No. 18-503

In The Supreme Court of the United States

N.E.L. and M.M.A.,

Petitioners,

v.

DOUGLAS COUNTY, COLORADO, LESA ADAME, in her individual capacity and CARL GARZA, in his individual capacity,

Respondents.

N.E.L., M.M.A. and E.M.M.,

Petitioners,

v.

MONICA GILDNER, ANGELA WEBB and TINA ABNEY, in their individual capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY TO THE COLORADO AND KANSAS RESPONDENTS' BRIEFS

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REPLY TO THE COLORADO AND KANSAS RESPONDENTS' BRIEFS

Petitioners respectfully submit this *Reply Brief* to the new points raised in both the Colorado and Kansas Respondents' *Briefs in Opposition*[1]:

I. The Complaint Dictates the Facts in Reviewing a Motion to Dismiss.

This case's procedural posture is central to a Rule 12(b)(6) review at this stage of the litigation because **the complaint's facts must be taken as true**. *See Zinermon v. Burch*, 494 U.S. 113, 114 (1990) (reversing 12(b)(6) dismissal where government employees violated state statutes requiring procedural due process). Petitioners object to the two *Briefs in Opposition* insofar as they impermissibly add to, alter, or omit the complaint's factual allegations. For example, the Colorado Brief entirely leaves out the fact that Adame and Garza saw for themselves that no emergency existed. ¶ 141-142. This fact required them to leave and obtain a warrant or a valid court order. Respondents' "alternative facts" must be disregarded at this stage and saved for a jury.[2] The Kansas Respondents' remarks

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[1] Brief in Opposition for Douglas Respondents Adame, Garza and Douglas County, filed 2/11/19, and Brief in Opposition for Kansas Respondents Gildner, Webb, and Abney, filed 1/10/19.

[2] In particular, Petitioners object to the Kansas Respondents' continued character assassination of Petitioners' parents, who **prevailed on the merits** in the CINC case, despite the government's effort to malign them. In no event did the false allegations against the parents in Kansas vitiate the right to a warrant and

are incorrect in suggesting, p.9, that this case was not filed within the time allowed for minors to bring suit under Colorado law.

II. It is Proper For This Court to Decide that Warrants and Procedural Due Process in Parent-Child Separation Cases are Clearly Established Fourth Amendment Rights Under §1983.

Petitioners' lawsuit arose from a deprivation of their right, while lawfully in Colorado, not to be summarily placed into Kansas' custody by government agents circumventing warrant and procedural due process rights required by Colorado's UCCJEA and the Constitution. Standing alone, the Fourth Amendment claim under 42 U.S.C. §1983 automatically encompasses the fact that procedural due process was denied. The Colorado Respondents are incorrect to argue, p.18, that an additional procedural due process claim for relief is required. Such a claim, though permissible, would have been redundant inasmuch as the pleaded facts plainly demonstrate that Petitioners were seized without any notice and hearing in Colorado. *See Vitek v. Jones*, 445 U.S. 480 (1980) (claim for denial of a liberty interest depends on denial of procedural due process).

In deciding this case, the Tenth Circuit essentially abandoned its own rulings in **parent-child separation cases** and replaced them with this Court's rulings for **excessive force cases**. This was improper because,

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procedural due process under Colorado's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

while the "reasonableness" of the use of force depends on many facts at the scene, the "reasonableness" of a parent-child separation primarily depends on whether the government obtained a warrant and provided untainted procedural due process before or after the seizure. Here the requisite procedures, detailed in Colorado's UCCJEA, were jettisoned. The Colorado Brief incorrectly contends, pp.14-17, that excessive force cases are controlling precedent for what is here, a warrentless forced-entry, parent-child separation case. It cites *White v. Pauly*, 137 S. Ct. 548 (2017) (officer fired at armed homeowner) and *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (officer made a takedown arrest). It also quotes liberally from a case in which police made a consensual entry into a vacant home and arrested trespassing, noisy, partygoers. *D.C. v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 589-90 (2018). The panel below also relied on excessive force cases, App. 17-18, namely *Pauly* and *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (officer shot an armed and fleeing suspect in a high speed chase).

On the other hand, Petitioners relied on *Pelzer*'s[3] "fair notice" doctrine, because decisional law requiring a warrant and procedural due process in parent-child separation cases is, by definition, fact-specific as to whether the government had authority to enter a house and provided notice and hearing. No notice and hearing? No qualified immunity. *Malik v. Arapahoe County Department of Social Services*, 191 F.3d 1306, n.4 (10th Cir. 1999), citing *Hollingsworth v. Hill*, 110

[3] *Hope v. Pelzer*, 536 U.S. 730 (2002).

F.3d 733, 739-40 (10th Cir. 1997). Varying facts leading up to a separation are not material to whether the government followed procedural due process, unless citizens are now presumed guilty and the government can sidestep procedural rights on a case-by-case basis. Also, the government agents here had fair notice of Petitioners' right to a warrant, notice and hearing because the UCCJEA (enacted in Colorado, Kansas and 47 other states) requires these. *See* K.S.A. §23-37,310: Hearing and Order; §23-37,311: Warrant to Take Physical Custody of a Child. In addition, the Tenth Circuit's own decisional law had itself long ago required notice and hearing for parent-child separation cases. *Malik*, *supra*. The Colorado Brief incorrectly contends, p.20, that there is "no split of authority" for this Court's review. On the contrary, the *Petition* cites the Ninth Circuit and even a subsequent Tenth Circuit case, both relying on *Pelzer* in child-separation cases, whereas the panel below rejected *Pelzer* entirely, stating it had "fallen out of favor." App. 17, n.18.

In the district court, although stating that "the magistrate judge misread the complaint in finding plaintiffs were not seized. . . ." App. 33, n.2, the reviewing judge found that Petitioners' authorities were not "sufficiently similar" to show a violation of "clearly established law." App. 34. Petitioners contended that the only necessary "similar facts" are the lack of a warrant, notice and hearing. The government's various excuses for such a failure might be a jury question, but here, at this stage of the litigation, Rule 12(b)(6) controls.

The Colorado Respondents wrongly state, p.20, that Petitioners failed to "assert a violation of their

procedural due process rights in either the District Court or the Court of Appeals." This argument is wrong. Specifically, the complaint's first paragraph states that Petitioners were unconstitutionally seized at a private home in Colorado "**without due process** . . ." (emphasis added). The first claim for relief, ¶¶196-198, alleges that the seizure was "**without due process**." (emphasis added). *See also* ¶¶189, 192, 208, 216, 218. The complaint also states, ¶146, that Colorado Agents issued summary orders, **without prior notice**. The complaint also states, ¶177, that the Kansas *ex parte* orders had not been docketed by a Colorado court as required in C.R.S. §14-13-301 *et seq*. (i.e., the Colorado UCCJEA), which contains detailed procedural due process and warrant requirements.

Responding to the Colorado Respondents' motion to dismiss asserting qualified immunity, Petitioners pointed out the obvious rule, p.21,[4] that clearly established law required notice and hearing, citing *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006). Also in the district court, in objecting to the magistrate's recommendation,[5] Petitioners pointed out, p.4, the lack of any procedural due process. Specifically, at p.10, Petitioners argued that procedural due process was clearly established law.

In appealing to the Tenth Circuit, Petitioners' Opening Brief, p.6, quoted the complaint's allegation

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[4] Doc. 67, filed June 2, 2016 (not included in Appendix), *N.E.L. et al. v. Douglas County et al*., Case No. 1:15-cv-02847, United States District Court for the District of Colorado.

[5] *Id.*, Doc. 93, filed 2/10/17.

that Adame and Garza issued orders without notice and opportunity to be heard, ¶¶146, 181. Again, on pp.10, 31 and 32, Petitioners reiterated the lack of a hearing. Also, the Opening Brief, p.15, quoted the complaint, ¶146, *supra*, and at pp.24-25, 31, Petitioners argued that at least a post-deprivation hearing was a clearly established right, citing *Gomes*, *supra*. In their Reply Brief in the Tenth Circuit, pp.16, 19, 21, 22, Petitioners reiterated their right to notice and hearing under the Fourteenth Amendment and Colorado's UCCJEA, citing the complaint, ¶¶172a-e, 177-186.

Importantly, the Tenth Circuit's opinion held that the complaint did allege "a Fourth Amendment violation," App. 19, but then held: "[T]he inquiry is narrower than whether Adame and Deputy Garza violated the Fourth Amendment. We address **only** whether our precedent clearly established that they did." App. 19 (emphasis added). The Tenth Circuit noted that Petitioners had argued that they had been "unreasonably seized" due to the lack of a post-deprivation hearing and even agreed that "broadly, a parent has a right to a post-deprivation hearing under the Fourteenth Amendment." Nevertheless, it incorrectly held that the Tenth Circuit's own precedent requiring at least a post-deprivation hearing was not clearly established law, App. 23, n.21, using a *Pauly* excessive force analysis, not a parent-child separation one.

The Tenth Circuit's opinion "exposes the danger of a rigid overreliance on factual similarity." *Pelzer*, 536 U.S. at 742. Of course, in parent-child separation cases, the government's reasons for a seizure will vary widely. What does not vary is the fundamental right to a

warrant, notice and opportunity to be heard under the UCCJEA. But under the Tenth Circuit holding in this case, government agents can even side-step state law on the grounds that, post-*Pauly*, even the right to notice and hearing has suddenly become "debatable."

On the other hand, *Pelzer* articulated that a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." 536 U.S. at 741. Notably, the Tenth Circuit and two *Briefs in Opposition* are strangely silent about the state of the law under Colorado's UCCJEA.

III. The Issue of Specific Jurisdiction has Imperative Public Importance for Immediate Determination and Deviation from Normal Appellate Practice.

Under this Court's Rule 11, Petitioners seek review of Colorado's specific jurisdiction over the Kansas Respondents. The imperative public importance in this case is the alarming fact that agents from two states had a reciprocal agreement to circumvent judicial oversight in conducting child removals in both states.[6] Equally alarming is the fact that the Kansas Respondents said, p.8, this is a "run of the mill" case, the Colorado agents said they "do this all the time," ¶137, and

[6] *Petition*, pp.i, 1, 7-8, 17-18.

Douglas County said its agents were following a standing administrative order by the County's chief judge.[7]

The Kansas Respondents' contact with Colorado was by no means "too slight." Rather than utilize the district attorneys in the two states to coordinate a court action in Colorado, the Kansas Respondents personally involved themselves in Petitioners' seizure. Their targeting of Colorado is shown from:

> [their] purposeful reaching out to Adame and Garza in Colorado, ¶¶131-132, to sending them the EPOs [i.e., the invalid ex parte orders], to giving them Dr. and Mrs. G's exact address, ¶108, to sending Adame and Garza to the house with instructions to "seize" Plaintiffs and their siblings, ¶¶131-132, to instructing Adame and Garza what to write as orders in the "safety plan," ¶¶145, 153, and what to order verbally, and to continue their separation for five days. ¶1. The *Complaint* more than plausibly alleges that Adame andGarza acted at the behest of, and in concert with, the [Kansas Respondents].[8]
>
> The *Complaint* alleges that the [Kansas Respondents], acting with Adame and Garza, instigated "cruel" and "outrageous" prohibitions upon Plaintiffs in Colorado, ¶157, restraining them from leaving with their parents, and causing "fear," "suffering," "panic," "distress," and "chaos" in Colorado, ¶159. *See also,* ¶¶112-113,

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[7] *Id.*, pp.29-33.

[8] Doc. 131, *supra*, in the District of Kansas, Case No. 2:17-cv-02155, pp.21-22.

> 116a-e, 125, 131-132, 141-142, 148, 150-153, 160, 186, 193-194, 196, 204-207. Nor can the Co-Conspirators contend that the wrongful conduct in this case was merely the "seeking of the *ex parte* orders." This is incorrect. Plaintiffs' claims are not based merely on the malicious prosecution or the abuse of process that occurred in Kansas but rather on the 4th Amendment act of seizing Plaintiffs in Colorado without probable cause, and depriving them for five days of their freedom and familial relations.[9]

The allegations in the complaint satisfy this Court's test in *Calder v. Jones*, 465 U.S. 783 (1984). The initial "brunt" of the wrongdoing by the Kansas Respondents and their conspiracy with the Colorado agents specifically targeted (and was felt by) Petitioners while they were in Colorado. The Kansas Respondents should expect to be "haled into court" in the jurisdiction where they conspired and out of which they "haled" Petitioners, namely, Colorado. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). As shown by recent headlines, malicious, partisan, incompetent or dishonest government agents have greater and greater ability with technology to conspire with each other to violate statutes and the Constitution.

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[9] *Id.*, p.29.

IV. Respondents Wrongly Complain that Petitioners Did Not Appeal the Interlocutory Order and Did Not Oppose the Transfer.

The Kansas Respondents' incorrectly argue, p.9, that Petitioners were required to appeal the Colorado district court's transfer order prior to a final order from the Kansas district court. This argument is wrong because the Colorado court's transfer order was interlocutory and, thus, could not have been included in the appeal to the Tenth Circuit from the Colorado district court.[10] The Kansas Respondents incorrectly state, p.12, that Petitioners "have not challenged the initial transfer order. . . ." On the contrary, Petitioners opposed the transfer in eight pages of their brief in the Colorado district court arguing that specific jurisdiction existed in that forum.[11] Likewise, in the Kansas district court, Petitioners filed a motion specifically asking to retransfer the case to Colorado.[12]

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[10] *See* 15 Fed. Prac. & Proc. Juris. §3855 Appellate Review of Transfer Rulings (4th ed. Westlaw 2018).

[11] *See* Section II, pp.2-9, *Petitioners' Response to Kansas Defendants' Motion* [Doc. 70], filed 6/14/2016, entitled "The First Amended Complaint adequately alleges facts that are plausible on their face in support of specific jurisdiction," Case No. 1:15-cv-02847, filed in the United States District Court for the District of Colorado.

[12] *See Plaintiffs' Motion for Retransfer of the Case to the United States District Court for the District of Colorado* [Doc. 130] and *Memorandum* [Doc. 131], filed 9/25/2017, Case No. 2:17-cv-02155, in the United States District Court for the District of Kansas.

V. Transfer to Kansas is Prejudicial to Petitioners and Jurisdiction is Lacking.

The Kansas Respondents concede that, if their qualified immunity is reversed, the transfer to Kansas is prejudicial to Petitioners.[13] Illustrating this point is the fact that Petitioners' Colorado witnesses consist of their siblings, parents, Dr. and Mrs. G. and the individual Colorado Respondents, totaling a minimum of 16 witnesses who reside in Colorado. This number does not count other witnesses from Colorado. Transporting all of these witnesses to Kansas for trial—and providing food, lodging and local transportation—would be nearly impossible and prohibitively expensive. Splitting the case between two districts for the same facts and witnesses unnecessarily burdens the federal judicial system with overlapping discovery, two trial settings and two appellate tracks for a single case.

The Kansas Respondents incorrectly state, p.14, that Petitioners failed to object that the transferee forum, Kansas, lacks jurisdiction over the Colorado defendants. This is wrong. Petitioners made this point in their appeal from the Kansas district court to the Tenth Circuit,[14] and in both the Colorado and Kansas district courts.[15]

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[13] Kansas Respondents state, p.8, that "denial of retransfer was harmless as long as the Kansas Respondents are entitled to qualified immunity."

[14] Opening Brief, pp.26 ¶7, 28 ¶d, Case No. 3059, filed June 13, 2018, in the Tenth Circuit Court of Appeals from the District of Kansas.

[15] *See* Doc. 131, p.28, *supra*, Case No. 2:17-cv-02155: "So, too, in the instant case, jurisdiction over the Colorado Defendants

VI. "Alternative" Narratives Must Be Disregarded.

Only a plaintiff's set of facts in the complaint can be taken as true, and any set of "alternative facts" must be disregarded. Specifically, Petitioners' family was not prohibited from leaving Kansas prior to the CINC hearing three weeks later. Any suggestion that the family had "fled" is pure falsehood. Petitioners had an unrestricted right to travel wherever they wanted. The allegations must be taken as true that Petitioners were involuntarily taken to Kansas by their family friends. Specifically, the so-called "safety plan" declared Petitioners to be in Kansas' custody on-the-spot. Respondents reached out across state lines to deprive Petitioners on-the-spot, in Colorado, of their rights by intentionally arranging for the seizure in Colorado. Respondents had an intent to deprive Petitioners of familial association as shown by the filing of the CINC petitions to terminate the parents' parental rights. ¶82.

VII. This Petition is a Proper Vehicle to Address Specific Jurisdiction Because a Rule 12(b)(6) Dismissal is Challenged.

The complaint alleges alarming conduct by government agents in two states acting together. Their conduct was upheld on the grounds that clearly established law did not require notice and a prompt hearing

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does not exist in Kansas. . . ."; *see also* Doc. 70, p.5, *supra*, Case No. 1:15-cv-02847, "So, too, in the instant case, jurisdiction over the CO Defendants does not exist in another state, but inasmuch as the wrong occurred in CO, jurisdiction exists [in Colorado] under *Goettman*."

in Colorado, nor a warrant nor an exigency for the seizure of ten children. Respondents incorrectly argue that, if the Tenth Circuit affirms qualified immunity for the Kansas social workers in the second appeal, then the transfer is harmless. This is untrue. Petitioners will be harmed by facing the expense and delay occasioned by a second petition for *certiorari* to this Court. Justice delayed is justice denied.

PRAYER

Wherefore, Petitioners pray that the Court will grant their Petition, including their Rule 11 request to review the issue of the Colorado District Court's specific jurisdiction over the Kansas Respondents, and grant such other and further relief that the Court deems just and proper.

Respectfully submitted,

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