No. _____

IN THE

Supreme Court of the United States

TAMRA L. LAMPRELL

Petitioner,

v.

REX E. STUCKEY,

Respondent.

On Petition For A Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI [APPENDIX REDACTED]

JOAN S. MEIER
DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street NW
Washington, DC 20052

CHARLOTTE H. TAYLOR
Counsel of Record
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3872
ctaylor@jonesday.com

G. RYAN SNYDER
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Counsel for Petitioner

QUESTIONS PRESENTED

A New Mexico district court issued an interim order removing a three-year-old girl from her mother's custody without a prior hearing. The court did not identify any imminent risk of physical or other serious harm to the child; instead, it pointed to the mother's "psychological testing and diagnosis," which allegedly showed she was "so highly consumed with this case that it interferes with her ability to spend time with [her daughter] to provide enriching activities." App. 11a. The court scheduled a post-deprivation hearing for 74 days later, but because of delays caused by the New Mexico Attorney General and the court itself, the hearing did not conclude for 493 days.

The New Mexico Court of Appeals upheld these actions under the federal Due Process Clause, on grounds that the interim order was in the child's "best interest," and that the 493-day delay was "reasonable." App. 9a. That decision created a split with other state and federal courts over when courts may order temporary custody removals without a pre-deprivation hearing, and deepened a split over how much delay is permissible before a post-deprivation custody hearing. The questions presented are:

1. Can a court temporarily remove a child from her parent's custody without a pre-deprivation hearing whenever the court deems it in the child's best interest, or must the court find that the child faces an imminent risk of physical or other serious harm?

2. If a court removes a child from her parent's custody without a pre-deprivation hearing, is a post-deprivation hearing that concludes 493 days later sufficiently prompt?

RELATED PROCEEDINGS

First Judicial District Court of the State of New Mexico:

Stuckey v. Lamprell, No. D-117-DM-2010-00151 (Feb. 13, 2015).

Court of Appeals of the State of New Mexico:

Stuckey v. Lamprell, No. A-1-CA-33295 (Nov. 27, 2013).

Stuckey v. Lamprell, No. A-1-CA-35538 (Dec. 18, 2018).

Supreme Court of the State of New Mexico:

Stuckey v. Lamprell, No. S-1-SC-37579 (Apr. 9, 2019).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This Court has repeatedly recognized that parents have a fundamental liberty interest in the care and custody of their children. Yet courts routinely disregard that interest by temporarily taking children away from their parents with little or no process. The states are divided over what procedural protections apply in this situation. This Court's intervention is urgently needed to establish that federal due-process protections apply fully in this context.

This case presents a heartbreaking example of the problem. On September 27, 2013, Tamra Lamprell ("Mother") walked into a New Mexico district court prepared to argue a motion for contempt against Rex Stuckey ("Father") for his refusal to return their three-year-old daughter, B.L.S., at the end of an unsupervised visit. Within minutes, however, the court issued an interim order that transferred primary physical custody and sole legal custody of B.L.S. from Mother to Father. The court did so on the flimsiest of rationales: a report that Mother had never seen, which alleged that her "psychological testing and diagnosis" showed that she was "so highly consumed with this case that it interferes with her ability to spend time with [her daughter] to provide enriching activities." App. 11a. And the court did so without *any* process—Mother was not allowed to review the report, introduce evidence or call witnesses, cross-examine the witnesses against her, or make any factual or legal argument about why she should retain custody.

It ultimately took Mother *over a year* to get a hearing, primarily because the New Mexico Attorney General stonewalled her efforts to obtain crucial

discovery and because of the court's own delays. And by that point the hearing was largely worthless: although the evidence showed that Mother did not have a personality disorder and posed no threat to her daughter, the now five-year-old B.L.S. had been living with Father for over sixteen months, which led the court to conclude that she "should not be subject to another major change in custody at this time." App. 21a. Thus, the court ratified the interim order.

Far from remedying these violations of Mother's due-process rights, the New Mexico Court of Appeals blessed them and established a breathtakingly lenient framework for reviewing temporary custody orders. The court of appeals held that the district court was "empowered to take whatever interim actions [were] needed to protect the best interest of a child even prior to [the parent] being given an opportunity to be heard." App. 9a. And the court held that the 493-day delay was "reasonable" because a hearing was initially scheduled (though not held) 74 days after the court took B.L.S. away. App. 13a–14a. The New Mexico Supreme Court denied review.

The decision below creates one split and deepens another. *First*, the decision creates a split over when a court may temporarily remove a child from her parent's custody without a pre-deprivation hearing. In contrast to New Mexico, two state supreme courts and one state court of appeals have held that courts cannot do so unless the child faces an imminent risk of physical or other serious harm. The decision also puts New Mexico into conflict with five federal courts of appeals—including the Tenth Circuit—which have adopted the same test in the related context of

temporary child removals without prior court approval.

Second, the decision deepens a split over how quickly courts must hold a hearing following a temporary custody removal. Two state supreme courts have sided with New Mexico and held that lengthy delays pose no due-process problems. On the other hand, five state supreme courts, three state courts of appeals, and one federal court of appeals have held that due process requires a much more expeditious post-deprivation hearing—generally within thirty days. Moreover, four federal courts of appeals have held, in the context of non-court-ordered custody removals, that delays of as little as seventeen days were unconstitutional.

The due-process problems presented here are even more significant, and their effects far deeper, than these numbers suggest. Although similar deprivations happen daily around the country, the nature of family-court proceedings and the incentives for litigants often prevent appellate review.

Finally, the decision below violates fundamental due-process principles. And those violations created a lopsided custody arrangement, under which Mother can see B.L.S. only five hours per week, cannot attend B.L.S.'s school and extracurricular activities without court permission, and has no say in B.L.S.'s upbringing. This Court should remedy that unjust situation by granting certiorari, settling these important and oft-arising questions about the Due Process Clause, reversing the decision below, and remanding for proceedings untainted by constitutional error.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is available at 2018 WL 7036001. App. 3a. The opinions of the New Mexico First Judicial District Court are unpublished. App. 18a, 35a.

JURISDICTION

The Court of Appeals issued its decision on December 18, 2018. App. 3a. Petitioner filed a timely motion for rehearing, which the court denied on February 11, 2019. App. 44a. Petitioner filed a timely petition for review, which the New Mexico Supreme Court denied on April 9, 2019. App. 1a. Petitioner filed a timely motion for rehearing, which the court denied on May 6, 2019. App. 42a. On July 15, 2019, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to October 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

A. The Custody Dispute and B.L.S.'s Abuse Allegations

B.L.S. was born in early 2010. App. 132a. A few months after her birth, her biological parents—Tamra Lamprell ("Mother") and Rex Stuckey ("Father")—permanently separated. *Id.* The parents agreed that Mother would have primary physical custody and that

Father would have supervised visits twice per week. Record Proper ("RP") 378.

In July 2010, Father filed a petition to determine custody in New Mexico's First Judicial District Court. RP 1. Over the next few years, the court issued several custody orders, but the basic arrangement stayed the same: Mother had primary physical custody, and Father had limited supervised visits. Eventually, in December 2012, the court granted Father limited unsupervised visits. RP 809.

One month later, two-year-old B.L.S. reportedly suggested that Father had abused her. On January 18, 2013, Father had an unsupervised visit with B.L.S. RP 901. After B.L.S. returned home, she told Mother that her stomach hurt, as well as her front and rear diaper areas. *Id.* When asked how she was hurt, B.L.S. reportedly responded that the "icky stinky old man hurt my bottom," and identified that man as "daddy." *Id.*

The next day, Mother repeated B.L.S.'s statements to the Archuleta County Victim Assistance Program, and took B.L.S. to her regular pediatrician. App. 134a–135a. The doctor examined B.L.S.'s genital area and found redness and mild irritation, without conclusive signs of sexual abuse. App. 135a. The County Sheriff's Department began an investigation, but concluded it without determining that sexual abuse had occurred. *Id.*

A few months later, the district court ordered Mother and Father to participate in an "advisory consultation." RP 958–59. In an advisory consultation, a court employee from Family Court Services investigates the parenting situation, writes a

report, and makes recommendations to the court. N.M. Stat. § 40-12-3. As part of that process, the court ordered the parties to complete psychological evaluations with Dr. Warren Steinman, a contractor with Family Court Services. RP 959.

In July 2013, B.L.S. again indicated that Father had abused her. On July 18, Father had an unsupervised visit with B.L.S. RP 986. Father refused to return B.L.S. at the end of that visit, however, alleging that she had made "alarming statements to [Father] that [Mother] had hurt the child." RP 1,026. Following these accusations, both parents took B.L.S. to the Solace Crisis Treatment Center, where the staff conducted a forensic interview. RP 1,048–49. During that interview, B.L.S. said that Father had "'hurt' her 'bottom' and her 'girl parts' at the dirty hotel." RP 1,049. Solace reported those statements to the New Mexico State Police, which opened a criminal investigation into Father for "criminal sexual cont[act]." RP 1,052. After the interview, Mother took B.L.S. home. RP 1,038–39.

B. The September 27 Hearing and Interim Custody Order

1. In September 2013, Mother moved to hold Father in contempt for his refusal to return B.L.S. on July 18. RP 1,064. The court set a hearing for September 27. RP 1,100.

Mother went to the September 27 hearing ready to argue the motion for contempt. When the hearing began, however, the court announced that Gary Lombardo of Family Court Services had finished the advisory-consultation report and recommendations. App. 114a. The court passed out copies of the 20-page

report, and then announced that, "[b]ecause of the nature of the report and the—the concerns raised by Gary Lombardo regarding mother, this Court is adopting the recommendations immediately." App. 114a–115a. The court adopted the recommendations less than one minute after handing out the report and just four minutes into the hearing.

The court's order drastically changed three-year-old B.L.S.'s life. Up to this point, B.L.S. had lived with and been raised by Mother and had only limited visits with Father. But the court reversed that arrangement, giving Father primary physical custody and Mother only one supervised visit per week. App. 36a, 40a. The court also gave Father the power to make "all decisions regarding [B.L.S.'s] education, child care, health care, ongoing activities, and religious upbringing." *Id.* Finally, the court prohibited Mother from attending any of B.L.S.'s school or extracurricular events. App. 36a, 41a.

At the hearing, the court gave virtually no explanation for its decision. The court said only that "it is the concern of Mr. Lombardo and of this Court that if such a drastic step is not made, that the child can be harmed." App. 115a. The court did not explain what type of harm B.L.S. might suffer, or whether that harm was imminent.

The court also did not give the parties any chance to contest its ruling. Immediately after announcing that it would adopt the advisory-consultation recommendations, the court said that the "order is being finalized right now," and that "each of you will receive a copy of it." *Id.* The court then stated it would hold a hearing on any objections to the report on December 10: *74 days later*. *Id.*

At the end of the hearing, the court told Father to "leave now and pick up your daughter" from Family Court Services, while telling Mother to "stay in the courtroom." App. 119a. Mother asked if she could say goodbye to B.L.S. App. 121a. The court refused. *Id.* Mother also asked for a stay of the order so she could appeal. *Id.* Again the court refused. *Id.* The court then ended the hearing, which had lasted 19 minutes.

2. The interim custody order provided only slightly more explanation about the court's reasons for taking B.L.S. away from Mother. The order said vaguely that "Mr. Lombardo's report raises significant concerns regarding Mother's ability to parent, and [B.L.S.'s] safety while with Mother." App. 35a. But the order gave only two concrete reasons for that conclusion: (1) "[t]he results of Mother's psychological testing and diagnosis," and (2) "[t]hat Mother 'is so highly consumed with this case that it interferes with her ability to spend time with [B.L.S.] to provide enriching activities." App. 35a–36a. On that basis, the court asserted that "it is in [B.L.S.'s] interest to adopt the Advisory Consultation Recommendations … immediately." App. 36a.

3. The advisory-consultation report itself, provided to Mother for the first time at the September 27 hearing, did little to shore up the court's analysis.

The report stated that Mother had a "personality disorder" that was "creating a number of problematic consequences" for B.L.S. App. 158a–159a. For example, the report suggested that Mother was spending too much time on the custody matter. App. 152a–153a. As another example, the report suggested that Mother was improperly trying to minimize Father's role in B.L.S.'s life—what the report called

"unjustified restrictive gatekeeping." App. 140a. The report reached this conclusion primarily because Mother had alleged that Father was "perpetrating child sexual abuse against [B.L.S.]," an allegation that Mr. Lombardo deemed unfounded. App. 139a, 155a.

Even without further discovery, it was plain that the report's conclusions were a dubious foundation for an emergency custody transfer. *First*, the report concluded that Mother had a personality disorder without any legitimate basis. The report explained that Dr. Steinman, who had performed Mother's psychological evaluation, gave her a "rule out" diagnosis of an unspecified personality disorder. App. 147a. As the report acknowledged, the term "rule out" "refers to a psychologist's impression that the diagnosis may require more clinical information to ascribe it with certainty." *Id.* But Mr. Lombardo concluded that Dr. Steinman was simply being "conservative," that there was "ample evidence … that Mother exhibits the hallmarks of a bona fide personality disorder," and that the "existence of parental PD in this case is creating a number of problematic consequences for the child." App. 158a–159a. Astoundingly, Mr. Lombardo reached that conclusion without doing *any* psychological assessment himself.

Second, the report repeatedly portrayed Mother's rational behavior as irrational. For example, the report concluded that Mother was unreasonable for not wanting Father—who may have been abusing B.L.S.—to participate in B.L.S.'s therapy sessions. On that ground, Mr. Lombardo concluded that Mother was "clearly" engaged in "unjustified restrictive gatekeeping." App. 153a–154a.

Third, the report did not say *anything* to suggest that B.L.S. was in imminent danger of physical or other serious harm. The report acknowledged that Mother is "intelligent," "analytic," and a "devoted parent." App. 147a (quotation marks omitted). The report stated that, even if Mother had a personality disorder, any "[a]ggression" would tend to be "more passive or subtle," if it existed at all. App. 145a (quotation marks omitted). The report further stated that unjustified restrictive gatekeeping can harm a child's "long-term adjustment"—not that it threatens substantial imminent harm. App. 139a. And the report nowhere suggested that Mother ever abused B.L.S. *in any way*.

C. Mother's Fight for Due Process

1. Immediately after losing custody of B.L.S., Mother took several actions to try to get her daughter back and to obtain due process.

First, Mother tried to undo the unconstitutional interim order. On October 7, 2013, Mother moved to vacate that order until the court held a hearing. App. 105a. Mother argued that she had "received no notice from the Court that the Advisory Consultation Recommendations would be presented and enforced at the [September 27] hearing," and that the court had adopted them "without giving [her] an opportunity to call witnesses or cross-examine the witnesses cited in the Advisory Consultation Report." App. 107a. As a result, Mother argued, the interim order violated the federal Due Process Clause. *Id.* On October 9, Mother filed an amended motion incorporating these arguments. App. 83a.

On October 28, Mother filed a petition for a writ of error with the New Mexico Court of Appeals. App. 64a. The petition again argued that the interim order denied her due process under the U.S. Constitution, and asked the court to reverse or stay the interim order. App. 74a–77a, 80a–81a. The court denied Mother's petition summarily. App. 33a.

Second, Mother tried to obtain crucial discovery. On October 2, Mother sent subpoenas to Family Court Services and Dr. Steinman requesting the information that they relied on, including the "raw psychological test data." RP 1,119; 1,283–84; 1,289–90. Although Mother needed this information to have anything resembling a meaningful hearing, Family Court Services and Dr. Steinman flatly refused to produce it. On October 28, Mother filed another subpoena requesting the same information from the New Mexico Attorney General's office. RP 1,248. The Attorney General responded by filing a motion for protection, arguing that this information was confidential. RP 1,243.

Third, on October 7 and 9, Mother filed objections to the substantive findings in the advisory-consultation report. Her ability to dispute those findings, however, was hampered by the state officials' stonewalling of her discovery requests.

2. The district court did not heed Mother's swift calls for due process. At the September 27 hearing, the court had scheduled a hearing on objections to the advisory-consultation recommendations for December 10. On October 21, the court unilaterally and without explanation moved the hearing to December 20. RP 1,199. The court then scheduled a hearing on the other pending motions (Mother's motion to vacate the

interim order and the Attorney General's motion for protection) for the same day. RP 1,312.

As the December 20 hearing date approached, Mother remained hamstrung by the refusal of Family Court Services and the New Mexico Attorney General to provide her with any discovery. She also learned that her attorney was going to withdraw on December 13 because of his plans to retire approximately a week later. Accordingly, Mother was forced to seek a continuance. RP 1,309, 1,332, 1,335.

Mother promptly found a new attorney, who entered a notice of appearance on January 14, 2014. RP 1,402. But that attorney had previously organized a fundraiser for the judge, which led the judge to recuse herself. RP 1,424. On February 7, a new judge was assigned to the case. RP 1,426.

As soon as the new judge was assigned, Mother tried to speed things up. On February 12, Mother requested an expedited hearing, RP 1,452, and on March 28, she did so again, explaining that there was an "urgent need" for action, RP 1,472. On March 31, the court finally set a hearing. RP 1,476. But the court set that hearing for June 26—*four and a half months* after Mother's initial request. *Id.*

On June 26, the court heard Mother's motion to vacate the interim order. Mother argued that the court violated her due-process rights by failing to hold a pre-deprivation hearing, and that "when justice is delayed, justice is lost." 06/26/14 Hr'g at 9:07:30.[1]

---

[1] New Mexico's First Judicial District Court uses audio recordings as the official record of all hearings. *See* N.M. R. App. P. 12-211.

Mother was also prepared to argue that she was entitled to discovery, but was unable to do so because the court had failed to notify the Attorney General about the hearing. *Id.* at 8:41:33 to 8:42:35.

A few days later, the court denied Mother's motion to vacate. App. 30a. The court held that Mother was not entitled to a pre-deprivation hearing because her "psychological testing and diagnosis" gave the court "concerns regarding [B.L.S.'s] safety." App. 31a. The court also noted that it had scheduled a post-deprivation hearing for December 10, 2013, which the court believed was sufficient process. *Id.*

On September 2, 2014, the court finally resolved the discovery dispute. App. 25a. The court recognized that the advisory-consultation report had a "fundamental impact on this case," and that Mother's "ability to respond and object to [that report] is impaired" by New Mexico officials' refusal to produce discovery of underlying materials. App. 26a. The court therefore held that "[d]ue process requires disclosure," and that Family Court Services and Dr. Steinman had to produce the documents forthwith. App. 27a. Family Court Services and Dr. Steinman ultimately produced the relevant documents on September 24—*362 days* after the court B.L.S. away from Mother. RP 1,856.

D. The Custody Hearing

Throughout 2014, Mother had repeatedly been forced to defer a hearing on her substantive objections to the advisory-consultation report, recognizing that any such hearing would be meaningless without the documents upon which the report relied. *See* RP 1,402–03, 1,563–64, 1,628. After Mother finally obtained that crucial discovery, the court scheduled a

two-day hearing commencing October 28, 2014. RP 1,645. That was *396 days* after the court took B.L.S. away from Mother. A two-day hearing proved insufficient, however, so the court scheduled an additional day on February 2, 2015: *493 days* after B.L.S.'s removal. RP 1,904.

Given this long delay, the evidence at the hearing focused largely on how B.L.S. had adjusted to living with her father, rather than the legitimacy of the interim custody order. Nevertheless, the evidence undermined all of the court's previously stated reasons for taking B.L.S. away from Mother:

- The court had based the interim order on the "results of Mother's psychological testing and diagnosis." App. 35a. But Mother's court-ordered therapist, Dr. Leslie Pearlman, concluded that Mother did *not* have a personality disorder, 10/28/2014 Hr'g, at 9:32:20 to 9:33:56, 9:41:04 to 9:42:25, 9:52:40 to 9:53:17, and Mother's expert witness, Dr. Roll, agreed, 10/29/2014 Hr'g, at 1:32:30 to 1:34:15, 1:44:24 to 1:44:39. On the contrary, Dr. Roll testified that Mother has the characteristics of a loving, protective parent. *Id.* at 1:47:40 to 1:50:00. Meanwhile, Mr. Lombardo admitted on the stand that he had diagnosed Mother as having a personality disorder without express legal authority, and even though the psychologist who actually evaluated her lacked sufficient clinical information for such a diagnosis. 10/29/2014 Hr'g, at 10:29:45 to 10:35:24. Based on the

evidence at trial, the district court said that it "cannot find" that Mother had a personality disorder. App. 20a.

- The court had based the interim order on unspecified "[c]oncerns regarding [B.L.S.'s] safety while with [Mother]." App. 36a. After the hearing, however, the court expressly found that Mother was *not* "a direct or imminent threat" to B.L.S. App. 19a.
- The advisory-consultation report accused Mother of making false allegations of sexual abuse. App. 139a, 155a. The hearing evidence, however, showed that Father repeatedly took showers with his now five-year-old daughter—sometimes while they were both naked. 02/02/2015 Hr'g, at 8:40:21 to 8:41:10. The court credited this testimony, and admonished Father that his "practice of showering with the child, even while wearing swimming trunks is inappropriate behavior." App. 21a.

E. The Final Custody Order

On February 13, 2015—more than 16 months after the court took B.L.S. away from Mother—the district court issued a final custody order. App. 18a. Although the evidence at the hearing failed to support the court's initial reasons for transferring custody, the court nevertheless ratified its earlier decision. The court did so largely based on its belief that B.L.S. was "currently doing well" and that she "should not be

subject to another major change in custody at this time." App. 21a.

Accordingly, the final custody order granted primary physical custody to Father, allowing Mother unsupervised visits for only five hours per week. App. 22a. The court again barred Mother from attending the child's school and extracurricular activities without court permission. *Id.* And the court gave Father the power to make "all decisions regarding education, child care, health care, on-going activities, and religious upbringing." App. 21a. Despite granting Father these important parental rights, the court felt the need to reiterate that Father "will not, under any circumstances, shower with the child." App. 22a.

F. The Court of Appeals Decision

Mother appealed, arguing that the interim custody order, and the final custody order ratifying it, violated her federal constitutional right to due process. App. 4a, 8a–9a. But the New Mexico Court of Appeals affirmed.

First, the court of appeals held that Mother was not entitled to a pre-deprivation hearing. Specifically, the court held that "a district court is empowered to take *whatever interim actions are needed to protect the best interest of a child even prior to being given an opportunity to be heard*." App. 9a (emphasis added); *see also* App. 10a. In other words, no special showing beyond the child's best interest was required to dispense with a pre-deprivation hearing on a temporary custody order.

Applying this lenient standard, the court of appeals held that the district court's finding of a "risk" to B.L.S.'s "safety and welfare" was validly based on

"'the results of Mother's psychological testing and diagnosis,' which showed that 'Mother is so highly consumed with this case that it interferes with her ability to spend time with [B.L.S.] to provide enriching activities.'" App. 11a (brackets omitted). The court of appeals elaborated that "the investment of time and energy [Mother] is making to analyze and interpret this case appears unhealthy and confirms the psychologist's assessment that her analytic skills can be detrimental when they are paired with suspiciousness, defensiveness, and self-protection." *Id.* (brackets omitted). The court therefore concluded that "the district court acted reasonably and in accordance with the safety, welfare, and best interest of [B.L.S.] in immediately adopting the advisory consultation recommendations." *Id.*

Second, the court of appeals held that the 493-day delay that occurred before Mother's hearing did not violate the Due Process Clause. The court explained that a post-deprivation hearing comports with due process so long as it occurs "within a reasonable period." App. 9a (quotation marks omitted). Here, the court noted that there was "significant delay" before the hearing. App. 14a. But the court deemed that delay reasonable because the hearing "was originally set to occur on December 10, 2013," and because Mother eventually received a "full evidentiary hearing to address her objections." App. 13a–14a.

Mother petitioned the New Mexico Supreme Court for review, again pressing her federal due-process arguments. App. 49a–51a, 53a–57a, 61a. On April 9, 2019, the New Mexico Supreme Court denied Mother's petition. App. 1a. And on May 16, 2019, the court denied Mother's motion for rehearing. App. 42a.

REASONS FOR GRANTING THE PETITION

This case presents two important questions of federal due process that warrant this Court's review. *First*, the decision below held that courts can temporarily remove children from their parents' custody without a pre-deprivation hearing whenever doing so is in the best interest of the child. That decision created a direct conflict with two state supreme courts and one state court of appeals. It also placed New Mexico's law in tension with the holdings of five federal courts of appeals, including the Tenth Circuit, in the related context of non-court-ordered child removals.

Second, the decision below held that, when a court orders an emergency transfer of custody without a prior hearing, due process is satisfied by a hearing that is not completed for 493 days. Two state supreme courts have similarly held that lengthy delays before a post-deprivation hearing comport with federal due process. But five state supreme courts, three state courts of appeals, and one federal court of appeals have held that due process requires a much prompter hearing. And four other federal courts of appeals have applied a more stringent standard in the context of non-court-ordered child removals.

This Court's review is needed to settle these conflicts. And that need is even more pressing than the just-cited decisions indicate. These issues arise on a daily basis around the country, and yet they often evade appellate review. This case therefore presents a rare opportunity for this Court to provide guidance.

Finally, this case warrants review because the decision below contradicts fundamental due-process

principles. Without this Court's review, parents' rights in New Mexico and the jurisdictions that have adopted similar rules will continue to be disregarded.

I. THE DUE PROCESS CLAUSE PROTECTS PARENTS' INTEREST IN THE CARE AND CUSTODY OF THEIR CHILDREN.

This Court has long held that parents have a "fundamental liberty interest" in the "care" and "custody" of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *accord Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Few interests are more important: it is "far more precious than any property right," *Santosky*, 455 U.S. at 758–59, and is "perhaps the oldest of the fundamental liberty interests recognized by this Court," *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The U.S. Constitution prohibits states from depriving parents of this fundamental interest "without due process of law." U.S. Const. amend. XIV, § 1. Although due process is a "flexible" concept, it necessarily requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted). And for a hearing to be meaningful, this Court has "traditionally insisted" that it occur "*before* the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasis added).

The Due Process Clause tolerates exceptions to this general rule "only in extraordinary situations where some valid governmental interest … justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43,

53 (1993) (quotation marks omitted). Even then, the government must hold a "prompt" post-deprivation hearing that concludes "without appreciable delay." *Barry v. Barchi*, 443 U.S. 55, 66 (1979). If the situation is not truly "extraordinary," or if the post-deprivation hearing is not sufficiently prompt, then the deprivation violates the Due Process Clause.

II. THE DECISION BELOW CREATES ONE SPLIT OF AUTHORITY AND DEEPENS ANOTHER.

A. The decision below creates a division of authority over when a court may temporarily remove a child from her parent's custody without a pre-deprivation hearing.

The decision below created a direct conflict with two state supreme courts and one state court of appeals over when a court may order a temporary custody transfer without a pre-deprivation hearing.

1. The decision below held that "a district court is empowered to take whatever interim actions are needed *to protect the best interest of a child* even prior to being given an opportunity to be heard." App. 9a (quotation marks omitted & emphasis added). Under that standard, courts can remove children from their parents' custody without a pre-deprivation hearing on virtually any basis. Indeed, the decision below held that the district court's precipitous action was justified merely because Mother was allegedly "so highly consumed with this case that it interferes with her ability to spend time with [B.L.S.] to provide enriching activities." App. 11a.

In contrast, two state supreme courts and one state court of appeals have held that parents must receive a pre-deprivation hearing unless the child faces an imminent risk of physical or other serious harm. In *Keisling v. Keisling*, 92 S.W.3d 374 (Tenn. 2002), a trial court removed three children from their mother's custody without prior notice. *Id.* at 376–77. The mother had accused the father of "sexually abus[ing] his daughters," and the trial court "found these allegations to be unfounded." *Id.* at 379. The Tennessee Supreme Court held, however, that the false allegations did not qualify as an "emergency that justifies either the transfer of custody by the trial court or the suspension of the basic elements of due process—notice and an opportunity to be heard." *Id.*

Likewise, the Supreme Court of Alabama has held that a pre-deprivation hearing is required unless the "actual health and physical well-being of the child are in danger." *Ex Parte Williams*, 474 So. 2d 707, 710 (Ala. 1985) (quotation marks & emphasis omitted). And the Florida Court of Appeal has held that a hearing is required unless "the child was threatened with physical harm" or "was about to be removed from the state." *Bahl v. Bahl*, 220 So. 3d 1214, 1216 (Fla. Ct. App. 2016). The court reached that conclusion despite a guardian ad litem's report outlining "ongoing parental alienation perpetrated by the father towards the mother." *Id.* (quotation marks omitted). In the court's view, though "serious," these allegations "did not rise to the level of harm that would excuse the trial court from providing the father with an opportunity to be heard." *Id.*

The decision below squarely conflicts with these cases. That decision determined whether a pre-

deprivation hearing was necessary by applying a malleable "best interest of [the] child" standard, rather than asking whether the child faced an imminent risk of physical or other serious harm. App. 9a. And the court of appeals did not cite any evidence that even remotely suggested such a risk.

2. The decision below also conflicts with the views of five federal courts of appeals regarding parents' due-process rights in the related context of temporary child removals without a court order. These courts have held in § 1983 actions that, where a child-welfare worker or other non-judicial state official removes a child from a parent, a pre-deprivation hearing is required unless the child is in imminent danger of physical harm. *See Southerland v. City of New York*, 680 F.3d 127, 151 (2d Cir. 2012 (requiring "emergency circumstances" that "demonstrate an imminent danger to the children's life or limb" (quotation marks omitted)); *Gates v. Texas Dep't of Protective Servs.*, 537 F.3d 404, 429, 433–35 (5th Cir. 2008) (exigent circumstances exist when "there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse"); *Kovacic v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 724 F.3d 687, 695 (6th Cir. 2013) (defining "exigent circumstances" as an immediate "need to assist persons who are seriously injured or threatened with such injury" (quotation marks omitted)); *Demaree v. Pederson*, 887 F.3d 870, 878, 880–81 (9th Cir. 2018) (holding that an "emergency" exists "when officials have reasonable cause to believe that the child is likely to experience serious bodily harm"); *Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006) ("[S]tate officials may remove a child from the home without prior notice and a

hearing when they have a reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there.").[2]

Indeed, the federal courts of appeals have consistently found that circumstances indicating even greater threats to a child's welfare than were claimed here do not rise to the level of an emergency justifying a deprivation without a prior hearing. For example, in *Gates*, the Fifth Circuit held that "allegations of emotional abuse" are not sufficient. 537 F.3d at 433–35. And in *Demaree*, the Ninth Circuit held that the risk that parents would take "sexually explicit photos" of their children did not create an emergency because it did not present "the requisite risk of *imminent* physical injury or abuse." 887 F.3d at 880–81.

3. Notably, the decision below creates a pronounced conflict between New Mexico and the Tenth Circuit, which has appellate jurisdiction over federal district courts in that state. As just discussed, the Tenth Circuit has held that a pre-deprivation hearing is necessary absent "a reasonable suspicion of an immediate threat to the safety of the child." *Gomes*, 451 F.3d at 1130. And the Tenth Circuit has repeatedly held that custody removals failed to meet this test when there was a far greater risk to the child

---

[2] This Court's precedents indicate that the due-process analysis is similar whether a court or some other state agent effectuates a deprivation of a protected interest. *Compare, e.g.*, *James Daniel Real Property*, 510 U.S. at 47, 53 (requiring that a court hold a pre-deprivation hearing except in "extraordinary situations"), *with Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 829, 848 (1977) (applying the same "extraordinary situations" test to a custody transfer without a court order).

than existed here. For example, in *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the Tenth Circuit held that emergency circumstances did not exist despite evidence suggesting that a mother was suffering from Munchausen Syndrome by Proxy, a disorder where an individual inflicts physical harm upon a child to gain the sympathy of medical personnel. *Id.* at 1238; *see also Gomes*, 451 F.3d at 1130; *Malik v. Arapahoe County Dep't of Social Servs.*, 191 F.3d 1306, 1311–12 (10th Cir. 1999); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997).

Under the Tenth Circuit's holdings, if child-welfare agents had removed B.L.S. from Mother's care, she would have been entitled to a hearing—and absent one, could recover in a § 1983 action. When a state-court judge ordered a custody removal with no prior hearing, however, the New Mexico courts found no due-process violation. Thus, the due-process rights of New Mexico parents differ depending on whether they litigate in state or federal court. This contradiction heightens the need for this Court's review.

B. The decision below deepens a division of authority over when a post-deprivation custody hearing is sufficiently prompt.

The decision below also held that the 493-delay before Mother received a full hearing did not violate the Due Process Clause. That decision deepened a split among seven state supreme courts, three state courts of appeals, and one federal court of appeals over what delay is permissible.

The New Mexico Court of Appeals acknowledged that courts must provide a post-deprivation hearing "within a reasonable period." App. 9a. But the court believed that Mother's hearing—which did not start for 396 days, and did not conclude for 493 days—satisfied that test. The court gave two reasons: first, because the hearing "was originally set to occur on December 10, 2013," and second, because Mother eventually received a "full evidentiary hearing to address her objections." App. 13a–14a. Two other state supreme courts have similarly held that the Due Process Clause can tolerate long delays if the court *sets* a hearing at the same time it orders the custody removal, and allows the parent reasonable visitation in the interim. For example, the Wyoming Supreme Court recently held that a 182-day delay did not violate the Due Process Clause because the mother "was not denied access to her children" and because the court promptly set a trial date. *Tracy v. Tracy*, 388 P.3d 1257, 1263–64 (Wyo. 2017). And the Montana Supreme Court has held that an 8-month delay did not violate due process because "the mother had contact with the children several times a week" and "the record contains no testimony … showing fundamental unfairness of such a delay." *In re Declaring Jones & Peterson Children Dependent & Neglected Children*, 539 P.2d 1193, 1195 (Mont. 1975).

In contrast, five state supreme courts have held that, when a court temporarily removes a child from a parent's custody, a far prompter hearing is required, and that lengthy delays violate the Due Process Clause. *See In re Carmelo G.*, 896 N.W.2d 902, 909–10 (Neb. 2017) (a hearing that started 16 days, and ended 8 months, after a temporary custody order violated

due process); *Anderson v. H. M.*, 317 N.W.2d 394, 401 (N.D. 1982) (holding that a 30-day delay violated due process, and that a hearing should have been held "within 96 hours"); *In re Custody of Lori*, 827 N.E.2d 716, 721 (Mass. 2005) (holding that a 152-day delay violated due process, and that a hearing should have been held "within seventy-two hours"); *Watkins v. Watkins*, 466 S.E.2d 860, 863 (Ga. 1996) (holding that an 18-month custody transfer, without notice and a hearing, violated due process); *In re Willis*, 207 S.E.2d 129, 140 (W. Va. 1973) ("Both this Court and the Constitution are offended by the [3-year] timespan of the retention of the infant child … in obvious disregard of his parents' rights[.]"). At least three state courts of appeals have reached the same conclusion. *Searle v. Searle*, 38 P.3d 307, 319 (Utah Ct. App. 2001) (17-day delay violated due process); *Ex Parte Couey*, 110 So. 3d 378, 381 & n.2 (Ala. Civ. App. 2012) (10-week delay); *Weissman v. Weissman*, 102 So. 3d 718, 721 (Fla. Dist. Ct. App. 2012) (90-day delay). Indeed, many of these courts have held that parents were denied due process by delays of *one month or less*.

The Third Circuit agrees. As that court explained, taking a child away from a parent is "among the most drastic actions that a state can take against an individual's liberty interest, with profound ramifications for the integrity of the family unit and for each member of it." *B.S. v. Somerset County*, 704 F.3d 250, 272 (3d Cir. 2013). As a result, when a court issues a temporary custody order without a prior hearing, any "delay [before the post-deprivation hearing] should ordinarily be measured in hours or

days, not weeks." *Id.* at 272 n.31. The court therefore held that a 40-day delay violated due process. *Id.*

In addition, in the context of non-court-ordered removals, the federal appellate courts have unanimously held that delays far shorter than 493 days violate the Due Process Clause. *See Whisman through Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997) (17-day delay violated due process); *Berman v. Young*, 291 F.3d 976, 985 (7th Cir. 2002) (72-day delay); *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990) (4-month delay); *Doe v. Cappiello*, 758 F. App'x 181, 185 (2d Cir. 2019) (117-day delay).

This split is unlikely to resolve itself. On the contrary, the split is deepening, with two courts upholding long delays in the past two years. *See Tracy*, 388 P.3d at 1263–64; App. 9a, 13a–14a. Thus, this Court should grant review now, rather than letting the divide continue to fester.

III. THE QUESTIONS PRESENTED ARISE DAILY AND YET OFTEN EVADE APPELLATE REVIEW.

The divisions of authority discussed above demonstrate that this Court's intervention is needed. Yet the due-process questions presented by this case are even more pressing than those cases indicate.

Every day, courts enter dozens of interim custody orders around the country. And in a disturbing number of cases, state courts deprive parents of custody without prior notice or an opportunity to be heard. *See, e.g.*, Nancy Stuebner et al., *Family Courts' Failure to Protect Abused Children in Custody Disputes* (2014), https://tinyurl.com/y4ow6duo

(surveying 399 family-court participants who self-identified as being "protective parents" and finding that 68.7% lost custody of a child in ex parte proceedings).

Although these cases arise frequently, they often evade review. Many temporary custody orders remain effective for "60 to 90 days." Child Custody Prac. & Proc. § 8:14. Such orders are long enough to cause serious pain and disruption, and potentially long enough to ensure that the temporary arrangement becomes permanent. *See infra* pp. 30–31. But they are short enough that they often expire before any due-process problems can be litigated. Indeed, appellate review routinely takes longer than 60 to 90 days, possibly "making an appeal unwise and possibly delay[ing] the permanent award." Child Custody Prac. & Proc. § 8:14.

In addition, various procedural roadblocks often prevent appellate review. *First*, family-court litigants often cannot afford legal counsel. *See* Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 Hastings L.J. 1389, 1391 (2016) (nearly 80% of family-law cases involve at least one party without counsel). *Second*, if litigants contribute at all to the delay, courts often hold that they failed to preserve any due-process argument. *See, e.g.*, *Garvey v. Valencis*, 173 A.3d 51, 61–62 (Conn. App. Ct. 2017) (holding that no due-process violation had occurred because the parent had "contributed to the delayed resolution of this matter"); *Overman v. Overman*, 629 P.2d 127, 131 (Idaho 1980); *Mitchell v. Manders*, 2015-Ohio-1529, ¶ 53 (Ohio Ct. App. 2015). *Third*, many courts hold that challenges to temporary custody orders are moot after the final hearing, even

though—as this case demonstrates—such orders are often effectively dispositive of a parent's rights. *See, e.g.*, *Stratton v. Stratton*, 834 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (challenge to a 182-day delay was moot); *L.S. v. B.S.*, No. 2009-CA-002288-ME, 2010 WL 4366367, *4 (Ky. Ct. App. Nov. 5, 2010) (45-day delay); *Krebs v. Krebs*, 960 A.2d 637, 641 (Md. Ct. App. 2008) (168-day delay).

This case does not present any of those reviewability problems. Mother promptly brought a due-process challenge to the district court's refusal to grant her a hearing, App. 83a, 107a, and renewed that challenge in the court of appeals, App. 4a, 8a–9a, 74a–77a, and the New Mexico Supreme Court, App. 49a–51a, 53a–57a, 61a. In addition, the court of appeals addressed both issues on the merits.

Finally, the due-process issue is not moot: the district court violated Mother's due-process rights by failing to hold a pre-deprivation hearing or a prompt post-deprivation hearing. Those violations infected the court's final order, which relied heavily on the court's belief that B.L.S. was "doing well" in her father's temporary custody and that she "should not be subject to another major change in custody at this time." App. 21a. And in turn, those violations led directly to the lopsided custody arrangement that exists to this day, under which Mother (a) can see B.L.S. for only five hours a week, (b) cannot attend B.L.S.'s school and extracurricular activities without court permission, and (c) has no say in B.L.S.'s "education, child care, health care, on-going activities, and religious upbringing." App. 21a. This Court could remedy the due-process violations by reversing the decision below and remanding for proceedings

untainted by constitutional error. At a minimum, Mother is entitled to seek a more equitable parenting arrangement. Under these circumstances, Mother's due-process challenge is not moot. *Armstrong v. Manzo*, 380 U.S. 545, 551–52 (1965).

IV. THE DECISION BELOW IS WRONG.

The New Mexico Court of Appeals misapplied the Due Process Clause on both questions presented.

A. The decision below wrongly held that a court can remove a child from her parent's custody without a pre-deprivation hearing whenever the court deems it in the child's best interest.

The decision below violates established due-process principles by allowing a court to remove a child from her parent's custody without a pre-deprivation hearing whenever the court believes it is in the child's best interest. App. 9a. That standard is far too lenient.

To determine whether a pre-deprivation hearing is necessary, this Court examines three factors: (1) "the private interest affected by the official action"; (2) "the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards"; and (3) "the Government's interest, including the administrative burden that additional procedural requirements would impose." *James Daniel Real Prop.*, 510 U.S. at 53. An examination of these factors shows that Mother was entitled to a hearing *before* B.L.S. was taken away from her.

1. The first factor strongly supports a pre-deprivation hearing. Parents have a "commanding"

interest in the care and custody of their children. *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981); *see also Santosky*, 455 U.S. at 758–59; *Troxel*, 530 U.S. at 65. Moreover, temporary custody transfers frequently become permanent. As one treatise explains, "[a] parent who has temporary custody has the opportunity to establish (or continue) a stable supportive environment that would be harmful, or at least disruptive, to the child to alter." Child Custody Prac. & Proc. § 8:2. That gives the parent with temporary custody an "advantage, especially if there is a long time between filing the pleadings and the trial." *Id.* Thus, as happened here, parents who lose custody of their children temporarily often never get it back. *See, e.g.*, *Produit v. Produit*, 35 P.3d 1240, 1246 (Wyo. 2001); *Spencer v. Spencer*, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997); *Matter of Angelina AA*, 222 A.D.2d 967, 970 (N.Y. App. Div. 1995); *Paryzek v. Paryzek*, 776 P.2d 78, 81 (Utah Ct. App. 1989).

2. The second factor—risk of error—decisively favors a pre-deprivation hearing. That risk is high any time the government deprives people of their rights through a "secret, one-sided determination of facts." *James Daniel Real Property*, 510 U.S. at 55 (quotation marks omitted). But the risk of error is unacceptably high in custody proceedings.

First, custody proceedings often involve intensely adversarial parents who do not agree even on basic facts. A pre-deprivation hearing addresses that problem by giving parents the chance to alert the court to "the existence of disputes about facts and arguments about cause and effect." *Goss v. Lopez*, 419 U.S. 565, 583–84 (1975).

Second, courts often place great weight on custody investigations, which are usually performed by social workers or court employees. Child Custody Prac. & Proc. § 10:1. Although these investigations can be valuable, they can also be highly problematic: they consist largely of "hearsay declarations" and the opinions of other third parties that "may or may not have a reasonable basis." *Denningham v. Denningham*, 431 A.2d 755, 759 (Md. Ct. App. 1981); *see also* Principles of the Law of Family Dissolution § 2.13 (2002); Robert J. Levy, *Custody Investigations As Evidence in Divorce Cases*, 21 Fam. L.Q. 149, 160 (1987). Such reports raise the risk of error still higher.

Third, custody proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." *Santosky*, 455 U.S. at 762. Courts may see little reason to revisit their prior decisions, so that "the only meaningful opportunity to invoke the [court's] discretion … is … *before* the [deprivation] takes effect." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (emphasis added).

3. The third factor—the government's interest—strengthens the case for a pre-deprivation hearing. The government has an "urgent interest in the welfare of the child." *Lassiter*, 452 U.S. at 27. As a result, the government "shares the parent's interest in an accurate and just decision," *id.*, which generally requires a pre-deprivation hearing, *James Daniel Real Property*, 510 U.S. at 55.

Moreover, requiring a pre-deprivation hearing "creates no significant administrative burden." *Id.* at 59. When a court takes a child away from her parent's custody, the court must hold a hearing either before

the deprivation or promptly after. "From an administrative standpoint," therefore, "it makes little difference whether that hearing is held before or after the [custody removal]." *Id.*

4. The above analysis demonstrates that courts should generally hold a hearing before taking children from their parents' custody. The question then becomes what circumstances are sufficiently urgent to warrant a departure from this rule.

When immediate action is not needed to avoid physical or similarly serious harm, the Court has required a pre-deprivation hearing. For example, schools must hold a hearing before suspending a student unless he or she "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Goss*, 419 U.S. at 582. Similarly, a state must hold a pre-deprivation hearing before allowing creditors to seize goods, unless the creditor "could make a showing of immediate danger that [the] debtor will destroy or conceal [the] disputed goods." *Fuentes*, 407 U.S. at 93.

B. The decision below wrongly held that the custody hearing, which ended 493 days after Mother lost custody, was sufficiently prompt.

The decision below also violates established due-process principles by approving the 493-day delay before Mother received a full hearing on the grounds for depriving her of custody. As explained above, where the Due Process Clause allows a hearing to be held *after* deprivation of a protected interest, the state must provide a "prompt" post-deprivation hearing. *Barry*, 443 U.S. at 66. To determine whether such a

hearing is sufficiently prompt, this Court again examines three factors: (1) "the importance of the private interest and the harm to this interest occasioned by delay"; (2) "the justification offered by the Government for delay and its relation to the underlying governmental interest"; and (3) "the likelihood that the interim decision may have been mistaken." *FDIC v. Mallen*, 486 U.S. 230, 242 (1988). As already established, these factors—setting aside the justification for the delay—all favor heightened due-process protections. *See supra* Section IV.A. The remaining question, then is whether there was an adequate, countervailing justification for the delay. And here, the New Mexico Court of Appeals offered none. It noted that a hearing "was originally set to occur on December 10, 2013." App. 13a. But that was *74 days* after the district court took B.L.S. away from Mother. That in itself is a substantial delay requiring some compelling justification, and neither the court of appeals nor the district court offered one. The court of appeals also noted that "there was a significant delay in the hearing" for various reasons. App. 14a; *see also* App. 6a–7a. But the court made *no* effort to determine whether that 493-day delay was justified. And it was not: most of the delay occurred because Family Court Services (which is an office of the district court) and the New Mexico Attorney General refused to produce crucial discovery materials—a refusal that the district court itself eventually acknowledged was a violation of due process. App. 27a.

This Court's precedents confirm that a 493-day delay—or even a 74-day delay—is not adequately prompt. For example, in *Barry v. Barchi*, this Court held that a state had to hold a post-deprivation

hearing for a horse-racing trainer before his 15-day suspension had finished. 443 U.S. at 66. Otherwise, it was "as likely as not that [the trainer] and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed." *Id.*

In addition, the longest delays this Court has upheld have been far shorter than the one at issue here. For example, this Court upheld a 27-day delay for holding a hearing about an impounded car, *City of Los Angeles v. David*, 538 U.S. 715, 719 (2003), and upheld a 30-day delay for a hearing about the suspension of a bank official, *Mallen*, 486 U.S. at 242. Given that parents' interest in the care and custody of their children is "far more precious than any property right," *Santosky*, 455 U.S. at 758–59, hearings on temporary custody removals should happen, if anything, more quickly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOAN S. MEIER
DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street NW
Washington, DC 20052

CHARLOTTE H. TAYLOR
Counsel of Record
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3872
ctaylor@jonesday.com

G. RYAN SNYDER
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

Counsel for Petitioner

OCTOBER 3, 2019