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 To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION FOR DOUGLAS RESPONDENTS ADAME, GARZA, AND DOUGLAS COUNTY

S. KELLY DUNNAWAY
Deputy County Attorney
DAWN L. JOHNSON
Senior Assistant County Attorney
(*Counsel of Record*)
MEGAN L. TAGGART
Assistant County Attorney
DOUGLAS COUNTY ATTORNEYS' OFFICE
100 Third Street
Castle Rock, Colorado 80104
(303) 660-7362
djohnson@douglas.co.us

Counsel for Douglas Respondents Adame, Garza, and Douglas County

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly applied this Court's precedent regarding the appropriate level of particularity required to satisfy the clearly established law prong of a qualified immunity analysis in concluding that Petitioners' claims against the Douglas Respondents arising out of a child welfare check were barred.

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INTRODUCTION

Petitioners' claims against the Douglas Respondents arise out of a welfare check conducted on May 6, 2009, by two Douglas County, Colorado (the "County") employees, Lesa Adame, a social worker, and Carl Garza, a sheriff's deputy. That welfare check was prompted by the County's receipt of a signed, entered *Ex Parte Order of Protective Custody* from a Kansas county court concluding that an emergency existed which threatened the safety of the Doe children.

On May 6, 2009, Mrs. Doe and the Doe children were not at their own home in Kansas, but were visiting family friends, a Dr. and Mrs. G., who resided in Douglas County, Colorado. Ms. Adame and Deputy Garza (collectively, the "Douglas Employees") went to the G.'s home, spoke with Dr. G. outside of the doorway to gain entry into the G.'s home, spoke with Mrs. Doe and the G.'s inside the home, secured Mrs. Doe's agreement to leave the home while the ten Doe children remained with the G.s, and then left the home.

Later the same day, Dr. G. decided to transport the ten Doe children back to Kansas and, after driving through the night, turned the ten Doe children over to Kansas authorities the following day. The Kansas authorities then placed the Doe children in foster care, where the children remained for five days.

Petitioners do not allege having any direct interaction with either Ms. Adame or Deputy Garza during the May 6 visit. Nevertheless, Petitioners filed suit against the Douglas Respondents alleging that they

were improperly seized in violation of their Fourth Amendment rights and deprived of their right to familial association in violation of the Fourteenth Amendment and seeking damages pursuant to 42 U.S.C. § 1983.

In their Petition for a Writ of Certiorari, Petitioners challenge two aspects of the Tenth Circuit's decision affirming the dismissal of their claims against the Douglas Respondents. First, Petitioners argue that the Tenth Circuit improperly applied this Court's precedent regarding the clearly established law component of the qualified immunity analysis in holding that Petitioners had failed to carry their burden of proffering case law particularized to the facts of this case demonstrating that the alleged conduct of the Douglas Employees constituted an unconstitutional seizure or an unconstitutional deprivation of their right to familial association. Second, Petitioners seek a ruling from this Court as to whether an Appellate Court may or must consider new arguments raised in an appellant's reply brief that are intended to refute alternative grounds for affirmance raised by an appellee in an answer brief.

Petitioners' grounds for seeking a writ of certiorari in this case fall short of demonstrating a compelling reason to grant the Petition. Petitioners' criticism of the Tenth Circuit's analysis, cast in the Petition as being in conflict with its own and this Court's decisions, instead takes issue with the Tenth Circuit's application of properly stated and well-settled law regarding the level of particularity required to demonstrate clearly established law for purposes of analyzing

qualified immunity. Furthermore, this case is not an appropriate vehicle for addressing the questions posed by Petitioners because, in several key respects, certain issues raised in the Petition were not addressed by the lower courts. The Tenth Circuit's sound analysis does not warrant further review. Certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are two[1] of ten siblings who were the subjects of an investigation into child abuse allegations conducted by the Kansas Department of Social and Rehabilitation Services, now known as the Department of Children and Families ("KDCF"). (Doc. 01019817225 at 17.)[2] KDCF's investigation ultimately spurred the local District Attorney's Office to file Child in Need of Care Petitions for all ten children with the District Court of Johnson County, Kansas in April 2009. (*Id.* at 24-25.)

Petitioners' operative complaint ("Complaint") alleges that on May 5, 2009, KDCF sought and obtained

[1] Petitioner E.M.M. was never joined in the suit brought against the Douglas Respondents, Lesa Adame, Carl Garza and Douglas County, Colorado.

[2] All document numbers cited herein refer to the document numbers assigned in the Tenth Circuit. Citations to page numbers are to the Tenth Circuit pagination and not to the parties' pagination in the original document.

an *Ex Parte Order of Protective Custody* from the Johnson County Court for each of the ten children. (*Id.* at 29-30 ¶ 111; *see also id.* at 50-51 (the "Order of Protection").) The Order of Protection cites the fact that the Child in Need of Care Petitions allege physical, sexual, mental or emotional abuse and includes the following findings:

> - Reasonable efforts have been made and have failed to maintain the family and prevent the unnecessary removal of the child from the child's home[;]
> - Reasonable efforts are not required to maintain the child in the home because ***an emergency exists which threatens the safety of the child***[;]
> - [R]emaining in the home or returning home would be contrary to the welfare of the child[;]
> - [I]mmediate placement is in the best interest of the child[; and]
> - ***The whereabouts and safety of the children are unknown***[.]

(*Id.* at 50 (emphasis added).) The Order of Protection goes on to order:

> all providers of services, treatment or care of the child and family, even if not specifically referred to herein, to provide information to the Secretary, any entity providing services to the child and family, counsel for the parties including the county or district attorney,

> appointed CASA, Citizen Review Board members, the court, and each other to the extent needed to ensure the safety of the child, prevent further abuse or neglect, and to provide appropriate treatment to the child or family.

(*Id.* at 51.) The Order of Protection is signed and dated by District Court Judge Kathleen Sloan and file-stamped by the Clerk of the Johnson County Court as having been entered at 3:39 p.m. on May 5, 2009. (*Id.* at 50-51.)

Ms. Adame and Deputy Garza had one limited encounter with Petitioners on May 6, 2009, the day after the Order of Protection was entered. (*See* Doc. 01019817225 at 34 ¶¶ 123, 125.) The Complaint alleges that Mrs. Doe and all ten children were visiting family friends, Dr. and Mrs. G., at the G.'s home in Douglas County, Colorado on May 6, and that Ms. Adame and Deputy Garza came to the G.'s home that day in a single patrol car, with a copy of the Order of Protection, at KDCF's request. (*Id.* at 34-35 ¶¶ 123, 125, 132, 133.) The Complaint alleges that when Dr. G. came to the door, Ms. Adame or Deputy Garza told Dr. G. that they were in possession of a Kansas order to seize custody of the ten children and sought entry into the home and custody of the children. (*Id.* at 35 ¶ 132.)

The Complaint alleges that Dr. G. then called a friend who was an attorney and, after speaking to the friend, asked Ms. Adame and Deputy Garza if they had a warrant or Colorado court order authorizing them to enter. (*Id.* at 35 ¶ 135.) The Complaint alleges that one of the Douglas Employees said they did not need a

warrant to enter the home. (*Id.* at 35 ¶ 136.) The Complaint further alleges that one of the Douglas Employees purportedly said words to the effect that "We do this all the time." (*Id.* at 35 ¶ 137.) The Complaint asserts that Deputy Garza told Dr. G. that he did not care what the lawyer had said and that they intended to come in and take the children. (*Id.* at 35 ¶ 139.)

The Complaint does not allege that the Douglas Employees pushed or otherwise forced themselves into the home. Once inside, the Complaint alleges that the Douglas Employees stated the ten children were in the custody of the State of Kansas. (*Id.* at 36 ¶ 143.)

Ms. Adame is then alleged to have prepared and executed a Safety Plan, dated May 6, 2009, which set out a "safety response" to "address identified safety concerns" in a manner requiring the "least restrictive response," providing "immediate controls for safety," and requiring actions to "correspond to each safety threat." (Doc. 01019817225 at 36 ¶ 147 & 52 (the "Safety Plan").) The Safety Plan provided that Mrs. Doe would leave Dr. G.'s residence "to ensure safety of the children (10)," that she would not have physical or verbal communication with the children, directly or through third parties such as Dr. or Mrs. G., and that she would contact one of the Kansas case workers the following day. (*Id.* at 52.) The Safety Plan included a notation that the ten children "are currently in the custody of Kansas State, Social Services." (*Id.*) The Safety Plan further provided that Mrs. Doe and Dr. and Mrs. G. would follow through with the Safety Plan. (*Id.*)

The G.s and Mrs. Doe, the "Safety Plan Participants and Parent(s)," signed the Safety Plan under the Family Agreement with Safety Plan acknowledgement stating, "We have participated in the development of and reviewed this safety plan and agree to work with the providers and services as described above." (*Id.*) The Complaint alleges that Ms. Adame telephoned Dr. G. later and informed him Mr. Doe and Mr. Doe's parents were also not to have contact with the ten children. (*Id.* at 37 ¶ 153.)

Following completion of the Safety Plan, the Complaint alleges that the County Employees informed Dr. and Mrs. G. that Kansas authorities would be arriving at some later date and time to take custody of the children. (*See* Doc. 01019817225 at 38 ¶ 161.) The Complaint contains no details regarding Mrs. Doe's departure from the home, but the allegations infer that she did in fact leave at some point after she agreed to the Safety Plan. (*See*, *e.g.*, Doc. 01019817225 at 38 ¶ 163.) The Complaint is also devoid of allegations describing any further interaction between the Douglas Employees and the G.s or the ten Doe children at the residence once the discussion about the Kansas authorities concluded. The Complaint alleges that Dr. G., on his own initiative, decided to drive the children back to Kansas later the same day and delivered all ten children into the custody of KDCF the following day. (*Id.* at 38-39 ¶¶ 164, 166.)

II. Procedural Background

Petitioners initiated this lawsuit on December 31, 2015, with the filing of a Complaint against the three Douglas Respondents and three employees of KDCF, Monica Gildner, Angela Webb and Tina Abney (collectively, the "Kansas Respondents"). (Doc. 01019817225 at 5.) Petitioners amended the Complaint in April 2016, asserting five claims for relief directed against one or more of the Douglas Respondents, including a claim for unlawful seizure in violation of the Fourth Amendment; a claim for deprivation of familial association in violation of the Fourteenth Amendment; a claim for conspiracy; a "claim" for exemplary damages; and a *Monell* claim against the County for unlawful seizure in violation of the Fourth Amendment. (*Id.* at 16, 44-48.)

The Douglas Respondents moved to dismiss the claims asserted against them pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the claims were barred by the applicable statute of limitations, that Ms. Adame and Deputy Garza were immune from suit under both the doctrine of absolute or quasi-judicial immunity and the doctrine of qualified immunity, and that the Complaint did not state a claim for liability against the County. (*See* Doc. 01019817225 at 56-64.) In support of their absolute immunity argument, the Douglas Respondents submitted a standing order from the Chief Judge of the Eighteenth Judicial District (the "CJO") addressing child abuse investigations. (*Id.* at 66.)

Following the completion of briefing, the Magistrate Judge issued a Recommendation on Pending Motions to Dismiss[3] (the "Magistrate's Recommendation") rejecting the Douglas Respondents' absolute immunity argument but concluding that Ms. Adame and Deputy Garza were entitled to qualified immunity, finding Petitioners had failed to allege an unlawful seizure or violation of their right of familial association and had failed to demonstrate "clearly established law" that would have put Ms. Adame and Deputy Garza on notice that they were committing constitutional violations. (App. at 54-76.) The Magistrate Judge also recommended that the claim against the County be dismissed because Petitioners had failed to plead constitutional injury at the hands of the Douglas Employees. (*Id.* at 77-78.) The Magistrate Judge declined to rule on the statute of limitations issue in light of his recommendations regarding qualified immunity. (*Id.* at 76 & n.14.)

Petitioners timely filed objections to the Magistrate's Recommendation, and the Douglas Respondents filed a response. (Doc. 0101987225 at 176-221.) On March 13, 2017, the District Court Judge entered an Order Overruling Objections To and Adopting Recommendation Of United States Magistrate Judge (the "District Court's Order") concluding that the Magistrate's Recommendation was "thorough and well-reasoned, and I approve and adopt it in all relevant respects." (App. at 33.) The District Court's Order expressed

[3] The Kansas Respondents separately moved to dismiss Petitioners' claims against them. (Doc. 01019817225 at 138.)

disagreement with the Magistrate Judge's rationale for concluding that Petitioners had not pled a Fourth Amendment violation but elected not to delve into an analysis of the issue because the law was not clearly established in any event. (*Id.* at 33-34 & nn.2 & 3.)

The District Court's Order approved and adopted the Magistrate's Recommendation as the order of the District Court, overruled the Petitioners' objections, and granted the Douglas Respondents' motion to dismiss. (App. at 39-40.) The District Court entered judgment with prejudice in favor of the Douglas Respondents and included a finding of no just reason for delay pursuant to Federal Rule of Civil Procedure 54(b). (Doc. 01019817225 at 228.) Petitioners filed their notice of appeal from the judgment in favor of the Douglas Respondents on April 7, 2017. (*Id.* at 238.)

On appeal to the Tenth Circuit, Petitioners argued that they had been unlawfully seized; that qualified immunity did not apply in this case; that the "limited" and "incidental" nature of the alleged deprivation of their right of familial association did not preclude relief; that they had sufficiently pled the existence of conspiracy between the Douglas Respondents and the Kansas Respondents; and that Douglas County should still be liable under § 1983 even if the Douglas Employees were entitled to qualified immunity. (*See* Doc. 01019817228.) The Douglas Respondents filed their Answer Brief, addressing Petitioners' arguments and asserting that Petitioners' claims were also barred by the applicable statute of limitations. (*See* Doc. 01019834099.) The Douglas Respondents did not raise

absolute immunity as grounds for affirming the dismissal on appeal. However, Petitioners asserted in their Reply Brief that the CJO was a "County" policy. (Doc. 01019848382 at 11.)

In an unpublished Order and Judgment dated July 3, 2018, the Tenth Circuit affirmed the District Court's dismissal of all claims asserted against the Douglas Respondents. (App. at 31.) In its Order and Judgment, the Tenth Circuit concluded that Ms. Adame and Deputy Garza were entitled to qualified immunity based on the absence of clearly established law demonstrating that the Douglas Employees' alleged conduct constituted an unlawful seizure or wrongfully deprived Petitioners of their right of familial association. (App. at 17-24.)

The Tenth Circuit also rejected Petitioners' arguments that the County either had a formal policy or unwritten custom that caused Petitioners' injuries or that the County acted with deliberate indifference. The Tenth Circuit noted that Petitioners had waived their argument regarding formal policy by failing to raise the issue until they replied but went on to conclude that, even absent a waiver, Petitioners had failed to sufficiently allege that any purported formal policy caused a violation of the Fourth Amendment. (App. at 26-27.) The Tenth Circuit found that the only factual allegation arguably supporting a "*Monell* county-custom claim" was the alleged statement of one of the Douglas Employees that "we do this all the time," which the Tenth Circuit found insufficient to allege a continuing, persistent, and widespread custom.

(App. at 28.) Finally, the Tenth Circuit found that Petitioners failed to allege sufficient facts to state a deliberate-indifference *Monell* claim against the County. (App. at 28-31.) As a result, the Tenth Circuit affirmed the dismissal of the claims against Douglas County as well as the Douglas Employees.

REASONS FOR DENYING THE WRIT

Petitioners seek certiorari after judgment has been entered against them and in favor of the Douglas Respondents both by the District Court and the Tenth Circuit. Review on a writ of certiorari is not a right. Sup. Ct. R. 10. The Petition does not present the compelling reasons required for the Court, in its discretion, to grant certiorari. *Id.*

The Petition does not present a conflict, under either the First or Second Questions Presented, between the Tenth Circuit's decision in this case and other Circuit Court decisions. Sup. Ct. R. 10(a). Furthermore, neither the First nor Second Questions Presented raise important questions of federal law which have not been, but should be, settled by this Court. Sup. Ct. R. 10(c). Rather, the Petition's First Question Presented regarding qualified immunity concerns a well-settled issue of law accurately set forth and applied by the Tenth Circuit.

In addition, the Petition raises issues which are not properly before this Court. Petitioners' procedural due process claim raised in conjunction with the First

Question Presented was not raised in or decided by the District Court or the Appellate Court and should not be considered now. The Second Question Presented raises an issue which is not in controversy in this case. Therefore, any opinion rendered on the Second Question Presented would be merely advisory. Even if the Second Question Presented does not seek what would ultimately be an advisory opinion, the Petition does not clearly present an issue of conflict, or even clear uncertainty, among the Circuit Courts. Accordingly, certiorari is not warranted.

I. The Petition's First Question Presented Concerns A Settled Issue Of Law.

In recent years, this Court has reiterated the longstanding principle that a "clearly established" constitutional right cannot be predicated on generalities or overarching concepts of constitutional protections, but must be particularized to the circumstances presented in a specific case:

> It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough ***that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply***. Otherwise, the rule is not one that 'every reasonable official' would know.
>
> The 'clearly established' standard also requires that the legal principle ***clearly prohibit the officer's conduct in the particular circumstances before him***. The rule's contours

> must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' ***This requires a high 'degree of specificity.'*** We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'

D.C. v. Wesby, ___ U.S. ___, 138 S.Ct. 577, 589-90 (2018) (emphasis added); *cf. Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (internal citations omitted).[4]

The Tenth Circuit was the target of this Court's admonishment for defining clearly established law at an overly-generalized level only two years ago. In

[4] To the extent the Petition suggests that specificity in clearly established law is only required in suits alleging excessive force, the Court has not so limited its holdings. *See Wesby*, 138 S.Ct. at 590 (addressing the existence of probable cause); *Anderson*, 483 U.S. at 643 (addressing the reasonableness of searches and seizures).

White v. Pauly, this Court rejected the Tenth Circuit's determination that qualified immunity did not apply because the right to be free from the use of excessive force was clearly established, explaining:

> Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'

___ U.S. ___, 137 S.Ct. 548, 552 (2017).

This Court has provided ample guidance to lower courts in recent years on the appropriate level of particularity to be applied when evaluating the clearly established law prong of the qualified immunity analysis. *See*, *e.g.*, *City of Escondido v. Emmons*, ___ U.S. ___, 139 S.Ct. 500, 503 (2019) (per curiam) (finding the Ninth Circuit's formulation of a "right to be free of excessive force" under the Fourth Amendment as clearly established law was "far too general"); *Wesby*, 138 S.Ct. at 590 ("The 'clearly established' standard also requires that the legal principle clearly prohibited the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'") (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *Ziglar v.*

Abbasi, ___ U.S. ___, 137 S.Ct. 1843, 1867 (2017) ("if a reasonable officer *might not have known for certain that the conduct was unlawful*—then the officer is immune from liability") (emphasis added); *White*, 137 S.Ct. at 552 (concluding the Tenth Circuit panel majority "misunderstood the 'clearly established' analysis" where it "failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment"); *Taylor v. Barkes*, ___ U.S. ___, 135 S.Ct. 2042, 2044 (2015) ("To be clearly established, a right must be sufficiently clear that *every reasonable official would have understood* that what he is doing violates that right.") (emphasis added) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

In their First Question Presented, Petitioners urge this Court to eschew its repeated directives to lower courts regarding the particularized analysis to be employed when evaluating whether a right was clearly established. In doing so, Petitioners do not argue that the law is unsettled in this area. Instead, Petitioners vaguely assert that the Court's analysis of the clearly established law prong of qualified immunity "is the subject of many criticisms" and advocate for "*Hope v. Pelzer's* 'fair notice' doctrine[.]" (Pet. at 17, 19.) The Petition fails to develop any reasoned argument as to why the Court should disregard what can only be characterized as well-settled law at this point.

Furthermore, Petitioners' singular focus on *Hope*'s use of the "fair notice" terminology fails to recognize more recent authority from this Court adding greater

clarity to what constitutes fair notice that an official's conduct is unlawful. As this Court's recent decision in *Kisela v. Hughes* demonstrates, the concept of fair notice continues to be incorporated in the Court's analysis of clearly established law:

> 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' 'Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.'
>
> Although 'this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.' 'In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.'

___ U.S. ___, 138 S.Ct. 1148, 1152 (2018) (internal citations omitted).

Adoption of the "fair notice doctrine" urged by Petitioners would not, as a practical matter, dispose of Petitioners' obligation to identify case law under factually similar circumstances such that any reasonable official in the Douglas Employees' shoes would have understood they were violating a clearly established right. Fair notice, under this Court's precedent, requires a high degree of specificity. Regardless of the

specific terminology employed, Petitioners cannot satisfy their burden of proving clearly established law which would render qualified immunity inapplicable in this case.

II. Petitioners' Procedural Due Process Claim Is Not Properly Before This Court.

Petitioners contend that issuance of a writ is necessary in this case to address what they characterize as an important federal question of procedural due process applicable to child removals. (Pet. at 12.) In doing so, Petitioners fail to acknowledge that they did not *assert* a claim against the Douglas Respondents for an alleged violation of their procedural due process rights.

The Petitioners' Complaint purports to allege six claims for relief, five of which are directed against one more of the Douglas Respondents. (*See* Doc. 01019817225 at 44-48.) Of the five claims asserted against the Douglas Respondents, only two substantive constitutional claims are pled: the first and sixth claims for relief allege an unlawful seizure in violation of the Fourth Amendment, and the third claim for relief alleges an unlawful deprivation of familial association in violation of the Fourteenth Amendment. (*Id.* at 44, 46, 48 ¶¶ 198, 208, 219; *cf. id.* at 46-47 ¶¶ 209-14.) The Complaint does not allege, as a factual matter, that the Douglas Respondents did not provide for or issue notice of a post-removal hearing, nor does the Complaint assert a claim for relief based upon an

alleged violation of Petitioners' procedural due process rights. (*See generally id.* at 34-48.)

In their briefing on the Douglas Respondents' motion to dismiss the Complaint, Petitioners also did not assert that the Douglas Respondents had violated their procedural due process rights. Indeed, the Magistrate Judge to whom the motion was referred for a recommendation expressly found that Petitioners' Fourteenth Amendment claim was predicated on an alleged denial of *substantive* due process after identifying both the procedural and substantive aspects of due process under the Fourteenth Amendment. (App. at 70-71.)

On appeal to the Tenth Circuit, Petitioners first raised an argument that the Douglas Respondents had not provided them with a prompt post-removal hearing, but that argument was raised in the context of analyzing the reasonableness of Petitioners' purported seizure under the Fourth Amendment. (*See* Doc. 01019817228 at 31-32.) Specifically, Petitioners claimed that the District Court had "erred in finding that the [Petitioners'] summary seizure was reasonable where Adame and Garza failed to provide [Petitioners] with notice of a prompt post-deprivation hearing." (*Id.*)

Contrary to Petitioners' argument, the Tenth Circuit did *not* decide an important federal issue regarding procedural due process rights attendant to child removals. The decision does not address procedural

due process rights at all—an omission which is unremarkable given that the issue was not raised on appeal.

Petitioners' failure to assert a violation of their procedural due process rights in either the District Court or the Court of Appeals precludes review in this Court. *See Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (declining to address an issue raised in the petitioner's brief that had not been addressed by either the District Court or the Court of Appeals); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Husty v. U.S.*, 282 U.S. 694, 701-702 (1931) (declining to address issues that were not presented to or passed on by the Court of Appeals).

III. The Tenth Circuit's Application Of Qualified Immunity In This Case Does Not Present A Split In Authority.

In affirming the dismissal of Petitioners' claims against the Douglas Respondents, the Tenth Circuit did not address the issue of whether Petitioners' allegations sufficiently pled an unlawful seizure of Petitioners by the Douglas Employees.[5] (App. at 19.) The

[5] The Petition incorrectly asserts that the District Court "did in fact find that a 'seizure' had been alleged." (Pet. at 4.) Petitioners rely on a footnote in the District Court's Order that expresses disagreement with the Magistrate Judge's rationale for concluding that no seizure had occurred, but the District Court does not render its own determination as to whether the allegations

Tenth Circuit instead elected to focus on the narrower question of "only whether [its] precedent clearly establishes that they did." (*Id.*)

Petitioners contend that the Tenth Circuit's decision on this issue is in conflict with its own decisions and those in other circuits. (Pet. at 22-25.) The Petition's criticisms of the Tenth Circuit decision do not substantiate those assertions.

A. Petitioners' Unlawful Seizure Claim

Petitioners maintain that the Tenth Circuit's decision below conflicts with its 2003 decision in *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003). Petitioners argue *Roska* "clearly established that, absent probable cause and a warrant or exigent circumstances, social workers may not enter an individual's home for the purpose of taking a child into protective custody." (App. at 22.) In doing so, Petitioners disregard the Tenth Circuit's particularized analysis of *Roska* below.

The Tenth Circuit specifically considered and rejected Petitioners' assertion that *Roska* constituted clearly established law from which any reasonable official would, standing in the Douglas Employees' shoes, have realized that their conduct was in violation of the

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adequately pled a seizure. (App. at 33 n.2.) Instead, the District Court's Order specifies that it *assumed* the sufficiency of Petitioners' allegations of a violation of their constitutional rights. (App. at 33-34.)

Fourth Amendment.[6] (App. at 19-20.) In *Roska*, state employees entered a home without a warrant and removed a young boy whose mother was suffering from Munchausen Syndrome by Proxy. The Tenth Circuit distinguished the facts of *Roska* from the case at bar, emphasizing that in *Roska*, the social workers did not even attempt to obtain an *ex parte* order before entering the home without a warrant, whereas in this case, Ms. Adame and Deputy Garza did have an *ex parte* order. (App. at 20-21.) The Tenth Circuit ultimately found *Roska* to be far from "particularized" to the instant facts notwithstanding its more generalized similarities to the present case. (App. at 21.)

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[6] The Tenth Circuit also examined the applicability of *Jones v. Hunt*, 410 F.3d 1221 (10th Cir. 2005), where a sheriff and social worker met with a sixteen-year-old female at her school and informed her that she could not live with her mother but must, contrary to a temporary protection order, live with her father. (App. at 21.) The Tenth Circuit pointed out the unique facts in *Jones* which led to the finding of an unreasonable seizure, including the confines of the small room at the school where the girl was questioned for an extended amount of time, the girl's knowledge that the sheriff and the social worker had authority to determine her custodial care, the threats made by the sheriff and the social worker to the girl, the length of the meeting and the girl's emotional state during the course of the meeting. (*Id.*) The Tenth Circuit found none of those facts here and further emphasized that the Douglas Employees sought to place Petitioners into Kansas custody pursuant to the *ex parte* order. (*Id.*) The Tenth Circuit explained that in *Jones*, the sheriff and the social worker acted *contrary* to a temporary protection order, whereas Ms. Adame and Deputy Garza acted *consistently* with the *ex parte* order, which, among other things, stated that an emergency threatened the safety of Petitioners and remaining in the home would be contrary to the welfare of the children. (App. at 21-22.)

Petitioners also argue that the Tenth Circuit's stated views on this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), conflict with those set forth in one of its more recent decisions, *Halley v. Huckaby*, 902 F.3d 1136 (10th Cir. 2018). Petitioners apparently base this argument on the fact that *Halley* cites *Hope*, but the substance of the Tenth Circuit's comments below is not fundamentally in conflict with the substance of its comments in *Halley*.

In the proceedings below, the Tenth Circuit considered and rejected Petitioners' assertion that they bore no obligation to proffer case law with closely analogous facts for purposes of demonstrating clearly established law. (App. at 17 n.18.) Citing *Hope v. Pelzer*, Petitioners had argued that case law need only provide "fair warning" that the conduct at issue was unconstitutional to satisfy the clearly established requirement. (*Id.*) In a footnote, the Tenth Circuit commented that "*Hope v. Pelzer* appears to have fallen out of favor, yielding to a more robust qualified immunity." (*Id.*); *see also Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016) ("As can happen over time, the Supreme Court might be emphasizing different portions of its earlier decisions. In this regard, we note Justice Thomas's dissent in *Hope*, where he complains that the Court ignored *Malley v. Briggs*'s pronouncement that qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' ") (citation omitted).

The Tenth Circuit's decision in *Halley* is not in conflict with its decision in this case. The Tenth Circuit's discussion of qualified immunity, and the requisites for

demonstrating clearly established law under that analysis, are substantially similar in its decision below and in *Halley*. *See Halley*, 902 F.3d at 1144; (*cf.* App. at 17-18). *Halley* relies on *Hope v. Pelzer* only for the often-noted point that a case need not be identical to be deemed clearly established law. *Halley*, 902 F.3d at 1149; *cf. Ziglar*, 137 S.Ct. at 1866-67 ("It is not necessary, of course, that 'the very action in question has previously been held unlawful.' That is, an officer might lose qualified immunity even if there is no reported case 'directly on point.'") (citations omitted); *Mullenix v. Luna*, ___ U.S. ___, 136 S.Ct. 305, 308 (2015) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.") (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

The Tenth Circuit's substantive analysis in *Halley* of a child's Fourth Amendment rights in the context of a seizure made for purposes of investigating abuse allegations also comports with its decision in this case. While *Halley*, a 2018 decision, cannot serve as clearly established law for the incident at issue here, which occurred in 2009, the Tenth Circuit's discussion of issues that were still unresolved in 2018 confirms that those issues were also unresolved (and thus could not constitute clearly established law) in 2009. Among other things, *Halley* identified the unsettled state of the law governing the Fourth Amendment standards applicable to child seizures outside of the child's own home. 902 F.3d at 1145-46.

The Petition's attempt to establish a split in authority with other Circuit Courts also lacks merit. Petitioners point to decisions from other circuits adopting arguably differing viewpoints on when the lack of a warrant renders a search or seizure unreasonable. (*See*, *e.g.*, Pet. at 23-24.) Those decisions do not conflict with the Tenth Circuit's decision in this case because the Tenth Circuit expressly did not reach the question of whether the Douglas Employees' alleged conduct violated the Fourth Amendment.[7] (App. at 19.)

B. Petitioners' Familial Association Claim

The Petition's claim of error with respect to the Tenth Circuit's holding on Petitioners' familial association claim appears to be that the Tenth Circuit should

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[7] Neither the District Court nor the Tenth Circuit had to address the question of whether the Douglas Employees' alleged conduct constituted a seizure of Petitioners to find that qualified immunity applied. *Halley*, which concludes that a seizure of a young child occurs where no reasonable child would believe he or she is free to leave, 902 F.3d at 1145, raises doubt as to whether Petitioners' allegations would satisfy that threshold issue, given that the First Amended Complaint did not allege any direct interaction between the Douglas Employees and Petitioners or their siblings. Similarly, Petitioners' allegations of unreasonableness predicated on a warrantless entry into the home of another raise issues regarding standing. *See Alderman v. U.S.*, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which, unlike some other constitutional rights, may not be vicariously asserted."). Further still, Petitioners point to no authority in the child removal context finding a Fourth Amendment seizure to have occurred where the child was not physically removed from his or her home or, minimally, sequestered and questioned when the interaction occurred outside the child's home.

have considered whether any cases cited in *Gomes v. Woods*, 451 F.3d 1122 (10th Cir. 2006), Petitioners' proffered authority for clearly established law, could independently demonstrate clearly established law that the Douglas Employees violated Petitioners' right to familial association. Petitioners contend that the Tenth Circuit should have concluded that *Malik v. Arapahoe County Department of Social Services*, 191 F.3d 1306 (10th Cir. 1999), cited in *Gomes*, constituted clearly established law that would have made any reasonable official aware the Douglas Employees' alleged conduct violated Petitioners' right to familial association. Petitioners' argument does not merit further review in this Court.

Petitioners' argument does not raise the type of concern that the Court typically considers when granting a petition for a writ of certiorari. *See* Sup. Ct. R. 10(a)-(c). Petitioners' argument does not implicate a split of authority among the Circuit Courts or with this Court, nor does it raise an important question of federal law.

Moreover, this Court's decisions in *Mullenix* and its progeny, as well as the Tenth Circuit's application of those decisions, do not suggest that *Malik* could clearly establish that the Douglas Employees' alleged conduct here violated Petitioners' right of familial association. In *Malik*, public officials began investigating a mother for suspected abuse and sending child pornography through the mail. *Id.* at 1310. The mother retained counsel, and counsel insisted that any interview of the child would have to be video recorded and

conducted in the presence of the mother, and that all questions would need to be prescreened by a child psychologist. *Id.* The public officials subsequently contacted the mother directly, notwithstanding their knowledge that she was represented by counsel, to try and obtain her consent to proceed with an interview devoid of the safeguards requested by her counsel. *Id.* After they were unsuccessful in securing an interview of the daughter without the conditions imposed by counsel, the public officials sought an order from a magistrate to pick up the daughter and take her into custody, which they obtained by making misrepresentations and omissions. *Id.* at 1311. The officials went to the mother and daughter's home, removed the daughter while commenting that it would not have happened if the mother had not retained counsel, and held the daughter until a hearing that had been scheduled for the following day. *Id.* at 1312.

The Tenth Circuit found the law to be clearly established that "[o]fficials cannot reasonably assume that the law permits them to obtain a custody order in retaliation for a parent's retaining counsel and through reckless omission of probative facts." 191 F.3d at 1316. The facts at issue in *Malik* bear no resemblance to the conduct in which the Douglas Employees are alleged to have engaged and do not meet the requisites of precedent "particularized" to the facts of this case as required under *Mullenix*.

IV. The Petition's Second Question Presented Is Merely Hypothetical.

In posing the Second Question Presented, the Petition argues that a conflict or uncertainty exists among the Circuit Courts regarding an appellant's right to respond in a reply brief to an alternative ground for affirming a district court decision raised in an appellee's answer brief. The Petition asserts that the rebuttal in Petitioners' Reply Brief, arguing that the County had judicially admitted in its motion to dismiss "that the CJO was the moving force for the seizure," was disposed of by the Tenth Circuit ruling that Petitioners had waived such argument by raising it for the first time in their Reply. (Pet. at 31.) The Tenth Circuit's analysis on this matter, however, did not stop at "simply [making] a 'waiver' ruling[.]" (Pet. at 31.) Rather, the Tenth Circuit went on to address the matter presuming there had been no waiver. (*See* App. at 26-27.) Therefore, the Second Question Presented is purely hypothetical and does not impact the substantive rights of the parties.

The Court does not have the power to render advisory opinions or to decide questions that cannot affect the rights of litigants in the case before them. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). The exercise of judicial power under Article III of the United States Constitution depends on the existence of a case or controversy. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Judgments of a federal court must resolve a real and substantial controversy admitting of specific

relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be based upon a hypothetical state of facts. *Id.* (internal quotation and citations omitted).

In the proceedings below, the District Court dismissed the claims against the County because "it is axiomatic that a local government body cannot be liable for damages if the plaintiff suffered no constitutional injury at the hands of a government employee." (App. at 71.) On appeal, Petitioners argued that the County could still be liable under § 1983 despite the applicability of qualified immunity to the claims asserted against the Douglas Employees. (Doc. 01019817228 at 41-42.) Petitioners argued that the Complaint established a claim for municipal liability based on its allegations that the County had an unwritten policy, custom or practice of authorizing the seizure of children based on out-of-state *ex parte* court orders obtained in violation of the United States Constitution and Colorado law. (*Id.* at 42.)

In response, the Douglas Respondents argued that the Petitioners' allegations fell short of pleading facts which, if true, would represent official policy promulgated by anyone with authority to make policy decisions on behalf of the County, or alternatively identify the existence and origin of the purported unwritten policy. (Doc. 01019834099 at 53-55.) The Petition characterizes this argument as an "alternative ground" for affirming the District Court's decision. (Pet. at 32.) In their Reply Brief, Petitioners argued that the Douglas Respondents made a binding judicial

admission that they acted pursuant to a County policy contained in a "standing order" issued by an Eighteenth Judicial District Court Judge.[8] (Doc. 01019848382 at 1-3.)

The Tenth Circuit found that Petitioners had waived their belated "formal policy" argument. There is, in fact, no mention of the CJO in the First Amended Complaint or in Petitioners' Opening Brief on appeal. There is no argument regarding a judicial admission in the Opening Brief. Nonetheless, the Tenth Circuit went on to state that even if they did not find a waiver, they would have concluded Petitioners failed to sufficiently allege that the CJO had caused their seizure in violation of the Fourth Amendment. (App. at 26-27.) The Tenth Circuit reasoned that the CJO did not authorize County officials to enter homes without a warrant, and therefore, Petitioners had not stated sufficient facts to sustain their "formal-policy-based *Monell* claim." (*Id.*)

The Petition contends that there is conflict or uncertainty on an appellant's right to respond in their reply brief to an alternative point raised in the answer brief of an appellee. However, Petitioners were afforded the opportunity to respond to all issues raised in the Douglas Respondents' Answer Brief. In their Reply Brief, Petitioners chose to raise a new argument on appeal, claiming the CJO constituted a judicial admission that was "formal policy." The Petition concedes

[8] The Eighteenth Judicial District of Colorado is a separate and distinct legal entity from the County.

Petitioners were aware of this argument as it had been raised in the motion to dismiss filings in the District Court. (Pet. at 32.) Regardless of the Tenth Circuit deeming Petitioners' new argument on formal policy as waived, again, the Tenth Circuit went on to hold that even if the argument had not been waived, the Tenth Circuit would still have reached a conclusion in favor of upholding the District Court's decision based on the failure of Petitioners to identify a policy sufficient to impose liability on the County. (App. at 26-27.) Therefore, even if a conflict or uncertainty existed among the Circuit Courts, such conflict or uncertainty did not affect Petitioners in the outcome of the Tenth Circuit's holding, and therefore, they can be afforded no redress if the Court were to consider the Second Question Presented.

Even if the Tenth Circuit had not addressed the formal policy argument despite deeming it waived, the authority cited in the Petition from the Ninth Circuit to argue a conflict or uncertainty among circuits is misleading. The Ninth Circuit has held that though they ordinarily decline to consider arguments raised for the first time in a reply brief, they may consider them if the appellee raised the issue in its brief. *U.S. v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992). This was the rule relied upon by the Ninth Circuit in *International Brotherhood of Teamsters, Airline Div. v. Allegiant Air, LLC*, 788 F.3d 1080 (9th Cir. 2015), underlying the discretionary language which the Petition takes issue with, stating "[w]e have discretion to consider an issue

raised in a reply brief where, as here, an appellee raised an issue in its brief." *Id.* at 1090. By contrast, Petitioners did not raise an issue in their Reply Brief which had been raised in Douglas Respondents' Answer Brief. The argument of judicial admission, and in fact any mention of the CJO, was not at all present in Douglas Respondents' Answer Brief. Therefore, the "conflict" or "uncertainty" which is suggested by the Petition regarding an appellant's rights with respect to a reply brief is not at all relevant to the facts of the proceedings below, even if any conflict or uncertainty does indeed exist.[9]

[9] The factual backdrop of this case makes it an inappropriate vehicle for the Court to consider whether statements contained in memoranda of law constitute judicial admissions that are binding on a party. (Pet. at 33.)

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

S. KELLY DUNNAWAY
Deputy County Attorney
DAWN L. JOHNSON
Senior Assistant County Attorney
(*Counsel of Record*)
MEGAN L. TAGGART
Assistant County Attorney
DOUGLAS COUNTY ATTORNEYS' OFFICE
100 Third Street
Castle Rock, Colorado 80104
(303) 660-7362
djohnson@douglas.co.us

Counsel for Douglas Respondents Adame, Garza, and Douglas County