No. _____

In The
Supreme Court of the United States

N.E.L., M.M.A. AND E.M.M.,

Petitioners,

v.

MONICA GILDNER, ANGELA WEBB, TINA ABNEY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Were Colorado's UCCJEA requirements detailed enough to defeat qualified immunity in a Fourth Amendment claim arising from the denial of a post-seizure hearing or, in the alternative, was the right to a post-removal hearing identified in decisional law with obvious clarity?

Did the Colorado district court have specific jurisdiction over Kansas agents who had direct and significant contact with Colorado agents in obtaining immediate legal custody of children while the children were located in Colorado?

PARTIES TO THE PROCEEDINGS

Petitioners are three siblings, N.E.L., M.M.A and E.M.M.

Respondents are three individual social workers, Monica Gildner, Angela Webb and Tina Abney.

CORPORATE DISCLOSURE

Not applicable

LIST OF ALL RELATED CASES

1. United States Court of Appeals for the Tenth Circuit, Case No. 18-3059 (appeal from the Dist. of Kansas) (not selected for official publication)
N.E.L., M.M.A., E.M.M. v. Monica Gildner, Angela Webb, Tina Abney;
Rehearing denied, August 20, 2019
Order and Judgment, June 25, 2019

2. United States Supreme Court,
Case No. 18-503,
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; and
N.E.L., M.M.A. and E.M.M. v. Monica Gildner, Angela Webb and Tina Abney, in their individual capacities, Respondents;
Certiorari denied, March 18, 2019

LIST OF ALL RELATED CASES – Continued

3. United States Court of Appeals for the Tenth Circuit,
Case No. 17-1120 (appeal from the Dist. of Colorado) (not selected for official publication),
N.E.L and M.M.A. v. Douglas County, Colorado, Lesa Adame, Carl Garza, Monica Gildner, Angela Webb and Tina Abney;
Order and Judgment, July 3, 2018

4. United States District Court for the District of Kansas,
Case No. 2:17-CV-02155-CM-JPO,
N.E.L., M.M.A., E.M.M. v. Monica Gildner, Angela Webb, Tina Abney;
Memoranda and Orders,
March 1, 2018 and March 7, 2018

5. United States District Court for the District of Colorado,
Case No. 15-CV-02847,
N.E.L. and M.M.A. v. Douglas County, Colorado, Monica Gildner, Angela Webb, Tina Abney, Lesa Adame and Carl Garza in their individual capacities;
Order Overruling Objections to and Adopting Recommendation of United States Magistrate Judge, March 13, 2017, as amended March 17, 2017;
Magistrate Judge's Recommendations on Pending Motions To Dismiss, January 27, 2017

LIST OF ALL RELATED CASES – Continued

Please note: the appellate and district court decisions in a separate case arising from the same seizure are as follows:

1. United States Court of Appeals for the Tenth Circuit, Case No. 19-1391
E.M.M., N.M.M. and G.J.M. v. Douglas County, Colorado, Lesa Adame and Carl Garza, individually
Opening brief due December 9, 2019

2. United States District Court for the District of Colorado,
Case No. 1:18-CV-02616-RBJ
E.M.M., N.M.M. and G.J.M. v. Douglas County, Colorado, Lesa Adame and Carl Garza, individually
Order Granting Motion to Dismiss, September 27, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, N.E.L., M.M.A., and E.M.M., file this *Petition for a Writ of Certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit, and respectfully submit:

OPINIONS BELOW

N.E.L. v. Gildner, No. 18-3059, 2019 WL 2592557 (10th Cir. June 25, 2019), *reh'g denied*, Aug. 20, 2019 (not selected for publication) (*N.E.L. II*).

N.E.L. v. Douglas County, Colorado, 740 Fed. Appx. 920 (10th Cir. 2018) (not selected for publication) (*N.E.L. I*).

BASIS FOR JURISDICTION

This Court's jurisdiction is under 28 U.S.C. §1254(1). Notifications are not required under Rule 29.4.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, 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.

The Fourteenth Amendment provides in salient part, in Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.

The Full Faith and Credit Clause, Art. IV, §1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

FEDERAL STATUTE INVOLVED

42 U.S.C. §1983, provides:

> 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.

COLORADO STATUTES INVOLVED

The Colorado Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") provides in salient part:

> **C.R.S. §14-13-204 – Temporary emergency jurisdiction**
>
> (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> (2) – (4) Omitted.
>
> **C.R.S. §14-13-205 – Notice – opportunity to be heard – joinder**
>
> (1) Before a child-custody determination is made under this article, notice and an opportunity to be heard in accordance with the standards of section 14-13-108 must be

given to all persons entitled to notice under the law of this state as in child-custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(2) – (3) Omitted.

C.R.S. §14-13-309 – Service of petition and order

Except as otherwise provided in section 14-13-311, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child.

C.R.S. §14-13-311 – Warrant to take physical custody of child

(1) Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(2) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on

the first judicial day possible. The application for the warrant must include the statements required by section 14-13-308(2).

(3) A warrant to take physical custody of a child must:

(a) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(b) Direct law enforcement officers to take physical custody of the child immediately; and

(c) Provide for the placement of the child pending final relief.

(4) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

C.R.S. §14-13-313 – Recognition and enforcement

> A court of this state shall accord full faith and credit to an order issued by another state and consistent with this article that enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under a provision of law adopted by that state that is in substantial conformity with part 2 of this article.

STATEMENT OF THE CASE

A. Facts and Basis for Federal Jurisdiction in the Court of First Instance

The complaint[1] alleges that, acting together, five agents in Colorado and Kansas agreed to use unenforceable *ex parte* orders from a Kansas court to conduct a warrantless entry into a private residence in Douglas County, Colorado, with the stated purpose of seizing ten children.[2] Petitioners were three of those seized. The agents reached agreement on detailed methods by which to give the Kansas agents immediate legal custody, to get the children transported to

[1] The "complaint" means the Second Amended Complaint filed in the Kansas federal district court. Allegations in the complaint are indicated by "¶" and the paragraph number(s). However, the complaint is not included in the Appendix.

[2] ¶¶118a, 131, 132-133.

Kansas, and to keep Petitioners from any contact with their parents and grandparents for days.[3]

The Colorado agents entered the residence over the owner's objection. They carried a sidearm and threatened arrest.[4] They claimed their authority to seize custody was based on the Kansas orders.[5] On the contrary, the *ex parte* orders authorized nothing at all by anyone.[6]

The agents immediately observed that the children were all safe and not in any danger of harm.[7] The basis for an emergency seizure did not exist, but even assuming *arguendo* that one existed, Colorado law required service of process giving notice of the basis for the seizure and required a post-removal hearing on the "next judicial day." C.R.S. §14-13-311(1), (2) and (4). The agents entirely disregarded Colorado's procedural and jurisdictional requirements in its UCCJEA.[8]

But as a result of the agents' threat of arrest and order declaring that the Kansas agents had immediate legal custody, Petitioners' friends delivered physical custody of the children to the Kansas agents at a Kansas office. Petitioners were detained for at least five

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[3] ¶¶144-145, 148, Ex. 2, 151-152, 160, 171a-e, 180-185, 187.

[4] ¶¶137-138.

[5] ¶148, Ex. 2.

[6] ¶¶116a-h, 171a-e.

[7] ¶140.

[8] ¶¶118a-b, 176.

days *incommunicado*.[9] A judge in Kansas found that the seizure in Colorado lacked probable cause.[10]

The complaint alleged a claim for conspiracy between the agents that deprived Petitioners of their Fourth Amendment liberty without procedural due process and specifically, that the agents had violated Colorado's UCCJEA:

> Through a formal or informal mutual reciprocal agreement between agencies and/or with the individual government employees in Douglas County, Colorado, Gildner, Abney and Webb knowingly or recklessly conspired to circumvent the legislative and constitutional requirements contained in the Uniform Child Custody Jurisdiction and Enforcements Acts of Kansas and Colorado, K.S.A. 23-37, 310 through 23-307, 317 and C.R.S. §14-13-101 through 14-13-403 (the "UCCJEA")."[11]

The complaint also alleged: "The Kansas ex parte orders had not been docketed by a Colorado court as required in C.R.S. §14-11-101(4) and the Uniform Child Custody Jurisdiction and Enforcement Act, C.R.S. §14-13-301 et seq. . . . "[12] The complaint's first claim for relief specifies that Petitioners were denied post-deprivation due process, alleging that the Kansas social workers had conducted a seizure "by which

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[9] ¶186.

[10] ¶214.

[11] ¶118a.

[12] ¶176.

Plaintiffs were deprived of their liberty without due process, both before **and after** the seizure. . . . " (emphasis added).[13]

The grounds alleged in the complaint for the Colorado district court's specific jurisdiction over the three Kansas agents included the Colorado agents' statement that they had been contacted by the Kansas agents to seize and take custody of the children;[14] that the Kansas agents had given the Colorado agents the address of Petitioners' location,[15] and transmitted copies of the Kansas *ex parte* orders,[16] that the Colorado agents misrepresented the Kansas orders as authorizing the raid;[17] that, during the raid, the Kansas agents were instructing the Colorado agents by phone on the terms to be included in the on-site verbal and written orders;[18] that the five agents agreed to prohibit the children from all contact with their parents and grandparents and to vest immediate legal custody with the Kansas agents until agents from Kansas would arrive to take physical custody;[19] that the five agents conspired to deprive Petitioners of their rights "by working

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[13] ¶190.

[14] ¶¶124, 132, 138.

[15] ¶124.

[16] ¶131.

[17] ¶¶131, 133, 135.

[18] ¶¶141, 142, 146, Ex. 2, 148, 153, 155.

[19] ¶¶146, Ex. 2, 151-152.

together either in meetings or over the phone and by other means of electronic communication."[20]

B. Procedural History

Two of the Petitioners, N.E.L. and M.M.A., filed suit in Colorado's federal district court after they reached 18 years of age. Subject matter jurisdiction arose under 42 U.S.C. §1983 and 28 U.S.C. §§1331 and 1343. Defendants were the five individual agents from Kansas and Colorado together with Douglas County, Colorado.[21] The Colorado district court adopted the magistrate's recommendation to dismiss the Colorado defendants.[22] The Tenth Circuit affirmed. *N.E.L. I.*

The Colorado district court transferred the claims against the three Kansas social workers to the Kansas federal district court.[23] Another sibling who reached age 18, E.M.M., joined as a plaintiff in the Kansas portion of the case.[24] The Kansas case, too, was dismissed,[25] and the siblings appealed for the second time to the Tenth Circuit.[26]

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[20] ¶187.

[21] App. 59.

[22] App. 50.

[23] App. 55.

[24] App. 19.

[25] App. 49.

[26] App. 1.

Prior to appellate review of the Kansas district court's order, all three siblings petitioned this Court. They sought review of the dismissal of the Colorado defendants, upheld by the Tenth Circuit, and review of the Kansas district court's failure to re-transfer the case to the Colorado district court. This Court denied their petition for writ of certiorari.[27]

The Tenth Circuit then affirmed the Kansas district court's refusal to re-transfer the case to Colorado and the Kansas district court's dismissal of all claims against the three Kansas agents. A motion for rehearing *en banc* was denied,[28] *N.E.L. II*, triggering this Petition.

REASONS FOR GRANTING THE WRIT

A. Introduction

Petitioners seek limited[29] review of *N.E.L. II* on the issues of specific jurisdiction, procedural due process and on subsidiary issues of seizure, conspiracy and re-transfer. On these issues, the Tenth Circuit's rationale

[27] Case No. 18-503.

[28] App. 108.

[29] This Petition does not seek review of other claims dismissed by the trial court in *N.E.L. II* for malicious prosecution, deprivation of familial association, and deprivation of the right to travel. And even though the complaint alleges to the contrary, this Petition assumes *arguendo*, as the panel ruled, that the seizure was based on an exigency due to concerns about Petitioners' mental well-being and their travel to Colorado prior to the scheduled non-emergency hearing.

in the instant case merely adopted-by-reference its previous rationale in *N.E.L. I*,[30] making both decisions, for all practical purposes, under review here. However, from the beginning of the case's journey in the Colorado federal district court, the issue of specific jurisdiction in the instant case, *N.E.L. II*, escaped any practical review. This was because the Colorado district court rejected any "clearly established right" arising from the seizure. This rejection was then treated as dispensing with the need to review the factual details of the conspiracy and seizure that established specific jurisdiction. The issue of the transfer to Kansas was interlocutory, and thus, non-appealable, in the first appeal, meaning specific jurisdiction could not have been, and was not, reviewed in *N.E.L. I*.

Notably, in the two appeals, the Tenth Circuit did not overrule the Colorado district court's opinion stating that: "the magistrate judge misread the complaint in finding plaintiffs were not seized . . . the ex parte orders did not contain *any* affirmative order, let alone a directive to take the children into custody" (emphasis in the original).[31] Because the issue of "seizure" was settled by the Colorado court, the narrow issue in this Petition is whether clearly established law required a post-seizure hearing in Colorado. If so, the writ should be granted to reverse the decision in *N.E.L. II*, which held: "For substantially the reasons stated in *N.E.L. I*, we affirm the dismissal on

[30] App. 6.

[31] App. 51, n. 2.

qualified-immunity ground of plaintiffs' claims relating to the execution of the ex parte orders and plaintiffs' resulting detention."[32]

Review is also requested to examine the use of two opinions that do not bind the court in the future. This request is more than a passing one due to the timing of sanctions imposed on the district judge, discussed *infra*. In general, designating certain rulings as non-binding appears to be arbitrary when no explanation is provided. A deeper concern is that, even if the facts in a previous case are on all-fours, a non-binding opinion can never be "clearly established law" to guide later litigants and judges. As a result, non-binding opinions breed needless expense and uncertainty for all concerned, even on questions of constitutional rights. This uncertainty compounds the consternation that already surrounds the doctrine of qualified immunity. *See* French, *End Qualified Immunity*, National Review (Sept. 13, 2018). In addition, designating opinions as being non-binding makes it seemingly impossible to satisfy this Court's Rule 10. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting). The designation gives the disconcerting appearance of being a signal, either to litigants or to this Court, not to consider any further review.

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[32] App. 6.

The two non-binding appellate opinions in this case aggravate another disquieting aspect. The panel upheld the instant case, *N.E.L. II*, on June 25, 2019, just a few weeks before the Judicial Council for the Tenth Circuit began an investigation in August 2019, and sanctioned the judge on September 30, 2019 for conduct that made him "susceptible to extortion." USA Today (Oct. 1, 2019). The judicial misconduct took place over a "lengthy period," indicating a possibility that, at the same time that the instant case was under review, the district court judge may have been "susceptible to extortion." The judge's misconduct was made public too late for Petitioners to seek his recusal.

B. The violation of Petitioners' procedural due process rights was "particularized to the facts" by virtue of detailed language in Colorado's UCCJEA which satisfied a *White v. Pauly*[33] test.

Since the Colorado district court was never overturned in finding that the complaint did allege that a seizure occurred, the issue is whether the lack of any post-seizure hearing in Colorado violated a clearly established right not to be summarily placed into legal custody of Kansas officials. To defeat qualified immunity, a plaintiff must show that a violation of a claimed constitutional right was "particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. at 552, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987). For a

[33] 137 S. Ct. 548 (2017).

Rule 12(b)(6) dismissal, this Court takes as true the facts in the complaint and draws all inferences in favor of Petitioners. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Petitioners contend, in part, that the detailed language in Colorado's UCCJEA satisfies *White v. Pauly*'s "particularity" test because, even assuming *arguendo* that an exigency obviated Petitioners' right to a pre-removal hearing, they still possessed a right to Colorado's post-seizure procedural safeguards that would have prevented the Kansas social workers from taking legal and physical custody when all favorable inferences are given to Petitioners. As briefed, *infra*, the complaint shows the unreasonableness of denying a post-removal hearing in Colorado, first, because of the UCCJEA's express requirements; second, because post-removal hearings are a clearly established right in the child-removal context; third, because foreign *ex parte* child custody orders are universally unenforceable; and fourth, because searches and seizures outside the scope[34] of a court order are universally unconstitutional.

The case at bar also meets the requirements of this Court's Rule 10 because the Tenth Circuit ruled on an important federal question in conflict with a relevant decision by this Court. In *Zinermon v. Burch*, 494 U.S. 113 (1990), a state statute allowed emergency seizures of adults but required post-seizure hearings

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[34] *Jones v. Hunt*, 410 F.3d 1221, 1229 (10th Cir. 2005), *citing Terry v. Ohio*, 392 U.S. 1, 20 (1968).

similar to the UCCJEA's requirements. This Court held that allegations that a public hospital's staff had violated state procedural safeguards did state a claim under Rule 12(b)(6). "[W]hat is unconstitutional is the deprivation of [a constitutionally protected interest] without due process of law." *Id.* at 125, *citations omitted.* By being seized, Petitioners in the instant case were, as in *Zinermon*, deprived of their Fourth Amendment liberty without Colorado's procedural safeguards and those of the Fourteenth Amendment.

Apart from the two non-binding designations by the Tenth Circuit, this case meets Rule 10's test because the decisions here conflict with decisions by the Ninth Circuit Court of Appeals. In *Hardwick v. County of Orange*, 844 F.3d 1112 (9th Cir. 2017), a state statute expressly barred civil immunity for public employees who initiated child neglect proceedings with malice accompanied by perjury, fabricated evidence, nondisclosure of exculpatory evidence or fraud. "The [state's] statute focuses on behavior designed wrongfully to affect dependency proceedings in court, the citadel of Due Process." The Ninth Circuit upheld the district court's denial of summary judgment for the social workers. *Id*. at 1120. Also, in *Soler v. County of San Diego*, 762 Fed. Appx. 383 (9th Cir. 2019) (not selected for publication), officials from Arkansas were subject to specific jurisdiction in a California law suit because, much like the Kansas agents in this case, the Arkansas agents had been directly and significantly involved in improperly extraditing the plaintiff from California to

Arkansas in violation of his clearly established due process rights.

Finally, the Tenth Circuit has decided an important federal question in a way that conflicts with a state court of last resort. *Arkansas Dep't of Human Serv. v. Cox*, 82 S.W.3d 806, 811, n. 1 (Ark. 2002). The Arkansas Supreme Court held: "Under the UCCJEA, no child custody determination order may be enforced in a foreign state if there was no notice and opportunity to be heard when the child custody determination was issued in the rendering state." And yet in the case at bar, the Tenth Circuit upheld the denial of notice and hearing under Colorado's UCCJEA.

Colorado law, as is universally true, prohibits government agents from cross-border child snatchings using out-of-state *ex parte* orders such as happened here. The UCCJEA is a uniform response to common disputes over the custody of children who happen to be located in another state. Custody orders and *ex parte* orders are non-final, and, historically, unenforceable by a sister state. If a child from another state is subject to a custody order and, while in Colorado, is "immediately likely to suffer serious physical harm," a warrant to seek custody must be based on a verified petition under C.R.S. §14-13-311(1). The application for a warrant must contain certain specific factual representations. C.R.S. §14-13-308(2). Then, provided the court hears testimony and finds that the child is imminently likely to suffer serious physical harm, the court may issue a warrant to take physical custody. *Id*. A warrant must recite the "facts upon which a conclusion of imminent

serious physical harm" is based. It must also direct law enforcement to take physical custody of the child immediately, and provide for placement of the child pending final relief. C.R.S. §14-13-311(3)(a) through (c). If a warrant is issued, parents are entitled to service of process, *i.e.*, a copy of the petition, the warrant and the court order. This service is required immediately after the child is taken into physical custody. C.R.S. §14-13-311(4). The petition must be heard on the "next judicial day after the warrant is executed unless that date is impossible," or on "the first judicial day possible." C.R.S. §14-13-311(2). The court may, on the basis of testimony, authorize law enforcement to enter private property to take physical custody of the child, or if required by exigent circumstances, to make a forcible entry at any hour. C.R.S. §14-13-311(5).

The operative facts in the case at bar are that the five agents flagrantly jettisoned all of the above procedural and jurisdictional safeguards contained in Colorado's UCCJEA in order that the Kansas agents could have immediate legal custody.

At this Rule 12(b)(6) stage of analysis, a court must infer that Colorado's procedural safeguards and a hearing on the next judicial day would have prevented Petitioners' transport to Kansas and their lengthy and baseless separation from their parents and grandparents, especially since, after the traumatic seizure and lengthy detention, the Kansas judge found "no probable cause" for the seizure.[35] Procedural due

[35] ¶214.

process requires an opportunity to be heard in a meaningful way, at a meaningful time, in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Here, the meaningful time for Petitioners to be heard was while they were in Colorado before custody was vested in the Kansas agents. Inferring in Petitioners' favor, under a proper Rule 12(b)(6) analysis, means that Petitioners would not have been transported and delivered to the Kansas agents at all, and they would not have spent five days in detention. The agents' wrongdoing caused meaningful damages.

The Tenth Circuit's application of *White v. Pauly* overlooked the requirements of the UCCJEA. In doing so, the panel "rendered meaningless" the uniform act by denying a federal remedy even though the agents were already on notice that the UCCJEA in Colorado and 49 other states[36] contains detailed warrant, service of process, and hearing protections in cross-border child custody matters. *Cf. Abbott v. Abbott*, 560 U.S. 1, 13 (2010) (reversing the appellate court's treaty interpretation that "rendered meaningless" a father's custody rights under his home country's laws).

In the case at bar, the panel's ruling is especially problematic, considering that the UCCJEA is a carefully designed, uniform response to this Court's longstanding edicts on the limitations of Full Faith and Credit in situations involving cross-border enforcement of

[36] Ann K. Wooster, J.D., Annotation, *Construction and Application of Uniform Child Custody Jurisdiction and Enforcement Act's Temporary Emergency Jurisdiction Provision*, 53 A.L.R. 6th 419 (2019).

non-final judgments for child custody disputes. *See New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947) (modifiable Florida decree was not binding on New York court); *Kovacs v. Brewer*, 356 U.S. 604 (1958) (New York custody decree was not binding on North Carolina court); *Ford v. Ford*, 371 U.S. 187 (1962) (Virginia custody order was not binding on South Carolina court).

This Court's rulings merely followed hornbook law barring enforcement of non-final foreign orders. Restatement (Second) of Conflict of Laws §107, Non-Final Judgments (ALI 1971). This is also the rule in Colorado, *Gutierrez v. District Court*, 516 P.2d 647 (Colo. 1973). Moreover, the *ex parte* orders in this case are "child custody orders," a category expressly excluded from a different Colorado statute that allows, on certain conditions, the enforcement of a narrow category of foreign "no contact" orders to prevent violent and threatening acts. *See* C.R.S. §13-14-110. Colorado's UCCJEA applies to child dependency and neglect orders from other states, such as the Kansas *ex parte* orders here. *See People ex rel. M.S.*, 413 P.3d 287, 289 (Colo. App. Div. 5, 2017). The UCCJEA supplied the necessary "particularity" of the constitutional duties that the five agents owed to Petitioners, even under the test in *White v. Pauly* and its progeny. Accordingly, the defense of qualified immunity should be barred in this case.

C. In the alternative, decisional law by numerous circuit courts and this Court gave "fair notice" under *Hope v. Pelzer* that Petitioners had a clearly established right to a post-removal hearing in Colorado.

Under a "fair notice" analysis, "general statements of law are not inherently incapable of giving fair and clear warning, and in [some] instances 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.'" *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In the context of child removals by government agents, the right to procedural due process has been identified for decades in the decisional law, giving any competent social worker and deputy sheriff "fair notice" that a post-removal hearing was required when a pre-removal hearing was not provided.

The due process clause of the Fourteenth Amendment has been recognized for decades as the basis of a fundamental right of parents and children to be free from unwarranted governmental interference in child rearing.[37] It is also clearly established that children enjoy the right to be free from the improper removal from

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[37] *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 760, n. 10 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651, 657-58 (1972), *Pierce v. Soc. of Sisters*, 268 U.S. 510, 534-35 (1925).

their home. *J.B. v. Washington County*, 127 F.3d 919, 928-29 (10th Cir. 1997).

These fundamental rights cannot be forcibly taken without notice and a pre-deprivation hearing.[38] A pre-removal hearing is required unless reasonable belief of imminent danger to a child's life or health can justify summary separation.[39] The circuit courts agree that the right to post-removal procedural due process is clearly established where a pre-removal hearing is denied.[40] In the case at bar, even assuming, *arguendo*, that the five agents reasonably believed that an exigency justified the agents' warrantless raid and

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[38] *See* J. Sherman, Annotation, *Right of Parents to Notice and Hearing Before Being Deprived of Custody of Child*, 76. A.L.R. 242 (Thomson Reuters 2018); *cf. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (a pre-deprivation hearing is a root requirement of due process).

[39] Paul Chill, *Burden of Proof Begone: the Pernicious Effect of Emergency Removal in Child Protective Proceedings*, Univ. of Conn. Sch. of Law Articles and Working Papers, p. 7, n. 15 (2004), *citing Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (child must be immediately threatened with harm); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (requiring immediate threat to child's safety); *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (requiring imminent harm to the child).

[40] *See Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006), *citing K.D. v. County of Crow Wing*, 434 F.3d 1051, n. 6 (8th Cir. 2006); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998); *Weller v. Dep't of Soc. Servs. For Baltimore*, 901 F.2d 387 (4th Cir. 1990); *accord Smith v. Williams-Ash*, 173 Fed. Appx. 363, 366 (6th Cir. 2005) (denying qualified immunity because parents' right to post-removal hearing was clearly established); *see also B.S. v. Somerset County*, 704 F.3d 250 (3d Cir. 2013) (due process guarantees a post-removal hearing).

seizure, decisional law gave the agents "fair notice" that Petitioners had a right to a post-removal hearing in front of a Colorado court. The Tenth Circuit itself had expressly ruled twice: "[W]e held in *Hollingsworth v. Hill*, 110 F.3d 733, 739-40 (10th Cir. 1997), that deprivation of parent's interest in care and custody of a child without notice and hearing, **in violation of state custody law**, violated law clearly established in January 1993." *Malik v. Arapahoe Cty. Dept. of Soc. Services*, 191 F.3d 1306, n. 4 (10th Cir. 1999) (emphasis added).

Here also, the five agents violated a Colorado custody law, the UCCJEA. Instead of citing child removal cases, the panel in the case at bar cited only excessive force cases, namely, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (fatal shooting during night standoff); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (fatal shooting after refusal to drop knife); and *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (fatal shooting after high speed chase). Excessive force cases fail to recognize the context of decisional law regarding procedural due process that applies with obvious clarity to the specific conduct here of child seizure, even though the very action in question has not previously been held unlawful. *Hope v. Pelzer*, 536 U.S. at 741.

D. The Tenth Circuit conflicts with the Ninth Circuit on the issue of specific jurisdiction over out-of-state government agents who reach out to the forum state.

When government officials ignore fundamental constitutional rights by reaching across state lines to self-execute upon facially defective, invalid orders, they should expect that they can be haled into court in the same foreign jurisdiction out of which they unlawfully "haled" their victims. In this context, the Tenth Circuit ruling in the case at bar conflicts with the Ninth Circuit. *See Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987) (Idaho had personal jurisdiction over a California attorney who unlawfully executed in Idaho upon California *ex parte* order); *see also Soler*, *supra*.

The ruling here also conflicts with this Court's test for the sufficiency of conspiracy allegations in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (allegations of mere parallel, independent practices are insufficient to allege an agreement). In the case at bar, the Kansas social workers were not merely passive background actors. On the contrary, they directly and significantly guided the seizure in real time by phone, supplied the bogus *ex parte* orders which were used as false authority for the seizure, provided the precise address for the seizure, assumed immediate legal custody of Petitioners on the spot in Colorado, and from the moment of the seizure while Petitioners were still in Colorado, prohibited all contact between Petitioners, their parents and grandparents.

The Colorado district court's transfer of the case to the Kansas district court was not appealable until the latter denied Petitioner's motion to re-transfer back to Colorado in *N.E.L. II*. "Transfer under Sec. 1404(a) is proper only to a judicial district where the transferee court has jurisdiction over the defendants." *Hoffman v. Blaski*, 363 U.S. 335 (1960). In this case, the Colorado agents were not subject to jurisdiction in the Kansas district court and, for that reason, transfer was improper. "Today, courts are uniform in requiring that the transferee have personal jurisdiction over the defendant. . . . " Wright & Miller, 15 Fed. Prac. & Proc., Jurisdiction §3845 (4th ed.).

More importantly, the transfer conflicts with *Calder v. Jones*, 465 U.S. 544 (2007) (upholding specific jurisdiction for purposefully reaching out to cause a tort in another state). Here, specific jurisdiction was wrongly denied in Colorado. Kansas officials purposefully reached out to the Colorado agents. The complaint shows the consummation of an agreement, not the independent, "parallel practices" alleged in *Twombly*.

The Kansas district court erred in failing to re-transfer the case to Colorado due to clear error by the Colorado district court. Re-consolidation of the cases in Colorado is needed to avoid the duplication of two lawsuits with possibly inconsistent rulings. Clear error or manifest injustice is always grounds for a trial court to correct erroneous decisions. *F.D.I.C. v. McGlamery*, 74 F.3d 218 (10th Cir. 1996). The "law of the case" did not deprive the transferee court of the power to correct a

clearly erroneous decision. *Id*. at 221; *see also Rimbert v. Eli Lilly Co*., 647 F.3d 1247 (10th Cir. 2011).

Colorado was the situs of the seizure and of a meeting of the minds to conduct the seizure by skirting Colorado's UCCJEA. As there was no evidentiary hearing on the issue of specific jurisdiction, both district courts were "bound to resolve all factual disputes in favor" of Petitioners. *A.S.T. Sports Science, Inc. v. CLS Distrib. Ltd.*, 514 F.3d 1054, 1057 (10th Cir. 2008). Defendants who purposefully direct their activities at the forum state can defeat personal jurisdiction only by presenting a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Niemi v. Lasshofer*, 770 F.3d 1331 (10th Cir. 2014). The Kansas agents offered no evidence whatsoever, merely their counsel's argument.

Jurisdiction in Colorado is required on the multiple grounds set forth below:

1. The long-arm statute, C.R.S. § 13-1-124 (1)(b), confers maximum personal jurisdiction for torts committed in Colorado. *Niemi*, 770 F.3d at 1348, *quoting Trujillo v. Williams*, 465 F.3d 1210, 1217 (10th Cir. 2006) and *Dudnikov v. Chalk & Vermilion Fine Arts, Inc*., 514 F.3d 1063, 1070 (10th Cir. 2008).

2. The commission of a tort, by itself, establishes specific jurisdiction. *See Found. for Know. v. Inter. Des. Cons.*, 234 P.3d 673, 681 (Colo. 2010). "Even a single act can sometimes support specific jurisdiction." *First Horizon Merch. Servs. v. Wellspring Cap. Mgmt., LLC*, 166 P.3d 166, 173 (Colo. App. Div. 2 2007). "In the tort

context, the issue is whether the nonresident defendant 'purposefully directed' its activities at the forum state." *Dudnikov*, *supra*, p. 1070. Here, the Kansas social workers only contacted the Colorado agents because they knew that Petitioners were with their mother in Douglas County, Colorado, quite intentionally, not fortuitously.

3. Causing a minor to leave a parent's custody confers specific jurisdiction. *D & D Fuller CATV Const., Inc. v. Pace*, 780 P.2d 520 (Colo. 1989) (specific jurisdiction existed over grandparents in N. Carolina who interfered with the Colorado mother's custody).

4. "But for" the defendants' contacts with Colorado, Petitioners would not have been seized. *See Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995). It cannot be argued that Petitioners suffered little or no injury in Colorado since they suffered the shock of the seizure and separation there, and they have lived with the ramifications since 2009, when their family moved to Colorado shortly after the seizure.

5. The Kansas social workers' conduct meets the "minimum contacts" requirements for due process based on an *ad hoc* analysis. *Goettman v. North Fork Valley Rest.*, 176 P.3d 60, 71 (Colo. 2007). *Goettman* is significant because the plaintiff was never a Colorado resident, meaning Petitioners' residency at the time they were seized is not the test.

6. The Kansas social workers' tortious conduct was not merely the "seeking of the *ex parte* orders." On the contrary, the Kansas social workers' wrongdoing

was also the conspiracy and seizure subsequent to seeking the *ex parte* orders.

7. The Kansas social workers cannot meet their burden to show that the exercise of jurisdiction by Colorado is unreasonable, as set forth below:

a. Courts are mindful that modern transportation and communication have lessened the burden of litigating in distant jurisdictions. *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005). The Kansas social workers cannot show that litigating in Colorado is prohibitively burdensome. They are represented by the Kansas Attorney General's office, whose 2016 budget was more than $21 million and SRS/DCF's budget was more than $642 million, per the state's budget website. The dramatic disparity of a state's financial resources against these private, youthful Petitioners weighs in favor of Petitioners. *See AST Sports Science, Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054 (10th Cir. 2008).

b. Social worker Gildner lives in Michigan, not Kansas, so a transfer to Kansas benefits only two out of the total of six defendants originally sued in Colorado. Any claim that "many witnesses are located in Kansas" would ignore the fact that Petitioners' family alone, combined with the owners of the Douglas County residence, Dr. and Mrs. G., total fourteen.

c. A serious protectable interest for Colorado exists because the Kansas social workers conspired with Colorado governmental employees, and one Colorado defendant is a political subdivision. In *Goettman*,

supra, the court found a substantial state interest exists in traveler safety on Colorado roads. Even more important is Coloradoans' interest in how child-snatchings are carried out in Colorado homes. Furthermore, inasmuch as Plaintiffs have been Colorado residents since 2009, Colorado has an interest in remedies for its citizens, particularly because Colorado statutes were violated, including C.R.S. §§14-11-101(4), 14-13-301, 18-3-304, 19-3-401, 19-3-405.[41]

d. To litigate in Kansas would "practically foreclose" Petitioners' recovery from the Colorado defendants, for whom jurisdiction would not exist. Colorado is obviously the "most efficient" forum to litigate the dispute. Obviously, too, "piecemeal litigation" will occur by denying the re-transfer to Colorado where all defendants can be tried together. *OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1097 (10th Cir. 1998).

e. Colorado has an equal or greater social policy interest in child seizures conducted within its boundaries, especially ones based on out-of-state orders and/or defective orders. The Colorado federal court's competence is equal to or greater than any Kansas court on the issues.

f. The complaint copiously alleges the requisite "affirmative link" between Webb's and Abney's authorization, approval and cooperation in Gildner's unconstitutional acts and in conspiracy with the Colorado agents. *See Dodds v. Richardson*, 614 F.3d 1185,

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[41] ¶¶176, 179-183.

1200-01 (10th Cir. 2010), *quoting Rizzo v. Goode*, 423 U.S. 362, 371 (1976). No heightened pleading requirements exist for §1983 actions. *Currier v. Duran*, 242 F.3d 905 (10th Cir. 2001), (noting it was unfair to require plaintiffs to assert more facts "in light of stay of discovery").

CONCLUSION

Petitioners pray that this Court will grant their Petition, reverse the Tenth Circuit Court of Appeals in *N.E.L. II*, re-transfer the case to the United States District Court for District of Colorado, and grant such other and further relief that the Court deems just and proper.

Respectfully submitted,

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