No. 18-503

In the Supreme Court of the United States

N. E. L., *et al.*,
Petitioners,
v.
DOUGLAS COUNTY, COLORADO, *et al.*,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR KANSAS RESPONDENTS GILDNER, WEBB, AND ABNEY

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QUESTION PRESENTED

Whether the Kansas federal district court, relying on the law of the case doctrine, correctly declined to retransfer the claims against the Kansas Respondents to the District of Colorado given that the dispute arises out of a Kansas state court case involving Kansas state officials, Kansas parents, and Kansas children.

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STATEMENT OF THE CASE

1. Petitioners N.E.L., M.M.A., and E.M.M. are three of John and Jane Doe's ten children. In 2008, one of the Does' other children began making comments about improper behavior by Jane Doe's brother, the children's uncle. Pet. App. 3. The Does, who lived in Johnson County, Kansas, reported the alleged abuse to the agency now known as the Kansas Department for Children and Families (DCF). Pet. App. 3.

Respondent Monica Gildner was a DCF social worker who was assigned by her supervisors, Respondents Angela Webb and Tina Abney, to oversee the Doe family's case. Pet. App. 3, 5. Gildner referred the Doe child to Sunflower House, a children's advocacy and abuse prevention center, for interviews about the alleged abuse. Pet. App. 3-4. After a criminal investigation, law enforcement informed Gildner that no criminal charges would be filed, and Gildner closed the Doe family case. *N.E.L. v. Gildner*, No. 17-cv-2155, 2018 WL 1185262, at *1 (D. Kan. Mar. 7, 2018) (unpublished). But after the child made additional allegations, Gildner reopened the file and referred the child to Sunflower House for more interviews. Pet. App. 4. Another Doe child later alleged abuse by the same relative, and Gildner also directed that child to Sunflower House. Pet. App. 4.

According to the complaint, Gildner ultimately came to believe that Jane Doe was mentally unstable and that the Doe children's allegations were fabricated. Pet. App. 4. Gildner recommended that the children continue counseling and that Jane Doe begin counseling. Pet. App. 4. This upset the Does, who complained about Gildner to DCF, but Webb and Abney

declined to replace Gildner with another social worker. Pet. App. 5.

Gildner later received two more allegations of abuse from the second-reporting Doe child and allegations from a third Doe child. Pet. App. 5.

2. On April 20, 2009, the Johnson County District Attorney's Office filed Child in Need of Care petitions for all ten Doe children in Johnson County, Kansas District Court, seeking to remove the children from the Does' custody. Pet. App. 6.

The petitions explained that given the "fantastic nature" of the Doe children's allegations, officials were concerned that Jane Doe may be experiencing delusions. *N.E.L.*, 2018 WL 1185262, at *9; 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 6.[1] For instance, the Doe children alleged that their uncle gave them injections, showed them pornography on his computer, forced them to watch animals being shot and mutilated, and pushed his parents down the stairs. *N.E.L.*, 2018 WL 1185262, at *9; 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 6. After investigation, DCF came to believe that these reports were untrue and that Jane Doe, not her children, was the source of the allegations. *N.E.L.*, 2018 WL 1185262, at *10.

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[1] The Child in Need of Care case documents are found in Volume III of Petitioners' Tenth Circuit Appendix, which is provisionally sealed. Volume III of the Tenth Circuit Appendix is not paginated, so citations are to the district court document and page number.

The Child in Need of Care petitions noted that law enforcement had uncovered no evidence to substantiate the Doe children's allegations. After the initial allegation, the uncle submitted to a polygraph examination, which indicated he was being truthful in his denial of the abuse. 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 4. Law enforcement also obtained a search warrant for the uncle's computer, but no pornography was found. *N.E.L.*, 2018 WL 1185262, at *9. Later, DCF learned that several law enforcement agencies had looked into allegations by the Does that the children's uncle took the children to a bar, gave them shots, stripped them naked, and made them lick a dead rat. *Id.* at *10. The law enforcement agencies informed DCF that they would not pursue their investigation any further, apparently finding no evidence to support these allegations. 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at pp. 8-9.

Given the allegation that the children's uncle had pushed his parents down the stairs, DCF opened an elder abuse investigation. This allegation was not confirmed, but it did lead to an investigation of financial abuse of Jane Doe's parents by John and Jane Doe. *N.E.L.*, 2018 WL 1185262, at *9. Specifically, DCF learned that Jane Doe's parents loaned tens of thousands of dollars to the Does to help them support their family with the understanding that the Does would pay the money back, but the Does had not done so. *Id*. John and Jane Doe became upset when her parents questioned how the money was being spent, and the Does cut ties with Jane Doe's side of the family. *N.E.L.*, 2018 WL 1185262, at *9; 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 7. This conflict between the Does and Jane Doe's side of the

family provided an additional reason to believe that the allegations against Jane Doe's brother might be fabricated.

According to the Child in Need of Care petitions, officials were concerned that subjecting the Doe children to interviews and investigations about the fantastic and apparently fabricated abuse allegations might be impacting the children's emotional health. *N.E.L.*, 2018 WL 1185262, at *10; 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 11. Concern was also expressed about the emotional stability of Jane Doe, who was the primary caregiver and was home with the children all day. *N.E.L.*, 2018 WL 1185262, at *10. DCF attempted to address these concerns with John and Jane Doe, but they refused to cooperate. *Id.* at *10. Based on these concerns, the petitions alleged that the Doe children were children in need of care under Kan. Stat. Ann. § 38-2201 *et seq*. 10th Cir. App. Vol. III, Docs. 123-2, 123-3, and 123-4 at p. 2.

3. After the Child in Need of Care petitions were filed, the Johnson County District Court set a hearing for three weeks later, on May 11, 2009, and allowed the children to remain in the Does' custody pending that hearing. Pet. App. 6. But on April 30, 2009, Gildner learned that Jane Doe and the children may have left town. Pet. App. 7. Jane Doe's mother informed Gildner that family members had seen the children loading boxes into the family van and that there was a large dumpster next to the house. 10th Cir. App. Vol. III, Docs. 123-11 and 123-12 at p. 3. Gildner went to the Doe home and spoke to John Doe, who refused to tell her where the children were and told her any communication needed to go through their attorney.

Pet. App. 7. DCF later learned that Jane Doe had used a food stamp card in Littleton and Englewood, Colorado, leading DCF to believe that Jane Doe and the children had left the State of Kansas. *N.E.L.*, 2018 WL 1185262, at *9; 10th Cir. App. Vol. III, Doc. 123-1 at p. 3.

Based on the Does' flight from Kansas, the Johnson County District Attorney's Office sought ex parte orders of protective custody for the Doe children under Kan. Stat. Ann. § 38-2242. The Johnson County District Court granted the orders on May 5, 2009, finding that remaining in the home would be contrary to the children's welfare and that immediate placement was in their best interest. Pet. App. 8. The court also issued "pick-up orders" authorizing the Doe children to be taken into custody by any law enforcement agency. Pet. App. 54 n.6; 10th Cir. App. Vol. III, Docs. 123-11, 123-12, and 123-13.

4. On May 6, 2009, Jane Doe and her ten children were at the home of family friends in Douglas County, Colorado, when Lesa Adame, a social worker for the State of Colorado, and Carl Garza, an employee of the Douglas County, Colorado Sheriff's Office, visited the home. Pet. App. 9. Adame and Garza told the family friend, Dr. G, that they had a court order from Kansas to take custody of the ten Doe children. Pet. App. 10. They produced a "safety plan" from the Colorado Department of Social Services and the Douglas County Department of Human Services that temporarily left the children in the care of Dr. G and his wife, Mrs. G. Pet. App. 10-11. As specified in the safety plan, Adame and Garza removed Jane Doe from the home and ordered that she not have any contact with the

children. Pet. App. 10-11. That night, Dr. and Mrs. G drove the Doe children back to Kansas, where the children were taken into DCF custody pending the outcome of the Child in Need of Care cases. Pet. App. 11.

5. Years later, two of the Doe children, N.E.L. and M.M.A., brought a § 1983 action in the District of Colorado against the Kansas DCF officials, the Colorado officials involved in the execution of the ex parte orders, and Douglas County, Colorado. The District of Colorado determined that it lacked personal jurisdiction over the DCF officials and transferred those claims to the District of Kansas. Pet. App. 38-39, 78-88. The court dismissed the claims against the Colorado officials and Douglas County, and the Tenth Circuit affirmed, holding that the Colorado officials were entitled to qualified immunity. Pet. App. 1-31.

In the District of Kansas, Petitioners filed an amended complaint adding another Doe child, E.M.M., as a plaintiff and adding two more claims, one for malicious prosecution/abuse of process and one for an alleged violation of their Fourteenth Amendment right to travel. After briefing, the district court granted the DCF officials' motion to dismiss on the grounds of qualified immunity, holding that Petitioners had not met their burden of demonstrating that the DCF officials violated clearly established law. The court also denied a motion filed by Petitioners to retransfer the case back to the District of Colorado, relying on the law of the case doctrine and the Colorado court's well-reasoned transfer decision. Pet. App. 90-92.

Petitioners appealed the district court's grant of qualified immunity and the denial of their motion to

retransfer. The appeal has been fully briefed in the Tenth Circuit (Case No. 18-3059), but the Tenth Circuit has not yet issued its judgment.

REASONS FOR DENYING THE WRIT

Petitioners seek certiorari before judgment in their case against the Kansas DCF officials (Respondents Gildner, Webb, and Abney), but their Petition explicitly does not challenge the district court's determination that those officials are entitled to qualified immunity. *See* Pet. 11 & n.39. Instead, the only question in their Petition relating to the Kansas Respondents involves the transfer of their claims against those Respondents from the District of Colorado to the District of Kansas. *See* Pet. ii (Question 3). That question falls well short of the demanding standard for obtaining certiorari before judgment.

Nor is the question otherwise appropriate for this Court's review. Even if the Tenth Circuit affirms the district court's denial of retransfer, Petitioners have not shown that the decision would conflict with the decision of any other circuit court of appeals or state court of last resort. At most, Petitioners allege that the district court misapplied a properly stated rule of law, which rarely justifies certiorari. *See* Sup. Ct. R. 10. In any event, the Kansas federal district court correctly concluded that the District of Colorado did not commit clear error in holding that it lacked personal jurisdiction over the Kansas Respondents in a dispute arising out of a Kansas state court case involving Kansas parents and Kansas children. Finally, even if this Court were inclined to address the existence of personal jurisdiction in these circumstances, this case would be a poor vehicle for doing so because Petitioners

have not challenged the initial transfer order and because the denial of retransfer was harmless as long as the Kansas Respondents are entitled to qualified immunity.

I. This Case Does Not Warrant the Extremely Rare Step of Certiorari Before Judgment.

Petitioners seek certiorari before judgment in their case against the Kansas Respondents. But a grant of certiorari before judgment is "an extremely rare occurrence" that is warranted only when "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.) (in chambers); Sup. Ct. R. 11. This case does not even come close to meeting that standard.

The rare cases where this Court has granted certiorari before judgment involved truly significant matters of public importance like an international agreement with Iran to resolve the hostage crisis, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); a subpoena of presidential records and an assertion of executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974); the President's unilateral seizure of the steel mills during the Korean War, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and the legality of a military commission during World War II, *Ex parte Quirin*, 317 U.S. 1 (1942). The question here—whether run-of-the-mill § 1983 claims were properly transferred from Colorado to Kansas because the Colorado federal court lacked personal jurisdiction over the Kansas Respondents—pales in comparison.

Nor is certiorari before judgment warranted based on the fact that the Petition also seeks review of claims against the Colorado Respondents in a separate case that has already been decided by the Tenth Circuit. Although the qualified immunity analysis may overlap to some extent in the two cases, the Petition explicitly disclaims any question as to whether the Kansas Respondents are entitled to qualified immunity. *See* Pet. 11 & n.39. The only question in the Petition involving the Kansas Respondents has to do with the transfer of the claims against them from Colorado to Kansas, which is unrelated to the questions involving the Colorado Respondents.

Petitioners also have not shown any need for an "immediate determination in this Court." Sup. Ct. R. 11. In fact, their actions demonstrate that this is no pressing matter. The events giving rise to this lawsuit occurred in April and May of 2009, but the initial complaint was not filed until December 31, 2015, over six years later. And while Petitioners filed their notice of appeal on March 28, 2018, and their opening brief in the Tenth Circuit on June 13, 2018, they did not seek certiorari before judgment at that time. Instead, they waited for several months, until October 11, 2018. Petitioners have not identified any urgency that would justify bypassing the normal appellate process.

II. There Is No Split of Authority.

Even putting aside the demanding standard for obtaining certiorari before judgment, this case still is not worthy of this Court's review. Petitioners have identified none of the conflicts listed in Supreme Court Rule 10 as a basis for certiorari. Instead, they claim that the *district court's* order denying retransfer

conflicts with the decisions of this Court and other courts. The Tenth Circuit may not even need to address that issue if it affirms the grant of qualified immunity. *See infra* at p. 15.

Even if the Tenth Circuit affirms the denial of retransfer for the reasons given by the district court, Petitioners have not shown that the decision would conflict with a decision of this Court, another federal circuit court, or a state court of last resort. Although Petitioners claim that the Colorado federal district court incorrectly held that it lacked personal jurisdiction over the Kansas Respondents, that issue is not directly before the Tenth Circuit. The initial transfer order is not included in Petitioners' notice of appeal (D. Ct. Doc. 137), which only cites the order denying retransfer (D. Ct. Doc. 134), not the initial transfer order (D. Ct. Doc. 98). And the propriety of the initial transfer is not directly addressed in Petitioners' Tenth Circuit brief, which focuses only on the denial of retransfer. The only issue here is the District of Kansas's denial of retransfer, and as discussed below, that denial was proper under the law of the case doctrine as long as the Colorado district court did not commit clear error. But a Tenth Circuit decision finding no clear error would not conflict with a decision finding personal jurisdiction outside the context of clear error review.

In any event, there is no conflict between the initial transfer order and the decisions of this Court, United States courts of appeals, or state courts of last resort. Because personal jurisdiction is a fact-intensive inquiry, different factual scenarios necessarily lead to different results as to whether personal jurisdiction

exists. *See, e.g.*, *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 92 (1978) ("[T]he 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."). None of the cases Petitioners cite involve similar enough factual scenarios to constitute a legal conflict.

The best case Petitioners identify is *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987), but even that case is materially different. In *Lake*, the Ninth Circuit held that Idaho had personal jurisdiction over an attorney who obtained an ex parte custody order in California for a child that had been living in Idaho for sixteen months. *Id.* at 1423. The decision rested on this Court's holding that "a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum *residents*." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (emphasis added). But Petitioners and their parents here were residents of Kansas, not Colorado. The Colorado magistrate judge relied heavily on this fact in finding no personal jurisdiction, noting that Petitioners "did not qualify as residents of Colorado or have a strong connection with Colorado." Pet. App. 83. The attorney in *Lake* also was not a California state child welfare official involved in a preexisting Child in Need of Care case. Nor did the Kansas Respondents here file for an ex parte order, like the attorney in *Lake*. That was done by the Johnson County District Attorney's Office (although Petitioners claim that the Kansas Respondents are responsible for reasons that are less than clear). Given these

important factual distinctions, the initial transfer order cannot be said to conflict with *Lake*.

At bottom, Petitioners are only arguing that the district court misapplied a properly stated rule of law, but that sort of argument rarely justifies certiorari. *See* Sup. Ct. R. 10. The Colorado federal magistrate judge, in an order adopted by the Colorado federal district judge, correctly identified the law governing personal jurisdiction. Pet. App. 37-38, 78-87. And in denying retransfer, the Kansas federal district court correctly articulated the law of the case doctrine. Petitioners do not argue that the courts below misstated any legal principle, only that the courts allegedly misapplied those legal principles to the facts of their case. But this Court does not sit as a court of mere error correction and cannot review every case where a litigant claims that the lower courts erred on a fact-dependent question of personal jurisdiction. The Petition fails to identify an issue worthy of this Court's review.

III. The District Court's Decision Denying Retransfer Was Correct.

Review should also be denied because the Kansas federal district court was correct in holding that the law of the case doctrine prevented retransfer of Petitioners' claims against the Kansas Respondents to the District of Colorado.

As noted above, Petitioners have not challenged the initial transfer order before the Tenth Circuit, only the Kansas federal district court's denial of their motion to retransfer. But "traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer

order." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988). Were it otherwise, the transfer statutes could result in "a perpetual game of jurisdictional ping-pong." *Christianson*, 486 U.S. at 818.

While it is true that the law of the case doctrine does not prevent a transferee court from retransferring a case when the initial transfer was "clearly erroneous," "such reversals should necessarily be exceptional." *Id.* at 819. A transferee court should decline to retransfer "if the transferee court can find the transfer decision plausible." *Id.* The Petition does not appear to challenge any of this. *See* Pet. 36 (arguing that the Kansas federal district court should have found clear error to overcome the law of the case doctrine).

The Kansas federal district court correctly held that the initial transfer decision was not clearly erroneous. This is a case against Kansas child welfare officials involved in Child in Need of Care proceedings in Kansas state court involving children who, at the time, resided in Kansas. Although the children were visiting Colorado and Colorado officials made contact with them there, a family friend returned them to Kansas, where they were taken into DCF custody. As the Colorado federal magistrate judge explained in a thorough and well-reasoned decision later adopted by the Colorado federal district judge, the Kansas officials did not have "minimum contacts" with Colorado necessary to create specific jurisdiction there. Pet. App. at 37-38, 81-85. And even if minimal contacts existed,

a Colorado court's exercise of personal jurisdiction "would offend traditional notions of fair play and substantial justice," given that this dispute arises out of a Kansas state court case involving Kansas state officials, Kansas parents, and Kansas children. Pet. App. 38, 85-87. The District of Colorado's determination that it lacked personal jurisdiction over the Kansas Respondents was plausible at the very least, and so the Kansas federal district court properly denied retransfer based on the law of the case doctrine.

Petitioners claim that the initial transfer order was clearly erroneous because the case could not have been brought in Kansas against all the defendants. They did not raise this argument below, but it is meritless in any event. The Colorado district court did not transfer the claims against the Colorado Respondents to Kansas. It only transferred the claims against the Kansas Respondents, holding that it lacked personal jurisdiction over them. The fact that the Colorado court had jurisdiction over the Colorado Respondents says nothing about whether it had personal jurisdiction over the Kansas Respondents.

IV. This Case Is Not an Appropriate Vehicle to Address Petitioner's Third Question.

Petitioners' litigation strategy makes this case a poor vehicle to address whether Colorado had personal jurisdiction over the Kansas Respondents. Because Respondents have only appealed the denial of retransfer—and not the initial transfer order—to the Tenth Circuit, the only question properly presented is whether the initial transfer was so clearly erroneous as to excuse application of the law of the case doctrine. *See supra* at pp. 12-13. If not, the Kansas federal district

court correctly denied retransfer regardless of whether the District of Colorado's personal jurisdiction analysis was ultimately correct. If for some reason this Court were interested in addressing the existence of personal jurisdiction in circumstances similar to the facts here, it should do so in a case where the issue is directly presented, without the procedural baggage of the law of the case doctrine and clear error review.

This case is also a poor vehicle to address Petitioner's third question because the question will be moot if the district court's grant of qualified immunity is affirmed. Whether or not the District of Colorado had personal jurisdiction over the Kansas Respondents, the District of Kansas certainly did. And the Tenth Circuit's review of the district court's grant of qualified immunity is de novo. So if the Tenth Circuit affirms the grant of qualified immunity—a purely legal determination—the denial of retransfer was harmless. The outcome would not have been any different had the parties litigated the motion to dismiss in the District of Colorado. The transfer decision is relevant only if the grant of qualified immunity to the Kansas Respondents is reversed and the case is sent back to district court. But the Petition declines to seek review of the grant of qualified immunity to the Kansas Respondents. *See* Pet. 11 & n.39.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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