No. _____

In The
Supreme Court of the United States

SARA HUCKABY and NATHAN CALLOWAY,

Petitioners,

v.

FRANK HALLEY, as Next Friend of J.H., a minor child,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

WELLON B. POE
Counsel of Record
JAMISON C. WHITSON
COLLINS ZORN & WAGNER, P.C.
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078
Email: wbp@czwlaw.com

Counsel for Petitioner
Nathan Calloway

EMILY B. FAGAN
JOHN K.F. LANGFORD
Assistant General Counsel
DEPARTMENT OF HUMAN SERVICES
P.O. Box 25352
Oklahoma City, OK 73125
Telephone: (405) 521-3638
Facsimile: (405) 521-6816
Email: Emily.Fagan@okdhs.org

Counsel for Petitioner
Sara Huckaby

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

QUESTIONS PRESENTED

An Oklahoma social worker and two law enforcement officers investigating child abuse allegations contributed to the brief removal of a minor child from his school for the purpose of conducting a forensic interview. This removal was made in reliance upon standing directives from the local prosecutor's office and an Oklahoma statute which requires the subject child to be interviewed "at any reasonable time and at any place[.]" Okla. Stat. tit. 10A, § 1-2-105(B)(1). The questions presented here are:

1) Whether the Court of Appeals erred in determining that the Petitioners did not act in an objectively reasonable manner in relying on a state statute, as well as standing directives from the local prosecutor's office concerning child abuse/endangerment allegations; and

2) Whether the Court of Appeals wrongly applied a new construction of a state statute that had never previously been so construed to the actions of the Petitioners thereby depriving them of fair notice that their actions were unconstitutional; and

3) Whether the Court of Appeals wrongly applied different standards to the individual officers; and

4) Whether the Court of Appeals misapprehended significant facts with respect to Petitioner Huckaby.

PARTIES TO THE PROCEEDING

Frank Halley, as next friend of J.H., a minor child, was the Plaintiff and Appellee below. Nathan Calloway and Sarah Huckaby ("Petitioners") were Defendants at the District Court level and Appellants at the Tenth Circuit level. The State of Oklahoma *ex rel.* Oklahoma State Department of Human Services ("DHS"), Ken Golden in his official capacity as Sheriff of Bryan County, Oklahoma, City of Colbert, Jeff Goerke, and the Bryan County School District 4 were also Defendants at the District Court level and Jeff Goerke was also Appellant at the Tenth Circuit level. Jeff Goerke does not join in this Petition.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Nathan Calloway and Sara Huckaby respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Decision of the Court of Appeals, reported at 902 F.3d 1136 (10th Cir. 2018), is reprinted in the Appendix (App.) at 1-44. The District Court's opinion denying qualified immunity on summary judgment to the Petitioners, which was unpublished, is reprinted at App. 48-85.

JURISDICTION

The Court of Appeals entered its opinion, reported at 902 F.3d 1136 (10th Cir. 2018), and judgment on August 27, 2018. (App. 1-47). The Court of Appeals denied a petition for rehearing *en banc* on October 29, 2018. (App. 86-87). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District

of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Shielding a governmental official from liability from a new interpretation of law for actions taken prior to the lower court's interpretation is the essence of qualified immunity. The holding below, applying that new interpretation retroactively to conduct without

notice to an official, defeats the purpose of qualified immunity. As a result, the holding below threatens to put children at risk of abuse, discourages reliance on state statutes and guidance from attorneys, and weakens the relationships between and amongst law enforcement officers and social workers as they must now second guess each other's decisions or risk personal liability. It erroneously determined that the Petitioners did not act in an objectively reasonable manner in relying on a state statute, as well as standing directives from the local prosecutor's office concerning child abuse/endangerment allegations. The Tenth Circuit compounded that error by applying a construction of a state statute that had never previously been so construed to the actions of the Petitioners thereby depriving them of fair notice that their actions were unconstitutional. Furthermore, the Tenth Circuit also wrongly applied different standards to the individual officers and misapprehended significant facts with respect to Petitioner Huckaby. In light of the Tenth Circuit's decision, social workers and police officers in the Tenth Circuit and other circuits who investigate child abuse allegations may, when faced with statutory language similar to that relied upon by the Petitioners in this case, hesitate and second guess whether they have authority to take a child into custody to determine whether any abuse is occurring. Such hesitation may well lead to the increased risk that child abuse will not be promptly investigated and halted. These extraordinary circumstances are of great public import and, therefore, warrant certiorari review.

This case arises from the brief removal of J.H., a minor child, from school on February 14, 2014 for questioning about possible domestic abuse. On February 12, 2014, the DHS received a tip on their hotline from a caller alleging that minor children, including J.H., may be in danger from their father, who had a history of drug abuse and domestic violence. (App. 5-6). The following day, DHS Child Protective Services Unit workers discussed the case with Calloway, a deputy with the Bryan County Sheriff's Office, to determine what action should be taken. (App. 5-6). In accordance with a state statute (which explicitly requires an interview to be conducted and allows for that interview to be conducted at any place), as well as standing directives from the local prosecutor's office concerning child abuse/endangerment allegations, it was decided to take J.H. into protective custody in order to conduct a forensic interview of the child at the local child advocacy center. (App. 6). On February 14, 2014, DHS requested assistance from Calloway, but he advised DHS that he could not transport J.H. to the forensic interview that afternoon. (App. 6). Although not involved in the initial discussions, Huckaby, a DHS child welfare specialist, was requested by DHS staff to assist in the securing of the juvenile and to perform the forensic interview as she was the only DHS staff person available who was trained in conducting the specialty interview. (App. 6). She subsequently contacted Jeff Goerke, Chief of Police for the City of Colbert, Oklahoma, for assistance in transporting the minor child approximately 15 minutes from the elementary school in Colbert to the child advocacy center. (App. 6-7).

Before the forensic interview began, Calloway arrived at ABC House and set up the video recording equipment. (App. 7). Although he set up the recording equipment, he did not participate in the interview itself, and never questioned J.H. (App. 7). Huckaby interviewed J.H. about his father and the situation at home for approximately forty minutes. (App. 7). The interview did not yield evidence of abuse and it was decided that there was no reason to retain J.H., a decision to which all persons agreed. Calloway then drove J.H. from the child advocacy house back to his elementary school. (App. 7). J.H. was away from the school for approximately 1½ hours.

Frank Halley, as next friend of J.H., commenced this action against the Petitioners and their co-defendants in the United States District Court for the Eastern District of Oklahoma on April 17, 2014, asserting causes of action against the Petitioners under 42 U.S.C. § 1983 for an alleged unconstitutional seizure in violation of the Fourth Amendment, and violating the Due Process Clause of the Fourteenth Amendment, by allegedly depriving J.H. of the right to familial association. The Petitioners filed motions for summary judgment, each arguing, in part, that they were entitled to qualified immunity because their actions did not violate J.H.'s clearly established constitutional rights, were supported by reasonable suspicion, and were objectively reasonable.

The District Court denied summary judgment to the Petitioners, finding that they were not entitled to qualified immunity. (App. 57-60, 71-75). On appeal, the

Tenth Circuit panel found that it was clearly established that a social worker needs at least reasonable suspicion of abuse in order to seize a child at school, and that the Petitioners did not have reasonable suspicion that J.H. was in imminent danger of abuse. (App. 11-22). The court further found that the state statute which the Petitioners relied upon as granting them authority for the seizure "cannot reasonably be read to authorize the conduct in question" and, thus, concluded that the Petitioners' actions "were not objectively reasonable." (App. 27-29). Accordingly, the court affirmed the District Court's denial of qualified immunity to the Petitioners with regard to the Fourth Amendment claim. (App. 44).

The Petitioners moved for rehearing *en banc*; which was denied on October 29, 2018. (App. 86-87).

REASONS FOR GRANTING THE PETITION

Petitioners now respectfully petition for a writ of certiorari because the Tenth Circuit Court of Appeals erred in determining that the Petitioners did not act in an objectively reasonable manner in relying on a state statute, as well as standing directives from the local prosecutor's office concerning child abuse/endangerment allegations. The Tenth Circuit compounded that error by applying a new construction of a state statute that had never previously been so construed to the actions of the Petitioners thereby depriving them of fair notice that their actions were unconstitutional. Furthermore, the Tenth Circuit Court

of Appeals also wrongly applied different standards to the individual officers and misapprehended significant facts with respect to Petitioner Huckaby. Unfortunately, the Tenth Circuit errors may have the unintended consequence of ultimately putting children at risk. In light of the Tenth Circuit's decision, social workers and police officers in the Tenth Circuit and other circuits who investigate child abuse allegations may, when faced with statutory language similar to that relied upon by the Petitioners in this case, hesitate and second guess whether they have authority to take a child into custody to determine whether any abuse is occurring. Such hesitation may well lead to the increased risk that child abuse will not be promptly investigated and halted. These extraordinary circumstances are of great public import and, therefore, warrant certiorari review.

A. Fourth Amendment Standard.

The Fourth Amendment protects persons from "unreasonable . . . seizures." U.S. Const. Amend. IV. "'The key principle of the Fourth Amendment is reasonableness. . . .'" *Florida v. Royer*, 460 U.S. 491, 514 (1983) (quoting *Michigan v. Summers*, 452 U.S. 692, 700, n.12 (1981)). Depending on the circumstances, a seizure must be supported by an arrest warrant, probable cause, or reasonable suspicion to detain and question an individual. *Id*.; *Jones v. Hunt*, 410 F.3d 1221, 1227-28 (10th Cir. 2005); *Storey v. Taylor*, 696 F.3d 987, 992 & n.5 (10th Cir. 2012). "Courts have reached differing results concerning the difficult issue of the scope

of the Fourth Amendment protection in the context of a child abuse investigation." *Snell v. Tunnell*, 920 F.2d 673, 697 (10th Cir. 1990).

A seizure occurs "within the meaning of the Fourth Amendment when 'a reasonable person would believe that he or she is not free to leave.'" *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1243 (10th Cir. 2003) (quoting *Florida v. Bostick*, 501 U.S. 429, 435 (1991)). "'[W]hether the person being questioned is a child or an adult' is 'relevant' to whether a person would have felt free to leave." *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005) (quoting *United States v. Little*, 18 F.3d 1499, 1505 n.6 (10th Cir. 1994)). A young child is seized for Fourth Amendment purposes if "no reasonable child would have believed that he was free to leave." *Hunt*, 410 F.3d at 1229 (quoting *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003)).

Prior to this case, the Tenth Circuit had previously applied these principles to cases in which social workers seized a child from his home. In *Roska*, 328 F.3d at 1244, the Tenth Circuit held social workers violated the Fourth Amendment when they seized a child from his home without judicial authorization or exigent circumstances. In that case, there was no compelling reason or special need of the government that made obtaining a warrant impracticable. The court held: "Simply put, unless the child is in imminent danger, there is no reason that it is impracticable to obtain [judicial authorization] before social workers remove a child from the home." *Id*. at 1242.

However, prior to this case, the Tenth Circuit had not decided what Fourth Amendment standard governs when social workers seize a child at school, rather than at home. In *Hunt*, the Tenth Circuit declined to decide precisely "what Fourth Amendment test is most appropriate" when social workers seize a child at school. 410 F.3d at 1228 & n.4. Nonetheless, the court held it is "clearly established" that a seizure "must be reasonable." *Id*. at 1229. It held that the social workers' seizure in that case violated the Fourth Amendment because it transgressed even the minimal reasonable-suspicion standard from *Terry v. Ohio*, 392 U.S. 1 (1968), and was therefore unreasonable. *Id*. at 1228.

B. The Qualified Immunity Standard.

Qualified immunity protects public officials from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (*per curiam*) (citations and quotation marks omitted). Qualified immunity is an entitlement not to stand trial or face the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It is an immunity from suit rather than a mere defense to liability. *Id*. Qualified immunity gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to

go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

When a defendant asserts the defense of qualified immunity, "the burden shifts to the plaintiff to establish (1) a violation of a constitutional right (2) that was clearly established." *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015); *see also Elder v. Holloway*, 510 U.S. 510, 514 (1994) ("[T]he plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the [district] court can determine whether the right allegedly violated was clearly established." (citation and quotation marks omitted). Deciding when a right is "clearly established" is a crucial part of qualified immunity analysis.

"The relative, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled in part, Pearson, supra.*; *see also Brousseau v. Haugen*, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004) (emphasizing inquiry should be conducted in light of the specific context of the case). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citations and quotations omitted).

"The question of whether a right is clearly established must be answered in light of the specific context of the case, not as a broad general proposition." *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012) (internal quotations omitted). This Court has "repeatedly told courts . . . not to 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." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (citation and internal quotations omitted). "[C]learly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S.Ct. 548, 552 (2017). With respect to matters involving child abuse allegations, "social workers and other state actors who cause a child's removal are entitled to qualified immunity because the alleged constitutional violation will rarely—if ever—be clearly established" as "the balance between a child's liberty interest in familial relations and a state's interest in protecting the child is nebulous at best[.]" *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1023 (7th Cir. 2000) (Sutton, J., dissenting).

C. The Court of Appeals Erred in Determining That the Petitioners' Actions Were Not Objectively Reasonable and its Decision in This Regard May Ultimately Put Children at Risk.

Oklahoma has a compelling state interest in ensuring the safety and protection of children. *Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994) (citing

Santosky v. Kramer, 455 U.S. 745, 766 (1982)); *see also Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (holding that "safeguarding the physical and psychological well-being of a minor . . . is a compelling [interest]." Under state law, DHS has a duty to promptly investigate allegations of child endangerment, abuse, or neglect, which includes interviewing the child "at any reasonable time and at any place." Okla. Stat. tit. 10A, § 1-2-105. They may do this when such actions are supported by reasonable suspicion. Okla. Stat. tit. 10A, § 1-4-201(A).

In *J.B. v. Washington County*, 127 F.3d 919, 926-27 (10th Cir. 1997), the Tenth Circuit determined that constitutional due process rights were not violated when county officials interviewed a child at a shelter care center rather than at her home. That decision further held that the procedures employed were reasonably calculated to balance the competing interests of the state and the child's parents, and to achieve an interview that was untainted by parental influence. *Id.* Tenth Circuit precedent states that a child's autonomy and relationship to his family must be balanced against the state's interest in protecting the safety and welfare of the child. *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993). Thus, whether government officials may interview children outside their home or school upon allegations of abuse or neglect is dependent upon the particular facts and circumstances of the case. In such cases requiring that competing interests be balanced, "the law is less likely to be well established than

in other cases." *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989).

"The touchstone of Fourth Amendment analysis is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *United States v. Oliver*, 363 F.3d 1061, 1066 (10th Cir. 2004). "In considering the 'objective legal reasonableness' of the state officer's actions, one relevant factor is whether the defendant relied on state statute, regulation, or official policy that explicitly sanctioned the conduct in question." *Roska*, 328 F.3d at 1251. To determine whether an office's reliance on a state statute renders his conduct objectively reasonable, the courts must consider:

> (1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.

Id. at 1253. Here, the Petitioners relied, in part, upon Okla. Stat. tit. 10A, § 1-2-105. Under that statute, when DHS receives a report of "child abuse or neglect," it is required to "promptly respond to the report by initiating an investigation." Under state law, DHS has a duty to promptly investigate allegations of child endangerment, abuse, or neglect, which includes interviewing the child "at any reasonable time and at any place." Okla. Stat. tit. 10A, § 1-2-105(A)(1). The investigation "shall include" a visit and interview with the

child. Okla. Stat. tit. 10A, § 1-2-105(B)(1). The visit "may be conducted at any reasonable time and **at any place including, but not limited to, the child's school**." *Id*. (emphasis added). As the statute allows the interview to be conducted at any place, and does not expressly limit the interview to the location at which the child could be found, it was reasonable for the Petitioners to conclude that the statute authorized them to transport J.H. from his school to the child advocacy center for a short interview. Interviewing J.H. either at the school or at the child advocacy center would have both involved a seizure within the meaning of the Fourth Amendment as no reasonable child would have believed that he was free to leave either situation. However, to ensure the safety, security, and privacy interests of the child in such situations, it is objectively reasonable to conduct such interviews at the child advocacy center, rather than at the child's school. Indeed, the Tenth Circuit panel agreed that "[i]t may very well constitute a best practice to interview a child at the safe-house during school hours. . . ." (App. 17).

However, the court nevertheless held that Okla. Stat. tit. 10A, § 1-2-105(B)(1) "cannot reasonably be read to authorize the conduct in question" and, thus, concluded that the Petitioners' actions "were not objectively reasonable." (App. 27). In support of this conclusion, the court reasoned:

> But Huckaby and Deputy Calloway ignore that a *different* section of the code provides the requirements for taking a child into

> custody without a court order. That section—titled "Circumstances authorizing taking a child into custody"—requires "reasonable suspicion" that the child is in need of immediate protection due to an "imminent safety threat." *Id*. § 1-4-201(A)(1). It makes little sense to interpret an authorization to interview "at any place" as a loophole allowing officers to detain children anywhere without consent, a court order, or reasonable suspicion of an imminent threat.

(App. 28). However, Okla. Stat. tit. 10A, § 1-4-201 addresses children being taken into "protective custody" (*see* Okla. Stat. tit. 10A, § 1-4-201(B)(1)) and contemplates their placement in a kinship care home, emergency foster care home, children's shelter, a health care facility for medical treatment, a behavioral health treatment facility for evaluation or inpatient treatment, or placed in the emergency custody of the DHS or some other suitable person or entity. *See* Okla. Stat. tit. 10A, § 1-4-201(E). Here, however, J.H. was not taken into "protective custody"[1] within the meaning of Okla. Stat. tit. 10A, § 1-4-201, as his placement in any kinship care home, emergency foster care home, children's shelter, etc., was not contemplated by the Petitioners at the time. Rather, J.H. was simply transported to the child advocacy center for a short

[1] Throughout the case below, the parties often referred to J.H. being taken into "protective custody." However, the use of that term was merely an informal idiom, and was not meant to convey that J.H. was taken into "protective custody" within the meaning of Okla. Stat. tit. 10A, § 1-4-201.

interview. As such, Okla. Stat. tit. 10A, § 1-4-201 simply has no bearing on the issue and would not have placed the Petitioners on notice that Okla. Stat. tit. 10A, § 1-2-105(B)(1) did not authorize their actions in this case.

In further support of its determination that Okla. Stat. tit. 10A, § 1-2-105(B)(1) cannot reasonably be read to authorize the Petitioners' conduct, the court further reasoned:

> Furthermore, that the Code authorizes interviews "at any place" does not authorize DHS to take a child *into custody* anywhere and everywhere. The authorization to interview "at any place" is certainly not the same as authorization to take the child into custody. In fact, this same section acknowledges that DHS officials might not be able to interview the child because they are not allowed to enter the "place where the child may be located." Okla. Stat. tit. 10A, § 1-2-105(B)(2). In that situation, the Code provides that officials may seek a court order allowing them to enter and interview the child. Id. The authorization to interview a child therefore cannot be read as *carte blanche* authorization to take custody of a child "at any place."

(App. 28). However, in this case, the Petitioners were allowed admission to J.H's school and did not need to secure a court order pursuant to Okla. Stat. tit. 10A, § 1-2-105(B)(2). The mere fact that that subsection sets forth a procedure for DHS officers to obtain a court order to allow entrance to any place a child may be found

but where the officer has been refused admission has no bearing on whether Okla. Stat. tit. 10A, § 1-2-105(B)(1) can be reasonably read to authorize the Petitioners' conduct in this case. Again, Okla. Stat. tit. 10A, § 1-2-105(B)(1) does not expressly limit the interview to the location at which the child could be found. Indeed, an officer would have to first be able to obtain admission to the place where the child could be found before they would be able to transport them to the child advocacy center for interview. As such, Okla. Stat. tit. 10A, § 1-2-105(B)(2) would not have placed the Petitioners on notice that Okla. Stat. tit. 10A, § 1-2-105(B)(1) did not authorize their conduct in this case.

The Tenth Circuit panel provided no further rationale for its determination that Okla. Stat. tit. 10A, § 1-2-105(B)(1) cannot reasonably be read to authorize the Petitioners' conduct. As such, its determination that Oklahoma law did not make the Petitioners' conduct objectively reasonable (App. 29) is unfounded. Indeed, the court's opinion seems to indicate that it would have been objectively reasonable for the Petitioners to have relied upon the statute to interview J.H. at his school and that the court may have not considered such an interview a seizure at all. *See* App. at 17 ("It may very well constitute a best practice to interview a child at the safe-house during school hours *once seizing the child is justified in the first place*. Unless officials have judicial authorization, however, they cannot seize a child without at least having reasonable suspicion of imminent danger."). However, as noted above, interviewing J.H. at his school would have

entailed just as much of as a seizure within the meaning of the Fourth Amendment as transporting him to the child advocacy center for interview as no reasonable child would have believed that he was free to leave either situation. As such, the court's seeming distinction between interviews at school and interviews at the child advocacy center is itself unreasonable and contrary to law. As a Fourth Amendment seizure would have occurred in either situation, it was objectively reasonable for the Petitioners to rely on Okla. Stat. tit. 10A, § 1-2-105(B)(1) as authorizing their actions in this case.

However, the Petitioners did not rely solely upon Okla. Stat. tit. 10A, § 1-2-105(B)(1), but also upon standing directives from the local prosecutor's office. In that regard, the Bryan County District Attorney's Office, through an Interagency agreement with Bryan County law enforcement officials and DHS, had established protocols for the investigation of child abuse allegations which included the requirement that juveniles who were the possible victims of such allegations were to be taken into custody and forensic interviews were to be conducted at the local child advocacy center. Both Huckaby and Calloway were aware of those directives and relied on them in their actions. The reliance on the protocols in support of the defense of qualified immunity and the reasonableness of their actions was raised in each of the Petitioners' respective motions for summary judgment before the District Court and was in their briefing before the Tenth Circuit.

Reliance on the directives or advice of counsel may create extraordinary circumstances which excuse a violation of clearly established rights. *Roska,* 328 F.3d at 1253-54 (10th Cir. 2003) (citing *V–1 Oil Co. v. Wyoming Department of Environmental Quality*, 902 F.2d 1482, 1488-89 (10th Cir. 1990)). Factors which must be considered to determine whether reliance on the advice of legal counsel may entitle an officer to qualified immunity include: "(1) how unequivocal and specific the advice was; (2) how complete the information provided to the attorney giving the advice was; (3) the prominence and competence of the attorney; and (4) the time between the dispersal of the advice and the action taken." *Id*. However, although the Petitioners addressed the issue on appeal, the Tenth Circuit panel wholly failed to address it in its analyses of whether the Petitioners' conduct was objectively reasonable.[2] As such, its analyses in that regard is incomplete and erroneous. Because the Petitioners relied not only upon Oklahoma statutory law, but also upon standing directives from the local prosecutor's office, their conduct in this case was objectively reasonable

Unfortunately, the Tenth Circuit's determination that Okla. Stat. tit. 10A, § 1-2-105(B)(1) cannot reasonably be read to authorize the Petitioners' conduct may have the unintended consequence of ultimately putting children at risk. In light of that decision, DHS workers and police officers in the Tenth Circuit and

[2] The District Court only mentioned the protocols briefly in passing, but did not substantively address them other than to say the Petitioners relied on them at their peril. (App. 57).

other circuits who investigate child abuse allegations may, when faced with similar statutory language, hesitate and second guess whether they have authority to take a child into custody to determine whether any abuse is occurring. Such hesitation may well lead to the increased risk that child abuse will not be promptly investigated and halted. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (" . . . [P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.").

D. The Court of Appeals Wrongly Applied a New Construction of a State Statute That Had Never Previously Been So Construed to the Actions of the Petitioners Thereby Depriving Them of Fair Notice that Their Actions Were Unconstitutional.

Prior to the Tenth Circuit panel's decision in this matter, there had been no order or opinion interpreting Okla. Stat. tit. 10A, § 1-2-105(B)(1) as precluding officers from transporting children to the local child advocacy center for interview about allegations of abuse. However, as discussed above, the court found that the Petitioners' reliance on the plain language of the statute—"at any place"—to actually mean "at any place" was not reasonable. The court held the Petitioners to this new standard despite the fact that the state statute had never been so narrowly construed before and denied qualified immunity to the Petitioners.

The very essence of qualified immunity is the requirement that officials must have been adequately put on notice by the prior law that their actions were in transgression of constitutional rights. However, as the statute had not been interpreted so narrowly at the time of the Petitioners' actions, neither would have had notice of the illegal nature of their conduct, the actions of the Petitioners cannot be said to have been unreasonable and each should have been entitled to qualified immunity on the Fourth Amendment illegal seizure claim. *See Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) ("Police officers are not constitutional lawyers, and they should not have to fear personal damages liability when they enforce the plain terms of an ordinance that has not been challenged in court, let alone overturned, unless its unconstitutionality is patent.").

In this regard, the Tenth Circuit panel's decision conflicts with prior Tenth Circuit case law as well as decisions of other circuits. *See Derda v. City of Brighton, Colo.*, 53 F.3d 1162, 1166 (10th Cir. 1995) (reversing denial of qualified immunity where appropriate interpretation of state statute was unclear); *Coffman v. Trickey*, 884 F.2d 1057, 1063 (8th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1989) (finding qualified immunity where no prior cases interpreted particular application of state statute); *Johnson v. Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983) (finding qualified immunity where no prior cases addressed the significance of particular statute involved); *Campbell v. Peters*, 256 F.3d 695, 701 (7th Cir. 2001) (finding qualified immunity

where definitive interpretation of state statute did not occur until after the defendant's conduct was taken in reasonable reliance on an interpretation of that statute that was later found prohibited); *Coates v. Powell*, 639 F.3d 471, 477 (8th Cir. 2011), *cert. denied*, 132 S.Ct. 412 (2011) (officer who assisted social service worker investigating a complaint of child neglect did not violate clearly established Fourth Amendment law by remaining in the home after the homeowner ordered the officer out, because he was comporting with state statute that authorized him to accompany social worker investigating a complaint of child neglect and to remain there until the investigation was complete). The Tenth Circuit's determination that the Petitioners' interpretation of the statute is unreasonable should have applied prospectively only, not retroactively to actions of the Petitioners that occurred more than four years ago.

To paraphrase language from *Sjurset v. Button*, 810 F.3d 609, 620 (9th Cir. 2015), "there is no 'robust consensus of cases of persuasive authority' that would put the officers on notice that they could not" take J.H. into custody and transport him to the child advocacy center under the state statute that provided DHS authority to interview a potential child victim "at any place," or under the task force protocols adopted at the direction of the Bryan County District Attorney's Office. In fact, there is a dearth of case law addressing similar situations. In *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), a child protective service worker and a deputy sheriff questioned a child at school about an

allegation of sexual abuse for two hours without a warrant and without parental permission. *Id*. at 1016-17. The child's mother later brought a § 1983 civil rights action, alleging in part that the in-school interview was an unreasonable seizure in violation of the child's Fourth Amendment rights. *Id*. at 1020. On appeal, the Ninth Circuit held that the in-school interview was a violation of the child's Fourth Amendment rights, but granted the individual defendants qualified immunity.[3] The Ninth Circuit granted qualified immunity despite its findings that the defendants had not provided any explanation for the deputy's presence at the interview and that their justification for the seizure lasting two hours was weak. *Id*. at 1032. In granting qualified immunity, the court found that its prior precedent did not clearly establish that the in-school seizure of a child suspected of being an abuse victim was subject to traditional Fourth Amendment protections and that, under the lesser "special needs" analysis,[4] the officers'

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[3] The defendants in that case petitioned for certiorari and sought review of the Ninth Circuit's holding that their actions violated the child's Fourth Amendment rights. On review, this Court found that the issue was moot as the deputy sheriff had since left the department and the child was no longer a minor, and vacated the part of the Ninth Circuit's decision holding that the officials had violated the child's Fourth Amendment rights, thus leaving the issue an unsettled question of law. *See Camreta v. Greene*, 563 U.S. 692 (2011).

[4] Under the "special needs" analysis, the courts engage in a two-fold inquiry to determine whether a warrantless search or seizure is reasonable. "[F]irst, [the court] must determine whether the . . . action was justified at its inception . . . ; second [the court] must determine whether the search [or seizure] as actually conducted was reasonably related in scope to the

actions were not so clearly invalid as to strip them of immunity. *Id*. at 1031-33.

As in the *Greene* case, the law in the Tenth Circuit is not clearly established as to what precise legal standards govern the seizure of a child at school. Indeed, the Tenth Circuit has declined to decide precisely "what Fourth Amendment test is most appropriate" in such situations. *Hunt*, 410 F.3d at 1228 & n.4. Rather, the Tenth Circuit has merely held that it is clearly established that such seizures must be reasonable. *Id*. at 1229. As set forth herein, the Petitioners' reliance on Okla. Stat. tit. 10A, § 1-2-105(B)(1) and on standing directives from the local prosecutor's office was objectively reasonable. Accordingly, the Tenth Circuit erred in failing to grant qualified immunity to the Petitioners. It compounded that error by applying a new construction of a state statute that had never previously been so construed to the actions of the Petitioners thereby depriving them of fair notice that their actions were unconstitutional.

E. The Court of Appeals Wrongly Applied Different Standards to the Individual Officers.

In its Opinion, the Tenth Circuit panel determined that City of Colbert Chief of Police Jeff Goerke was entitled to qualified immunity in his actions as he was entitled to rely on the information provided by DHS

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circumstances which justified the inference in the first place. . . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (citations and internal quotation marks omitted).

officials. (App. 22-26). However, the court did not give the same discretion to Petitioner Calloway. The allegations were received by DHS, which later relayed some information to Calloway. Calloway's decisions were based on information provided to him by DHS staff as well as his knowledge of the local prosecutor's directives. Importantly, Calloway had frequently worked with DHS officials and as such, it was reasonable for him to rely on DHS's assessment of the hotline call, the urgency for a forensic interview, the potential threat to J.H.'s safety, and the location where the forensic interview would be conducted.

Second, in its Opinion, the Tenth Circuit panel denied qualified immunity to the Petitioners, appearing to determine that the seizure of J.H. from the school as it relates to these Petitioners was improper because there was no imminent danger to the minor while he was at the school. (App. 17). However, the court then granted qualified immunity to Goerke correctly noting that the imminent danger necessary for the taking of J.H. into protective custody at the school did not have to be imminent danger at the school but could arise from the home. (App. 25).

In making such ruling, the court improperly applied two different standards to the different officers. If imminent danger of J.H. at the school was not a requisite for Goerke, it should not have been a requisite for Huckaby or Calloway. *See* App. at 25 ("Chief Goerke could have reasonably assumed the danger did not lie at school, but at home. If a child faces an imminent threat of abuse upon returning home from school, a

DHS official would likely have grounds to request the child's seizure while still at school."). The Tenth Circuit panel wrongly applied a different standard to the Petitioners as opposed to the standards applied to Goerke.

F. The Court of Appeals Misapprehended Significant Facts With Respect to Petitioner Huckaby.

In considering whether Petitioner Huckaby's actions violated the Fourth Amendment, the Tenth Circuit panel misapprehended the facts when it stated that "Huckaby had intimate knowledge about the basis for J.H.'s detention." (App. 18). Following that misstatement of fact, the court explained that Huckaby "was the one who told Goerke to seize J.H. And she conducted the interview herself." (App. 18). From this, the court concluded that "[a] reasonable official in her position should have known there was no reasonable suspicion that J.H. was in imminent danger." (App. 18). However, there is no factual basis to support the court's conclusion that Huckaby had "intimate knowledge about the basis for J.H.'s detention" so that she would have known there was reasonable suspicion that J.H. was in imminent danger.

In fact, the court's own restatement of the facts in the "Background" section of its decision shows that Huckaby did not have "intimate knowledge" but instead, like Goerke, reasonably relied on a decision made by others and conveyed to her by her supervisor. *See* App. at 6 ("As Reed was leaving the office, Sara

Huckaby, DHS child welfare specialist and defendant in this case, asked whether she could help. Reed asked Huckaby to arrange for J.H. to be picked up for the interview. Huckaby then called Chief of Police Jeff Goerke, the third defendant here, and asked him to pick up J.H."). There is simply no evidence that Huckaby had any knowledge, let alone intimate knowledge, of the reasons for J.H.'s seizure prior to her being asked to arrange for his transport from school to the interview site. The Tenth Circuit panel found that there was a question of fact as to whether or not Huckaby told Goerke there was a verbal order for the pickup. (App. 6). However, that is immaterial to the fact that Huckaby reasonably relied upon her superior's decision to pick up J.H. from school and to transport him to the interview site. Accordingly, like Goerke, Huckaby was entitled to qualified immunity. *See* App. at 23 ("Since the undisputed evidence at this stage supports Chief Goerke's claim that he merely relied on the DHS officials' directions, we conclude Chief Goerke is entitled to qualified immunity."). The Tenth Circuit's differing decisions with respect to Huckaby and Goerke throws the law of reasonable reliance into disarray and will cause social workers to think twice before relying on decisions made by co-workers. The time it takes to think twice may very well place children in grave danger.

G. Certiorari Should be Granted

The Tenth Circuit Court of Appeals erred in determining that the Petitioners did not act in an objectively

reasonable manner in relying a state statute, as well as standing directives from the local prosecutor's office concerning child abuse/endangerment allegations. The Tenth Circuit compounded that error by applying a new construction of a state statute that had never previously been so construed to the actions of the Petitioners thereby depriving them of fair notice that their actions were unconstitutional. Furthermore, the Tenth Circuit Court of Appeals wrongly applied different standards to the individual officers and misapprehended significant facts with respect to Petitioner Huckaby. Unfortunately, the Tenth Circuit errors may have the unintended consequence of ultimately putting children at risk. In light of the Tenth Circuit's decision, DHS workers and police officers in the Tenth Circuit and other circuits who investigate child abuse allegations may, when faced with statutory language similar to that relied upon by the Petitioners in this case, hesitate and second guess whether they have authority to take a child into custody to determine whether any abuse is occurring. Such hesitation may well lead to the increased risk that child abuse will not be promptly investigated and halted. These extraordinary circumstances are of great public import and, therefore, warrant certiorari review.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

WELLON B. POE
Counsel of Record
JAMISON C. WHITSON
COLLINS ZORN & WAGNER, P.C.
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078
Email: wbp@czwlaw.com

Counsel for Petitioner
Nathan Calloway

EMILY B. FAGAN
JOHN K.F. LANGFORD
Assistant General Counsel
DEPARTMENT OF HUMAN SERVICES
P.O. Box 25352
Oklahoma City, OK 73125
Telephone: (405) 521-3638
Facsimile: (405) 521-6816
Email: Emily.Fagan@okdhs.org

Counsel for Petitioner
Sara Huckaby