question about whether [damage actions] have any real impact on an operating system. . . . [T]heir utility, beyond redressing the harm to a particular plaintiff, is questionable.”).

²⁴³ See Mushlin, *supra* note 126, at 250.

child when many others have been injured or will be injured in the future.²⁴⁴

Damage actions allow courts to avoid dealing with the widespread deficiencies of child welfare systems, the deficiencies which cause harm to individual children within the system.

In light of the inadequacy of suits seeking damages, a federally enforceable injunction is a "more promising catalyst for foster care reform."²⁴⁵ In particular, the "structural injunction" is the most appropriate remedy to bring about reform of troubled foster care systems.²⁴⁶ A structural injunction, by definition, "seeks to effectuate the reformation of policies or practices of an ongoing social institution."²⁴⁷ It is "a court's remedial tool to reform an entire state institution in order to bring it into compliance with the Constitution" and it "requires a judge to maintain an ongoing relationship with the institution as she supervises its reconstruction."²⁴⁸ To improve failing child welfare systems and protect foster children from abuse and neglect, states must be forced, among other things, to appropriate more funding to embattled systems, provide better training to caseworkers and foster families, ensure closer monitoring of children placed in state custody, and decrease caseloads of caseworkers to guarantee adequate supervision. The structural injunction is the tool that can best accomplish these goals. It is the best way to proactively prevent harm, abuse, and neglect from occurring within the foster care system in the first place.²⁴⁹

Federal courts must, therefore, take it upon themselves to fulfill the duty and jurisdiction bestowed upon them and to

²⁴⁴ Homer, *supra* note 234, at 217-18 (internal citations omitted); see also Lowry, *supra* note 242, at 267.

²⁴⁵ Homer, *supra* note 234, at 222.

²⁴⁶ See Preston, *supra* note 233, at 1706. Preston traces the introduction of the "structural injunction" to the injunction issued by the Supreme Court in 1955 in the case of *Brown v. Board of Education*, noting that "[t]hereafter, the Supreme Court began to uphold other forms of public law litigation aimed at remedying constitutional violations at various state funded institutions." *Id.* at 1687.

²⁴⁷ *Id.* at 1688.

²⁴⁸ Rodger Citron, Note, *(Un)Lucky v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 497 (1991).

²⁴⁹ Mushlin, *supra* note 126, at 250.

protect the constitutional rights of foster children by hearing cases such as *Bonnie L.* In hiding behind a misguided interpretation of the Younger abstention doctrine, the Eleventh Circuit has passed this obligation to the state courts of Florida, a forum which is not equipped procedurally or practically to grant the relief required. The Eleventh Circuit, like the beleaguered Florida Department of Children and Families, has failed the foster children of Florida. The federal courts should be the greatest ally of these vulnerable children in making the state of Florida live up to its obligation to provide foster children with the protection and care they are entitled to and desperately need; instead the Eleventh Circuit has chosen to abandon them.

VI. CONCLUSION

Florida's Department of Children and Families is not alone in its failure to provide adequate care for children in its custody. In a recent audit of thirty-two states' foster care systems, in which each state system was measured against a national standard in seven categories, no state passed in more than two areas.²⁵⁰ The problems that state child welfare agencies face are no secret: insufficient resources, inadequate number of foster homes and facilities, improper training and support, high turnover of caseworkers, and unmanageably high caseloads. These problems have been around for decades and continue to persist today. And yet, the deplorable state of foster care seems to only capture the attention of politicians and the general public *after* the horrible, gruesome, preventable death of a child in foster care.²⁵¹

Children languishing in foster care need the protection of the courts. When the Eleventh Circuit abstained from adjudicating *Bonnie L. v. Bush*, it not only deserted Florida's foster children, it also set a dangerous precedent that could

²⁵⁰ Meckler, *supra* note 23.

²⁵¹ A recent example of this was the January 2003 death of Faheem Williams, a New Jersey child found starved, decomposed, and dead in a garbage bin in the basement of his Newark home, along with his two brothers who were alive but severely starved. The New Jersey system had closed its investigation of the Williams' home despite open allegations of abuse. See Michael Powell & Christine Haughney, *Kids in N.J.'s Care Missing; 110 in Abuse Cases Unaccounted For as Files Are Checked*, THE WASHINGTON POST, Jan. 11, 2003, at A8; Richard Wexler, *Don't Rush to Foster Care*, THE STAR-LEDGER, Jan. 12, 2003. The tragic death spurred the State of New Jersey to settle a class action suit filed against its Division of Youth and Family Services four years prior to Williams' death.

have a widespread effect on the half a million children in foster care in the United States today. The decision to abstain in *Bonnie L.* was improper. As this Note has attempted to show, the Younger abstention doctrine does not provide just cause for abstention in this case. The relief sought would not interfere with juvenile court dependency proceedings, and the plaintiff foster children cannot seek the relief they need and ought to be given in the state court forum. Moreover, federal courts have an obligation to vindicate federal constitutional violations. As Chief Justice Marshall put it in 1821, “[T]o decline the exercise of jurisdiction which is given . . . would be treason to the constitution.”²⁵² The Eleventh Circuit’s affirmation of the District Court’s decision not to hear this case and not to protect abused and neglected children in Florida and throughout the country was just that.

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²⁵² *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

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