United States Court Of Appeals
For The Eighth Circuit

No. 19-1419

Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M.; Bryce Mitchell; Stop Child Protection Services From Legally Kidnapping,

Plaintiffs – Appellants,

v.

Dakota County Social Services; Emily Piper, in her official capacity as Commissioner of Department of Human Services; Patrick Coyne, individually and in his official capacity as Executive Director of Dakota County Social Services; Joan Granger-Kopesky, individually and in her official capacity as Deputy Director of Dakota County Social Services; Leslie Yunker, individually and in her official capacity as Supervisor of Dakota County Social Services; Diane Stang, individually and in her official capacity as Supervisor of Dakota County Social Services; Susan Boreland, individually and in her official capacity as Social Worker of Dakota County Social Services; Chris P'Simer, individually and in his official capacity as Social Worker of Dakota County Social Services; Christina Akolly, individually and in her official capacity as Social Worker of Dakota County Social Services; Jacob Trotzky-Sirr, individually and in his official capacity as Guardian ad Litem of Dakota County; Tanya Derby, individually and in her official capacity as Public Defender of Dakota County; Kathryn Scott, individually and in her official capacity as Assistant County Attorney of Dakota County; Elizabeth Swank, individually and in her official capacity as Assistant County Attorney of Dakota County; Lucinda Jesson, individually and in her official capacity as Commissioner of Department of Human Services; County of Dakota,

Defendants – Appellees.

APPELLANT'S PRINCIPAL BRIEF

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SUMMARY OF THE CASE

According to one district court, a child seized held by county officials for 22 months, when the underlying reasons for the seizure (spanking) no longer existed and had not been in existence for months, has no recourse against government officials. As a result of a district court's dismissal of Appellant Dwight Mitchell's amended complaint under Rule 12, his child can be deprived of his constitutional rights without relief while, for example, Minnesota school authorities may exert corporal punishment with statutory immunity, but not parents. Further, county officials may make misrepresentations of fact to the district court and fail to adhere to statutory law requiring certain jurisdictional facts be disclosed to the state court without reprisal. Likewise, despite facts reflecting the parent as a non-threat to the child, the same officials characterized Mitchell as an unfit parent and culturally deficient for using spanking as a disciplinary tool because of his black descent, refusing to release the seized child. Instead, immunity was given to all governmental officials and standing was deprived of all Appellants.

Mitchell requests 20 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1 and Local Rule 26.1A of the United States Court of Appeals for the Eighth Circuit, Appellants Dwight D. Mitchell, individually and on behalf of his children, X.M. and A.M., Bryce Mitchell, and Stop Children Protection Services from Legally Kidnapping note that Dwight Mitchell and his children are individuals and are not a corporate entity nor affiliated with any corporate entity regarding their appeal.

Stop Children Protection Services from Legally Kidnapping is a member association under the Family Preservation Foundation, Inc., a 501(c)(3) non-profit corporation registered in both Minnesota and New Jersey.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota issued a final judgment on January 28, 2019. The judgment adjudicated all claims as against all parties with the court's grant of motions to dismiss. The district court had asserted jurisdiction under 28 U.S.C. §1331. Under 28 U.S.C. §1291, the court of appeals shall have jurisdiction of appeals from all final decisions of the federal district courts. Appellants filed their Notice of Appeal on February 22, 2019.

STATEMENT OF THE ISSUES

Under the Federal Rules of Civil Procedure Rule 12, a complaint must be liberally construed and all reasonable inferences must be drawn in the light most favorable to the plaintiff, accepting the alleged facts as true even if doubtful or improbable. Thus, a well-pleaded complaint may proceed even if it appears that recovery is very remote or unlikely.

1. Whether children's or their parents' constitutional rights are violated when child protection statutes allow seizure of a minor from their parents based on an allegation of child abuse when reasonable force or corporal punishment is used to protect or discipline the children, but the same statutes authorize educational officials to exercise the same amount of force and are statutorily immune from lawsuit.

Apposite Cases:

- *Ashcroft v. Iqbal*, 566 U.S. 662 (2009);
- *Johnson v. City of Shelby, Miss.,* 135 S.Ct. 346, 346–47 (2014);
- *Stanley v. Finnegan*, 899 F.3d 623, 628 (8th Cir. 2018);
- *Kia P. v. McIntyre,* 235 F.3d 749, 762 (2d Cir. 2000);
- *Troxel v. Granville,* 530 U.S. 57, 68 (2000).

2. Whether children's or parents' due process rights or substantive due process rights were violated when the government continues a seizure separating the child from his or her parent(s) based upon the governmental officials' intentional misrepresentations and fabrications of evidence to the judiciary as conduct shocking to the contemporary conscience.

Apposite Cases:

- *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, 927 (8th Cir. 1987);
- *Bell v. City of Milwaukee,* 669 F.2d 510, 512 (7th Cir. 1984);
- *Stanley v. Finnegan*, 899 F.3d 623, 628 (8th Cir. 2018).

Parental rights are protected constitutional rights, including the right of association with their children. A government official loses the protection of qualified immunity when the alleged unlawful official action is unreasonable when assessed in light of the legal rules that were clearly established at the time action(s) had been taken. The question is

3. Whether government officials are immune from liability when their conduct involves allegations of overt misrepresentations to the court to continue a seizure, including the failure to follow state statutory law regarding out of state jurisdiction over the parties that could affect Minnesota child protection proceedings when unwarranted by law and factually unsupportable.

Apposite Cases:

- *Mumm v. Mornson,* 708 N.W.2d 475, 490 (Minn. 2006);
- *Hardwick v. County of Orange*, 844 F.3d 1112, 1120 (9th Cir. 2017).

When members of an association suffer similar harm with the seizure of their children under child protection statutes based on allegations of child abuse when reasonable force or corporal punishment to protect or discipline a child is part of either their pre-enforcement or post-enforcement proceedings, the question is

4. Whether members of an association have standing to bring an action to challenge Minnesota child protection statutes for prospective declaratory or injunctive relief if they have been subject to and will continue to be subject to the jurisdiction of child protection statutory enforcement.

Apposite Cases:

- *Lowry ex. rel. Crow v. Watson Chapel Sch. Dist.,* 540 F.3d 752, 761n.8 (8th Cir. 2008);
- *Keup v. Hopkins,* 596 F.3d 899, 904 (8th Cir. 2010);
- *Watts v. Brewer,* 588 F.2d 646, 648 (8th Cir. 1978);
- *Higgins Electric, Inc. v. O'Fallon Fire Protec. Dist.*, 813 F.3d 1124, 1128 (8th Cir. 2016).

STATEMENT OF THE CASE

I. The Minnesota seizure of Mitchell's children begins with an ex-wife six years ago and her attempts to gain custody of her children with false claims of child abuse in New Jersey.

When Campos's child abuse claims are found to be false, she attempts to hire a hitman to kill Mitchell and take the children to Spain.

The minor children of Dwight Mitchell, X.M., A.M., and Bryce Mitchell[1] were seized by county authorities on February 16, 2014. Amend. Compl.¶28.App.32. X.M. was spanked by his father the day before. *Id.* And with that seizure, father and child (X.M.) would be separated from each other for 22 months and his youngest son and oldest, Bryce, for five months. Why the seizure? Why for 22 months? Why five months? And why is a parent prosecuted for corporal punishment when school officials can do so with statutory immunity? When a child complains of ordinary spanking, how does that give rise to justify seizure of the children? *See generally,* Amend. Compl.App.23-169.

In an admittedly lengthy and detailed amended complaint, Mitchell reveals the excruciating pain and anguish he and his minor children experienced due to the Minnesota Dakota County Child Protection Services forced separation. But, through the web of detail, and sometimes hyperbole, the essence of supportable claims remain intact. The web woven has its beginnings in 2008 with Mitchell's first and former wife

[1] At the time of the seizure, Bryce Mitchell was a minor. He is no longer a minor; thus, he is identified by name, not his initials.

who engaged in inexplicable behavior which ultimately resulted in her incarceration and deportation. Her troubled behavior arose again in February 2014 resulting in dire consequences for both her own children and their father. *Id.*

Mitchell's former wife, Mirina Campos, engaged in irrational behavior starting in late 2008 when she was arrested for theft and for making terroristic threats to kill Mitchell. *Id.*¶¶45–61.App.37-40. Despite a temporary restraining order Mitchell obtained, Campos repeatedly disobeyed it causing the New Jersey court to issue a warrant for her arrest. *Id.*¶¶46–49.App.37. Before the execution of the warrant, Campos called New Jersey Middlesex County social services accusing Mitchell, for the first time, of abusing their children. *Id.*¶50.App.37. She did this twice in February 2009; in all cases, county officials found no evidence of child abuse. *Id.*¶50–51.App.37-38.

The next month, Campos told X.M. to tell his school teacher that his dad spanked him. *Id.*¶53.App.38. The police and social services conducted yet another investigation and found no evidence of child abuse and the accusations unfounded. *Id.*¶¶53–55.App.38.

Days after telling X.M. to tell New Jersey officials Mitchell spanked him, Campos attempted to remove X.M. from school. *Id.*¶54.App.38. School authorities contacted the police and Campos was finally incarcerated for violating the existing temporary restraining order. *Id.*

Soon after her first release from prison, things went from bad to much worse. Campos and her new boyfriend were arrested for conspiracy to kill Mitchell by means of a "hitman" and plans to kidnap X.M. and A.M. with the idea of taking them to Spain. *Id.*¶¶57–58.App.38-39. Campos would later be indicted for conspiracy, two counts of giving aid to another in the commission of a crime, one count of weapons possession for unlawful purposes, and another for unlawful possession of weapons. *Id.*¶60.App.39. A plea agreement reduced the charges. The court sentenced Campos to five years in prison in which she served three. ¶¶61.App.39. Upon release in late 2011, Campos was immediately deported to Spain. *Id. see* Ex.9 (Or. N.J. Super. Ct. Fam. Prt. Dec. 19, 2012). (Dckt.8).

II. When divorced from Campos, Mitchell gets both legal and physical custody of his minor children.

When Campos started her criminal behavior, Mitchell sought a divorce. He obtained the divorce decree in 2012. *Id.* The family court, with particularity, noted Campos's criminal history including references to her conspiracy to "set on fire" Mitchell and leave the country with their children. *Id.* Notably, the court stated that it would "no longer continue to entertain [Campos's] repeated and unsupported allegations that [Mitchell] is abusing the children." *Id.* And, although Campos was denied any right to visitation of the children, the court would allow her to contact them via Facebook or Skype. *Id.*

III. Campos repeats her attempts to obtain custody of X.M. and A.M. through her minor children by having Mitchell accused of child abuse for spanking.

County officials equate spanking with child abuse and make promises to the deported Campos to assist her in regaining custody.

Some two years removed from her latest incarceration and now living in Spain, Campos seemed undeterred from her past criminal experiences to obtain custody of X.M., A.M., and Bryce. As she did in New Jersey, Campos told X.M. to have the police called if his father ever spanked him. *Id.*¶29.App.32.

Meanwhile, X.M. had rebelled against parental authority. X.M. had continually disobeyed his father. X.M. failed to do school work. X.M. disregarded rescinded privileges. So, Mitchell did spank X.M. *Id.*¶¶28–29.App.32. And. as his mother Campos instructed X.M., the next day, X. M. called the police. *Id.* ¶29.App.32. Without any pre-investigation, county officials seized the children. *E.g.* ¶29;31.App.32;33.

After the seizure of X.M. and A.M., Dakota County social service official, Susan Boreland, contacted Campos. *Id.*¶¶17; 32.App.30;33. Campos outlined claims of child abuse when she and Mitchell resided in New Jersey and requested Boreland to keep the underlying petition case in Minnesota because New Jersey courts ignored her attempts of aid in the past and would do so in the future. *Id.*¶¶32–33.App.33. Campos went so far as to suggest the children be returned to her in Spain. *Id.*¶33.App.33.

Boreland agreed to keep the case in Minnesota and to ensure the children be removed from Mitchell's custody and eventually to Campos in Spain. *Id.*

In fact, despite Campos's past criminal behavior and a New Jersey family court order giving Mitchell sole legal and physical custody, Dakota County officials had Campos participate in psychological evaluations in 2014 culminating in the eventual effort of the County to terminate Mitchell's parental rights by having Campos be the custodian of their minor children later in May 2015. Exs. 34 at 231 and 252. Dckt.8.

Yet, the day after Mitchell's children were seized by Dakota County officials, the county officials had contacted New Jersey officials and had constructive knowledge of Campos's previous criminal conduct and within days New Jersey family court documents concerning Mitchell having sole legal and physical custody. *Id. e.g.,* ¶¶44; 62;65–66;110;112;134.App. 37;40-42;53;54;57.

Meanwhile, having learned that their minor children were seized by county officials, Mitchell and his then-current wife Litvinenko,[2] having been out for dinner, rushed to the police department. Plts. Amend. Compl. ¶28; 34.App.32;34. Mitchell was immediately arrested for malicious punishment of a child *Id.*¶34.App.34.

During the county officials' questioning of X.M. and A.M., the minors stated that Mitchell had spanked them in the past. *Id.* ¶31.App.33. Notably, they also told authorities that they had *never* been spanked with a belt. *Id.* ¶89.App.46. They also

[2] Besides Mitchell's two minor children, Litvinenko had her own minor child M. L. Amend. Compl.¶28.

stated that their stepmother Litvinenko had not spanked nor abused them; yet, this fact did not deter county officials from threatening and filing a CHIPS petition regarding her child M.L.

Then, Boreland interviewed Litvinenko and the minor children. First, Boreland aggressively and accusatorily interviewed Litvinenko:

> "So how often does [Mitchell] hit you…So your husband has a violent streak…You know that this happens, whether or not you see it or not, you can't be that dumb…It's not safe for the boys…I have a foster home for all three [boys] right now. How do you feel about that…They're going to tell me what's going on, I don't believe that you never know that the children were being hit…."

Id.¶¶37–38; Ex.4.App.35;Dckt.8.

Despite Litvinenko's statements that she had never seen Mitchell abusive toward the minor children and that the minors never told her of being spanked in the past, Boreland would not believe her. *Id.*¶¶39–40.App.35-36. Instead, Boreland accused Litvinendo of neglecting to stop the abuse. *Id.*¶40.App.36. Boreland further assured Litvinendo that she would do everything she could to prevent the children from returning to the family. *Id.*

Meanwhile, Mitchell's and Litvinendo nanny for the children, Kenall Broders, told Boreland that she had not seen any bruises or signs of abuse on any of the children during her tenure with the family. Id. ¶42.App.36. She also told Boreland that none of the children had complained of spanking or otherwise were afraid of their father. *Id.*

Shortly after Litvinendo's interview, she was released with her biological child M.L. and allowed to return home. *Id.* ¶43.App.36-37. Mitchell's biological children, X.M., A.M., and Bryce continued to be under seizure by county officials. *Id.*

Meanwhile, Mitchell would be criminally charged with malicious punishment of a child. *Id.* ¶165.App.68. County officials tried to add charges of "terrorist threats," but the court would have none of it. *Id.* ¶¶180-81.App.72. Instead, the court offered Mitchell an *Alford* plea to a misdemeanor offence resulting in a $100 fine. *Id.* ¶¶182; 184.App.72-73. Mitchell, believing he had no choice because the corresponding CHIPS proceeding would continue until the criminal proceeding ended, accepted the plea. *Id.* ¶182–83.App.72-73.

IV. Boreland classified Mitchell as a black man unfit to be a parent because black families are too quick to spank their children.

After Mitchell's release on February 19th, he and Litvinenko were directed to return to the courthouse to accept service of a Dakota County Social Services petition titled: "Child in Need of Protection or Services." *Id.* ¶67.App.41. Outside of the courtroom, Boreland revealed her intent of ensuring X.M. and A.M. were never returned to Mitchell's custody, "I am going to do everything in my power to see that the children are never returned to your custody." *Id.* ¶68.App.41.

Boreland then accused Mitchell as unfit to be a parent and undeserving to have children. *Id.* ¶70.App.41. She classified him as a black family man who is too quick to spank a child:

> "Why are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children." *Id.*

Boreland's belief was based upon her experiences in her own family because some of her relatives were also black. *Id.*¶72.App.42. Boreland stated that she understood African-Americans very well: "her brother-in-law [was] African-American and [she] has African-American relatives." *Id.*

Mitchell was in disbelief that a social worker would use what he believed to be derogatory, racially motivated, and discriminatory statements about his cultural ethnicity. *Id.* ¶71.App.41. As a black male, Boreland's statements brought to mind the targeting of blacks generally, and reminder of continuing racial tensions between blacks and whites. *Id.* Despite the attack on his ethnicity, Mitchell reiterated to her that Campos and his children, for an unknown reason (other than Campos's desire to regain custody) had created a false narrative. *Id.* ¶72.App.42.

And Boreland knew it. *Id.* ¶¶63–66.App.40-41.

Mitchell tried to explain to Boreland that the New Jersey courts have an effect on the Minnesota proceedings. *Id. e.g.,* ¶¶74; 99–100;110–114; 134.App.42;51;53-54;57. Two days after the seizure of Mitchell's children and his arrest, Boreland had contacted New Jersey officials and received police records regarding Campos's criminal past and false claims of child abuse and Mitchell having full legal and physical custody of his children. *Id.* ¶¶62;66;243, App.40;41;89; *e.g.* Ex.45–46. Dckt.8. Moreover, because of the records she received, Boreland knew that there existed a

New Jersey proceeding that could have affected the Minnesota proceedings, yet chose not to disclose these facts to the Minnesota court although required to do so under Minnesota statutory law. *Id.*

Inexplicably, Boreland directly contacted Litvinenko's former partner, Ter-Saakov, with whom she had a child, M.L. (also seized but for a shorter duration), and stated that she wanted to breakup Mitchell's marriage. *Id.*¶145–48.App.59-60. Boreland directed Ter-Saakov as to how to assist her to accomplish her objective through the New Jersey courts. *Id.*

Eventually, the matter would be transitioned from Boreland to Chris P'Simer. *Id.* ¶110.App.53. He continued Boreland's strategy and tactics. Allegations further assert a consistent approval of Boreland's strategy and tactics including continuing misrepresentations and omissions to the court regardless of statutory requirements of disclosure. *Id. e.g.*, 153–55;157–58; 160.App.62-63;64-65.

The county did charge Mitchell with criminal malicious punishment of a child. *Id.*¶180.App.73. And, when the county tried to add a felony count of terroristic threats, the court stepped in to curtail the over-zealousness of county officials. *Id.* Instead, Mitchell pled to an *Alfred* plea, was convicted of a misdemeanor and fined $100. *Id.* ¶¶181–84.App.72-73. Without the plea and completion of the criminal proceedings, Mitchell's children remain seized by Dakota County Social Services indefinitely. *Id.* ¶182.App.72-73.

So, the children remained in the custody of Dakota County Social Services. Days dragged into weeks. Weeks dragged into months. The minors wanted to return home, a fact officials would refuse to reveal to others. *Id. e.g.,* ¶¶194;197;198(c);199; App.76-78;80.

In desperation to reunite part of his family, Mitchell reluctantly succumbed to the pressures of county governmental officials. In July 2014, government officials agreed to return A.M. and Bryce to Mitchell. *Id.* ¶189.App.74. However, the conditions set including Mitchell agreeing that X.M. was in need of child protection services who would not be returned to him and Mitchell would be subjected to an order prohibiting him from using corporal punishment. *Id.*

Notably, X.M. did not agree—nor was he asked—that he should remain apart from his father. X.M. had and would continue to repeatedly assert his desire to return to his father, wanting to go home, and in some desperation ran away from a foster care home to do just that. *Id.* ¶¶194;197;198(c);199; App.76-78;80.

Instead, governmental officials ignored X.M.'s right to be reunited with his father, whom the same officials had returned A.M. (the youngest child of the three) and Bryce to Mitchell with no concern of them being in his custody. *Id.* ¶¶ 191.App.75.

Finally, officials decided to terminate Mitchell's parental rights with the transfer of custody to X.M.'s mother Campos in an ill-advised petition in April 2015,[3] despite knowing (1) her criminal background; (2) previous efforts to gain custody of her children through false accusations of child abuse against Mitchell, and (3) that Dakota County had no authority to transfer custody due to an existing custody order they had in their possession since March of 2014. *Id.* ¶ 289.App.104. But for Mitchell's pro se motion challenging the jurisdiction of the district court, Dakota county officials might have succeeded. *Id.* 296.App.105.

V. The district court dismissed the underlying amended complaint without prejudice.

The Appellees moved to dismiss the Mitchell complaint under Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6). The district court granted their motion and dismissed Mitchell's amended complaint. The district court generally found the underlying complaint as speculative and conclusory, finding no support for any of the claims asserted *E.g.,* Ord. at 8;14–15.App.8,14-15. The court found all the individual plaintiffs as lacking standing because they moved back to New Jersey. Ord. 6–7.App.6-7. However, while Mitchell's complaint sought injunctive relief, it also sought monetary relief for the claims asserted. Amend. Compl. Relief (a). Second, the court

[3] The final hearing would occur on December 4, 2015. Amend. Compl. ¶ 296.App.105.

found that the association, SCPS, had no standing because it was a parental organization with an "abstract concern." Ord. 7–8.App.7-8.

Further, Mitchell's constitutional claims were dismissed as having failed to state a claim. In short, the court found nothing in the underlying amended complaint that substantiated or stated a fact as plausible to support any of the claims asserted. Moreover, the court accepted the Appellee-Defendants arguments that they were entitled to immunity, both under the doctrines of sovereign immunity and common law official immunity, and granted their motions to dismiss relief accordingly. *Id.* at 22.App.22.

This appeal followed.

SUMMARY OF ARGUMENT

A complaint under Rule 12 analysis requires enough facts to state a claim for relief that is plausible even if actual proof is improbable. Nor can allegations be held to a higher standard of particularity in civil rights cases regarding for instance, municipal liability. These principles were not applied to the claims of the Appellants. Although declaratory relief was sought, because the Appellee-Defendants ceased their alleged illegal activity voluntarily, the mootness doctrine applies allowing for declaratory judgment. Because the Appellant-Plaintiffs children and their father also sought monetary damages, they have standing to pursue their lawsuit as does the Appellant association and its members.

The victims in this case include the seized children, and their father, regarding their protected constitutional rights. The amended complaint reflects sufficient facts to show at least the probability of lost substantial and due process rights inclusive of the loss of familial association. The amended complaint also challenges the constitutionality of state child protection statutes that resulted in seizures detrimental to the children, particularly to X.M.— seized for 22 months—because his father spanked him for misbehavior. The gross continuation of X.M.'s seizure, for example, was unreasonable and constitutionally unsupportable.

Meanwhile, government officials revealed racial discrimination toward blacks who spank claiming it to be cultural and thus, assert blacks to be unfit to have children and using the vague child protection statutes at issue that allow spanking to be equated to abuse, without finding the parent unfit and for which there is no civil parental defense. The governmental intrusion of the children's rights and that of the father were sufficiently pled to give detailed notice of the claims asserted to allow this Court to reverse the decision of the district court which granted the Appellee-Defendants' motion to dismiss.

ARGUMENT

I. Facts alleged in a complaint are accepted as true even if proof is improbable and recovery is remote or unlikely.

This Court will review de novo the district court's grant of a motion to dismiss. *Keating v. Neb. Pub. Power Dist.*, 562 F.3d 923, 927 (8th Cir. 2009); *Buckler v. U.S.,* 919 F.3d 1038, 1044 (8th Cir. 2019).

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the complaint. *See Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010); *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). To render ineffective a motion to dismiss, the complaint must include "enough facts to state a claim to relief that is plausible on its face" and something "more than labels and conclusions," "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 566 U.S. 662 (2009). The Court must grant all reasonable inferences in favor of the nonmoving party. *Lustgraaf v. Behrens,* 619 F.3d 867, 872–73 (8th Cir. 2010).

Notably, under a Rule 12 analysis, plaintiffs are required only to show the factual basis of their claims—not the legal basis. *Ashcroft,* 566 U.S. at 678; *Twombly,* 550 U.S. at 555. *Johnson v. City of Shelby, Miss.,* 135 S.Ct. 346, 346–47 (2014). Because Rule 8(a)(2) calls only for a short and plain statement of the claim showing that the pleader is entitled to the relief requested, a court may not apply a more rigid or

heightened standard of pleading particularly, for instance, in civil rights cases asserting municipal liability. *E.g., id.; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164 (1993).

Likewise, when considering a motion to dismiss, a complaint must be liberally construed in the light most favorable to the plaintiff. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2006). The Court must accept the alleged facts in the complaint as true even if it appears that "actual proof of those facts is improbable," and reviews the complaint to determine whether its allegations show that the pleader is entitled to relief, even if it appears that recovery is very remote or unlikely. *Twombly,* at 555–56; Fed. R. Civ. P. 8(a)(2).

Because the Appellee-Defendants also moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), as a facial challenge (and not on the factual truthfulness of the allegations, *e.g., Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993)), Mitchell, as the nonmoving party, "receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Osborn v. United States,* 918 F.2d 724, 729 n.6 (8th Cir. 1990).

Finally, regarding the plaintiff's burden to defeat a qualified immunity defense, at the Rule 12(b)(6) stage, the issue is whether a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. It is only on the merits to defeat a qualified immunity defense that the plaintiff has the burden of proving that

defendant's conduct violated a clearly established constitutional right. *See Stanley v. Finnegan,* 899 F.3d 623, 626 (8th Cir. 2018) *citing Hess v. Ables,* 714 F.3d 1048, 1051 (8th Cir. 2013).

II. The Appellant-Plaintiffs have standing since the relief sought included monetary damages under § 1983 and although even if it appears the declaratory relief sought is unavailable, there is an exception applicable because of alleged governmental illegalities.

Mitchell and his children have moved back to New Jersey. While it is their present residence, because of Mitchell's type of work, it does not preclude them from ever visiting Minnesota again. However, until that time, his children may not be in immediate danger of being seized again by a county's child protection services, but, they did seek monetary relief under § 1983 for the constitutional violations asserted. Amend. Comp. Relief (a). But, because Mitchell and his children had returned to New Jersey, the district court concluded they had no standing and dismissed Counts 1 through 6. Ord. 6–7.App.6-7.

There are two aspects to this issue. First, if it is concluded the declaratory judgment claim is moot, there remains the claim for damages which survives. Second, the allegations supporting the declaratory judgment claim may not be moot in light of the final action by Mitchell that caused the county officials to change their position regarding the continued seizure of X.M. as one example.

The Declaratory Judgment Act provides that:

> in a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*

28 U.S.C. §2201 (emphasis added). And, under Article III of the United States Constitution, federal courts may only adjudicate actual cases and controversies. *See Steger v. Franco, Inc.,* 228 F.3d 889, 892 (8th Cir. 2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)).

The Appellant-Plaintiffs had standing for monetary damages at the time of the district court granted the Appellee-Defendants' motion to dismiss.

Generally, when the prohibited behavior ends, a plaintiff no longer has a claim for declaratory or injunctive relief, and the case is moot. *See Keup v. Hopkins,* 596 F.3d 899, 904 (8th Cir. 2010). Instead, the plaintiff may only seek an award of monetary damages. *See id.* (holding that a change in policy "mooted any need for prospective injunctive or declaratory relief" but the change "did not deprive Keup [plaintiff] the opportunity to seek monetary damages for prior violations of his constitutional rights"). *See also Watts v. Brewer,* 588 F.2d 646, 648 (8th Cir.1978). Additionally, each child himself has standing under the Fourteenth Amendment "to assert a claim that would, if [he or] she were successful, result in full compensation for any harm suffered." *J.B. v. Washington County,* 127 F.3d 919, 928 (10th Cir.1997). Further, "parents may assert their children's Fourth Amendment rights *on behalf of* their children." *Hollingsworth v. Hill,* 110 F.3d 733, 738 (10th Cir.1997). To demonstrate

entitlement to declaratory and injunctive relief and to establish entitlement to such relief is not moot, the plaintiff must also demonstrate that "the injury likely will be redressed by a favorable decision." In general, when the prohibited behavior ends, a plaintiff no longer has a claim for declaratory or injunctive relief, and a plaintiff's case is moot. *See Keup v. Hopkins,* 596 F.3d 899, 904 (8th Cir. 2010).

But, there is an exception to the mootness doctrine and it applies when the defendant voluntarily stops the allegedly illegal activity. *See Lowry ex. rel. Crow v. Watson Chapel Sch. Dist.,* 540 F.3d 752, 761 n.8 (8th Cir.2008). In *Lowry,* the Eighth Circuit recognized the voluntary cessation exception and held that mootness was not an issue where the defendants voluntarily changed their allegedly illegal behavior. *See id.* Where the defendant voluntarily stops his or her conduct, he may only prevail where the defendant can make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 189 (2000) (citation omitted); *Charleston Housing Authority v. U.S. Dept. of Agric.,* 419 F.3d 729, 740 (8th Cir.2005) (when mootness is argued by a defendant "due to changed circumstances based on their own [defendant] behavior face[s] a heavy burden."). The underlying complaint asserts that the initial seizure was constitutionally illegal as well as the continued seizure of Mitchell's children.

Here, as one example, after having seized X.M. for 22 months, county officials sought under alleged misrepresentations to the court since the inception of X.M.'s seizure, to terminate Mitchell's parental rights. *E.g.,* Amend. Compl. ¶¶277–91 (and

cited exhibits).App.100-107;Dckt.8. Mitchell, acting pro se, filed a motion challenging the subject matter jurisdiction of the court under Minnesota Statutes §518D.306 of the Uniform Child Jurisdiction & Enrollment Act for a hearing in October 2015. *Id.* Ex. 80. Dckt.8. The New Jersey November 2009 divorce decree, had been the subject of Mitchell's allegations that the order could have an effect on the underlying Child in need of Protection Services (CHIPS) proceedings since February 2014. As alleged in the amended complaint, government officials did not disclose the New Jersey order to the court for over 18 months although required to do so under Minnesota statutory law:

> [E]ach party, in its first pleading or in an attached affidavit, shall give information… [and in that] The pleading or affidavit must state whether the party… knows of any proceeding that could affect the current proceeding… and, if so, identify the court, the case number, and the nature of the proceeding…. each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding…

Minn. Stat. §518D.209(a) and (a)(2).[4]

The district court's order, in footnote 11, contends that Mitchell's motion in October 2015 "resolved this concern," but did not address the amended complaint's allegations related to facts supporting the claims of government officials' illegal acts

[4] Although the statute states "each party," apparently, Mitchell did so to the court orally and was directed to provide county officials with the New Jersey divorce decree order. Mitchell forwarded the document in early March 2014. Amend. Compl. Ex. 9 (Mar. 5, 2014 email to Appellee-Defendant Chris P'Simer). Dckt.8. County officials thereafter, did not advise the court of the New Jersey proceeding.

resulting in the continuing interference with parental rights and familial association and other constitutional infirmities. Ord. 9 n.11. The question remains that if the "concern" was resolved in October 2015, if county officials had informed the state court in March 2014 of a sister court proceeding, as required by statute, and had not knowingly made misrepresentations to the court, would X.M. have had to suffer a continuing violation of his constitutional rights for over 21 more months?[5]

Notably, X.M. had for months indicated his desire to return to his father; however, county officials did not inform the court, purposefully omitting X.M.'s requests, and continued on their path to terminate Mitchell's parental rights thereby terminating X.M.'s familial association rights—for ordinary spanking used to correct a child's misbehavior. Amend. Compl. *E.g.,* ¶¶194–97; 198(a); 291.App.76;78;104. The intended path of Dakota County government officials was to give X.M. to his mother Campos who they knew as a felon who had used similar false accusations of child abuse in New Jersey in a fruitless attempt to obtain custody. *Id. e.g.,* ¶¶44–62; 289.App.37-40;104.

But, at the December 2015 court hearing on Mitchell's motion to dismiss for want of subject matter jurisdiction, Dakota county officials immediately and voluntarily dismissed the underlying CHIPS petition, the petition to terminate

[5] The children were seized in February 2014. A.M. and Bryce were release five months later. After government officials acquired the reports and documentation in February and March 2014, X.M. remained in custody until December 2015.

Mitchell's parental rights, and requested the court to grant the immediate release of X.M. to Mitchell. *Id.* ¶296.App.105. The state court granted the government's request. *Id.*

Throughout Mitchell's amended complaint, the Appellant-Plaintiffs continuously contended that the government officials' actions as illegal. Importantly, Mitchell has a declaratory judgment claim to be adjudicated. And most certainly, there remains a monetary claim for damages. Thus, contrary to the district court decision, the Appellee-Plaintiffs have standing.

III. SCPS, as an association, has standing too because its members continue to be subject to Minnesota's child protection laws at issue.

Stop Child Protection Services from Legally Kidnapping ("SCPS") is without a doubt a provocative name for an organization. However, it should not detract that it is an association of parents who have been affected by child protection services in Minnesota. *See e.g.,* Amend. Compl. ¶4.App.28.

An organization may have standing to seek relief from injuries to the organization itself ("organizational standing"), or as the representative of its members ("representational standing"). *Carson v. Pierce*, 719 F.2d 931, 933 (8th Cir. 1983). When an organization asserts standing on behalf of its members, it must demonstrate that at least one of its members "would otherwise have standing to sue in their own right." *Higgins Electric, Inc. v. O'Fallon Fire Protec. Dist.*, 813 F.3d 1124, 1128 (8th Cir. 2016) (internal quotation and citation omitted); *see also Warth v. Seldin,* 422 U.S. 490, 511

(1975) (stating that representational standing "does not eliminate or attenuate the constitutional requirement of a case or controversy"). Under the claims asserted, there is an allegation that members of the SCPS have been subject to similar indiscretions of county officials in the enforcement of state law governing child protection. Amend. Compl. *e.g.,* ¶¶ 368;378;388;401; 415; 427.App.119;121;122;125;127;130. Moreover, it is inferred that Mitchell is a SCPS member. *Id.* Moreover, because the amended complaint describes the harm that occurred to association members under the governing statutes as both concrete and actual, the organization has standing.

As previously noted, a court must accept the alleged facts in the complaint as true even if it appears that "actual proof of those facts is improbable," and reviews the complaint to determine whether its allegations show that the pleader is entitled to relief, even if it appears that recovery is very remote or unlikely. *Twombly,* at 555–56; Fed. R. Civ. P. 8(a)(2). It should also be noted that the amended complaint challenged the constitutionality of the standard of proof used to seize children and all SCPS members have had their children seized by Minnesota's child protection services. *E.g.,* Amend. Compl. ¶4.App.28.

Therefore, at the Rule 12 posture of the case, SCPS has standing.

IV. The fundamental constitutional rights asserted in the amended complaint involve not only the parents, but those of the seized children.

Parents are presumed to be fit to discipline their children by ordinary spanking which cannot be constitutionally presumed to be *per se* child abuse.

It cannot be forgotten that the Appellant-Plaintiffs include children, and not just their parent Dwight Mitchell. There is no question that Mitchell has a liberty interest in the care, custody, and management of his children as a substantive due process right under the Fourteenth Amendment, albeit not absolute. *Thomason v. SCAN Vol. Services, Inc.,* 85 F.3d 1365, 1370 (8th Cir. 1996) (citations omitted). Likewise, the children have a "familial right of association" under the Fourteenth Amendment. *See Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *Halley v. Huckaby,* 902 F.3d 1136 (10th Cir. 2018); *see e.g.,* Amend. Compl. ¶¶429–439.App.130-32. Here, X.M. and A.M. were seized. While A.M. and Bryce had been seized for five months, X.M. was seized for 22 months. And, as the amended complaint alleges, Boreland and other county officials intended to deprive the children of their protected relationship with their father because the intrusion of their relationship was not warranted by the county's interests in the health and safety of X.M. over that period. Here, county officials equated spanking of a child for disciplinary reasons as child abuse to justify the seizure of the children.

In *Stanley v. Finnegan*, this Court framed the issue regarding the seizure of children by county officials under the Fourth Amendment analysis: "Cause or suspicion warranting a seizure must exist at the moment of the seizure." *Finnegan,* 899 F.3d 623, 628 (8th Cir. 2018) citing *Ripson v. Alles,* 21 F.3d 805, 808 (8th Cir. 1994). "An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Id.* (citations omitted). "[T]he Fourth Amendment applies in the context of the seizure of a child by a government agency official during a civil child-abuse or maltreatment investigation." *SPhillips v. County of Orange*, 894 F. Supp. 2d 345, 359–60 (S.D.N.Y. 2012) *quoting Kia P. v. McIntyre,* 235 F.3d 749, 762 (2d Cir.2000).

This Court has also addressed how the Fourth Amendment applies when a child is removed from his family:

> In the context of removing a child from his home and family, a seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers have reason to believe that life or limb is in immediate jeopardy.

Heartland Acad. Cmty. Church v. Waddle, 317 F. Supp. 2d 984, 1091 (E.D. Mo. 2004) (*quoting Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1010 (7th Cir. 2000)), *aff'd*, 427 F.3d 525 (8th Cir. 2005).

As the amended complaint alleged, the police arrived at Mitchell's Minnesota residence based upon a baby-sitter's phone call, made at the request of a minor that he was spanked. Amend. Compl. ¶28.App.32. Mitchell was not at home. Despite the long-time babysitter's statement to the police *and* county officials that she had not seen any corporal punishment on or reported to her by any of the children, the children were seized and remained in custody for an extraordinary period of time *Id.* ¶30.App.32-33. The long-time babysitter also stated that she did not consider Mitchell a threat to the children. *Id.*

Hence, as alleged, the seizure of the children was done on private property, Mitchell's Minnesota residence, without a court order, without support of probable cause, and not justified by exigent circumstances in which the government official believed life or limb was in immediate jeopardy. *See Doe v. Heck*, 327 F.3d 492, 514 (7th Cir. 2003), *as amended on denial of reh'g (*May 15, 2003).

There is a fair inference in the amended complaint that the police disregarded the exculpatory evidence, did not have probable cause, certainly did not have a court order, nor believed imminent bodily harm would come to the children: "[T]he removal of children from their parents' custody violates a constitutional right if the removal occurs without reasonable suspicion of child abuse." *Finnegan,* 899 F.3d at 627 (citations omitted). Moreover, as the amended complaint contends regarding the constitutionality of the child protection statutes at issue, spanking to correct the behavior of a child is not the equivalent to child abuse. And at the very least, spanking

as a "reasonable use of force" should be identified as a defense to counter civil allegations of child abuse.

Under-inclusiveness, is found under Minnesota Statutes §121A.582, subdivision 1 where, "a teacher or school principal, in exercising the person's lawful authority, may use reasonable force when it is necessary under the circumstances to correct…a student…." And under civil or criminal prosecutions against school officials, the use of "reasonable force" to correct a student is a defense. *Id.* Subds. 2, 3, and 4. The question is why are parents given the same protection as teachers in Minnesota's child protection statutes? This legal question covers several core constitutional allegations found in the amended complaint. *E.g.,* Amend. Compl. ¶¶362–366; 372–376; 381–387.App.119;120;121-22.

Moreover, based on the minors' statements that they were spanked, and having excluded the exculpatory evidence provided by the Mitchell babysitter, the police and county officials disregarded the constitutional presumption that "fit parents act in the best interests of their children," *Troxel v. Granville,* 530 U.S. 57, 68 (2000). The Supreme Court has stressed that unless government officials have evidence calling into question the fitness of a parent, there is "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69. Instead, government officials presumed the *exact opposite* under Minnesota's child protection statutes. And although, as the district court noted, the parties conceded

that the Uniform Child Custody Jurisdiction and Enforcement Act does not *per se* require a showing of unfitness of the parent, the constitutional *presumption* that a parent is fit cannot be disregarded. *Id.*; Ord. at 10 n.11.App.10.

Moreover, although the Supreme Court has not "set out exact metes and bounds to the protected interest of a parent in the relationship with his child," *Troxel,* 530 U.S. at 78 (Souter, J., concurring), the fundamental right of parents to direct the upbringing of their children necessarily includes the right to discipline them. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1932) (holding that the "liberty" guaranteed by the Fourteenth Amendment "denotes ... the right of the individual to ... establish a home and bring up children ... and ... enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). *Heck,* 327 F.3d at 522 n.29.[6]

What the amended complaint alleges and fairly infers, given the facts as outlined, it is apparent that the Appellee-Defendants treated spanking as child abuse *per se.* And, Minnesota statutes require the Appellee-Defendants to do because there is no parental defense of reasonable force to protect or discipline a child. By doing so, the Appellee-Defendants disregarded the constitutional presumption "that fit parents

[6] Citing 3 William Blackstone, *Blackstone's Commentaries on the Laws of England* 120 (1765) (noting the legality of parents and teachers giving moderate physical "correction" to the children entrusted to their care); 2 James Kent, *Commentaries on American Law* 169 (1826) (noting that parents have "a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust").

act in the best interests of their children," *Troxel,* 530 U.S. at 68. Hence, the asserted facts supporting the alleged constitutional claims in the amended complaint are sufficiently plausible for the relief sought (if not declaratory, then monetary under § 1983).

Mitchell is not suggesting that his right to discipline his children gives him a license to abuse them. However, it does preclude government officials from interfering with his right as a parent to physically discipline his children unless there is evidence that the discipline administered is patently unreasonable or excessive. As one court held,

> [T]hat unless there is evidence that the physical contact or discipline in question was severe or excessive, even "a single hitting of a child" will not give rise to a reasonable suspicion of child abuse because:
>
> [W]ere that the case, nearly any practitioner or case worker who has ever witnessed a slapping of a child would be under a legal duty to report the occurrence to the designated agency—and every parent who ever slapped or spanked a child would face the possibility of losing custody of the child .... While one instance of child-hitting may raise a red flag, it does not immediately become a "suspicion" of child abuse.

Lewis v. Anderson, 308 F.3d 768, 774 (7th Cir.2002), *cert. denied, Lewis v. Stolle,* 538 U.S. 908, 123 (2003).

Viewed from this perspective, the spanking of X.M. is not child abuse even though Minnesota Statutes define it as such. Hence, Mitchell's constitutional challenges to the child protection statutes as alleged in the amended complaint arise

from these circumstances involving Dakota County officials. Amend. Compl. *e.g.,* ¶¶363–64; 384; 392–97;408–13; 418–25.App.119;121-22;122-24;125-27;127-30. Although the district court did not reach the merits of the constitutional claims, the allegations generally assert that certain provisions of Minnesota's child-protection statutes are unconstitutional because they are not narrowly tailored to meet a compelling state interest and because they do not give ordinary people "fair warning" of the specific conduct they prohibit such as spanking. *Id. e.g.,* ¶¶362–66; App.119 (citing Minn. Stat. §§260C.007, subd. 5, subd. 6(2)(i)–(iii), (4), (5), subd. 13; 260C.301, subd. 1, (b)(2), (4), (5); and 626.556, subd. 2(f), (k)); ¶394.App.123.).

V. The amended complaint's factual allegations assert the constitutional challenges to state child protection statutes regardless of whether the Appellant-Plaintiffs prevail.

The state's interest in protecting children is not absolute. It must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference and for the child, the child's interest in the continuing familial relationship with his parent. *Alsager v. Dist. Ct. of Polk County, Iowa (Juv. Div.)*, 406 F. Supp. 10, 22 (S.D. Iowa 1975), *opinion adopted sub nom. Alsager v. Dist. Ct. of Polk County, Iowa*, 545 F.2d 1137 (8th Cir. 1976). Once a child has been removed from the risk of harm, however, as well as in cases where the risks of harm are insufficient to justify temporary separation, it can be said that the state's child protection interests are less compelling. And as the "risks of harm" decrease, coupled

with the desires of the child and parent to reunite, the government's continuing interference become even less compelling. For X.M., 22 months was appalling.

The civil standards of Minnesota's child protection statutes to seize children and accuse parents of "child abuse" do not comport to due process. Normally, the standards between criminal and civil statutes are on a sliding scale, with criminal cases on the high end and civil cases on the low end. However, the lack of consistent definitions, notice, and defenses in the civil context leads to a grave injustice as Mitchell and his children have suffered, wherein, ordinary spanking leads to excessive government interference in the family. *Cf. U.S. v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00),* 956 F.2d 801, 808 (8th Cir. 1992) (Beam, J. dissenting op.).

The amended complaint's constitutional issues challenging the Minnesota child protection statutes involve *both parental rights* and the *rights of children*—substantial and procedural due process and familial association.

For example, child protection Minnesota Statutes §260C.007, subdivision. 5's failure to incorporate §609.06 or 609.379, the "authorized use of force" criminal defenses, leaves a parent who has corporally punished a child without an "authorized use of force" defense in a civil seizure proceeding in which the parent is accused on the theory that the corporal punishment is an assault or malicious punishment of a child—i.e., "child abuse" under §260C.007, subdivision 5. This is a facial violation of the Seizure and Due Process Clauses.

First, §260C.07, subdivision 5 defines "child abuse," in part, by incorporating Minnesota's criminal code including criminal assault and criminal malicious punishment of a child:

> "Child abuse" means an act that involves a minor victim that constitutes a violation of section … 609.224 [Assault in Fifth Degree], … 609.377 [Malicious Punishment of Child]… or that is physical or sexual abuse as defined in section 626.556, subdivision 2, or an act committed in another state that involves a minor victim and would constitute a violation of one of these sections if committed in this state.

Second, §260C.007 fails to incorporate §609.06 and 609.379, the "authorized use of force" criminal defenses. Section 609.06 is the general "authorized use of force" criminal defense and is not referenced in §260C.007. Section 609.379, subdivision 1, directs that the "reasonable force as to a child" criminal defense is applicable to §260C.425, but not the rest of chapter 260C, including §260C.007:

> Reasonable force may be used upon or toward the person of a child without the child's consent when the following circumstance exists or the actor reasonably believes it to exist:
>
> (a) when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil, in the exercise of lawful authority, to restrain or correct the child or pupil; or
>
> (b) (b) when used by a teacher or other member of the instructional, support, or supervisory staff of a public or nonpublic school upon or toward a child when necessary to restrain the child from self-injury or injury to any other person or property.

Subd. 2. Applicability**.**

> *This section applies to sections 260B.425, 260C.425, 609.255, 609.376, 609.378, and 626.556.*

(Emphasis added.) So, §609.379, subdivision 2's applicability section does not reference section 260C.007; nor does §260C.007 reference §609.379.

Further, §609.06, subdivision 2's single reference to chapter 260C, §260C.425 (not §260C.007), shows that the "reasonable force on a child" defense is available in criminal proceedings, but not civil CHIPS proceedings leading to seizure of a child. Section 260C.425 defines as a crime making a minor child a CHIPS under §260C.007. So, §609.379, subd. 2, makes the "lawful use of force as to a child" defense apply in a criminal proceeding under section 260C.425, but not for a civil CHIPS proceeding leading to civil seizure of a child under chapter 260C.007.

Digging a little deeper, §609.224, subd. 1, which is incorporated into §260C.007, subdivision. 5, reveals that a person is guilty of assault in the fifth degree if the person "intentionally inflicts or attempts to inflict bodily harm upon another." This statutory text incorporated into the state's definition of "child abuse" makes commonplace parental corporal punishment "child abuse" to cause civil seizure of a child. Specifically, §609.02, subdivision 7, contains this definition of bodily harm, which applies to §609.224: "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." This means that an ordinary spanking involving

mere transient pain and even no temporary marks is "bodily harm"—again "child abuse" under §260C.007, subdivision 5, causing lawful seizure of the child.

Similarly, §609.377, which is incorporated into s§260C.007, subdivision 5, defines the crime of "malicious punishment of a child." Subdivision 2 provides the penalty for a violation that "results in less that substantial bodily harm." Section 609.02, in addition to containing the definition of "bodily harm," subdivision 7, also contains the definitions of two grades of bodily harm: "substantial bodily harm," subdivision 7a, and "great bodily harm," subdivision 8. So, §609.377's definition of "excessive" punishment causing "less that substantial bodily harm" implies that any "bodily harm" no matter how slight is enough to result in "child abuse" under §260C.007, subdivision 5. This means that an ordinary spanking involving mere transient pain and even no temporary marks is "bodily harm"—again "child abuse" under §260C.007, subdivision 5, causing lawful seizure of the child.

In Minnesota, while educational officials are immunized for use of corporal punishment to discipline children, the parent is not.[7] In contrast, parental corporal punishment is legally authorized in many states.[8] For example, Oklahoma Statutes

[7] *See also Ingraham v. Wright,* 430 U.S. 651 (1977) (corporal punishment administered by public school officials is constitutional).
[8]Gunderson Center for Effective Discipline, at http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/punishment-vs-abuse/(last viewed July 23, 2018).

Title 10A, §1-2-105(A)(2) provides that corporal punishment used to discipline a child cannot be the legal basis for a continuing child protection investigation or proceeding.

Recently, the Supreme Judicial Court of Massachusetts in 2015 upheld a common-law right to parental corporal punishment based on "the long-standing and widespread acceptance of such punishment remain[ing] firmly woven into our nation's social fabric." *Com. v. Dorvil*, 32 N.E.3d 861, 868 (Mass. 2015). Additionally, the Hawaii Supreme Court has found a state constitutional right to parental corporal punishment. *Hamilton ex rel. Lethem v. Lethem,* 270 P.3d 1024 (2012).

Finally, federal courts have not resolved the federal constitutionality of child protection services' intervention based on a parent's use of reasonable force to protect or discipline a child. Answering the constitutional question may have important consequences for the Department's admitted racial disparities. Since 1986, the University of Chicago's General Social Survey has been asking Americans about disciplining children "with a good, hard spanking."[9] The latest data, through 2016, show that about 74% strongly agree or agree with that sentiment;[10] however, African-Americans are, on average, about 11 percentage points more likely than whites, including Hispanics, to favor corporal punishment.[11] So, in turn, the alleged Appellee-Defendants unconstitutional seizure of children for ordinary spankings—as detailed

[9]University of Chicago General Survey data can be found at https://gssdataexplorer.norc.org/variables/646/vshow.
[10] *Id.*
[11] *Id.*

above—is at least part of the explanation for the Appellee-Defendants racial disparities.

Further, the amended complaint establishes the framework of alleged violations of familial association of the children from the parent and parent from the children wherein the ambiguity and vagueness of the underlying statutes allows governmental officials to equate spanking to assault or malicious punishment (as statutorily defined in a civil context) which a court would not do in the criminal context. *Id. e.g.,* ¶¶374–76.App.120.

Thus, one issue is whether the allegations in the Mitchell's amended complaint, taken as true and viewed in the nonmoving parties' favor, state a plausible claim that Boreland and the Appellee-Defendants lacked reasonable suspicion of child abuse when she participated in removing Mitchell's minor children from the home and custody of their parent. County officials used an unconstitutional legal standard because Minnesota statutes equate actions to discipline a child as "child abuse." To see the point, one needs to compare corporal punishment authorized for school officials their defenses which are not afforded to parents in Minnesota child protection statutes. *E.g.,* Amend. Compl. ¶¶372–76.App.120. Moreover, the alleged unconstitutionality of the governing child protection statutes served as a pretext to continually hold X.M. for 22 months depriving him of his constitutional rights of due process, substantive due process, and familial association.

Further, the constitutional claims of the amended complaint take issue regarding the proper notice to the parent of the termination of parental rights if disciplinary actions, such as spanking taken for the welfare of the child, are violative of procedural and substantive due process. *Id. e.g.,* ¶¶361–66; 371–376; 381–386; 391–398.App.119;120-22;122-23. At this stage of the underlying proceedings, Mitchell does not have to prove his legal theories. Under a Rule 12 analysis, plaintiffs are required only to show the factual basis of their claims—not the legal basis. *Ashcroft,* 566 U.S. at 678; *Twombly,* at 555.

Even if facts reveal an allegation of spanking as unreasonable, there also remains the issue of the government officials' manner in which they seized the children that also supports the claims under substantive due process showing as alleged that they interfered with the parental constitutional rights of the parent, but also with the familial right of association of his children. In this regard, X.M. held for 22 months and A.M., for five months, and Bryce, can take issue with the county officials regarding their initial seizure, and in particular, challenging the necessity of the length of their respective seizures—particularly X.M.[12]

[12] The fact that Mitchell pled to a lessor criminal offense as an objective to have two of his three children returned to him and agree that X.M. was in need of protection is immaterial as to the rights of the children. Amend. Compl. ¶¶180–83; 189–91.App.72-75. X.M., like A.M. and Bryce, was a victim of the governing child protection statutes as much as Mitchell as the parent. X.M.'s rights are as important from his point of view as that alleged for his father. While A.M. and Bryce were held for five months, X.M. was held for 22 months from February 2014 to December 2015. Amend.

Mitchell's right of familial association is included in the substantive due process right of freedom of intimate association—the right of privacy—which is based on the Fourteenth Amendment liberty interest. *See J.B. v. Washington County,* 127 F.3d 919, 927 (10th Cir. 1997) citing *Griffin v. Strong,* 983 F.2d 1544, 1547 (10th Cir. 1993). "The substantive component of the due process clause protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and are implicit in the concept of ordered liberty...." *Singleton v. Cecil*, 176 F.3d 419, 425 (8th Cir. 1999) (internal quotations omitted). Substantive due process protections are generally accorded for matters related to marriage, family, procreation, and the right to bodily integrity. *Id.*

This Court has stated that to establish a substantive due process claim, the plaintiff must demonstrate that the government's conduct is so outrageous that it shocks the conscience, offends judicial notions of fairness, or is offensive to human dignity. *Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002). Whether conduct shocks the conscience is a question of law. *Folkerts v. City of Waverly, Iowa,* 707 F.3d 975, 980–81 (8th Cir. 2013) citing *Terrell v. Larson,* 396 F.3d 975, 981 (8th Cir. 2005) (en banc).

> Because a wide variety of official conduct may cause injury, a court must first determine the level of culpability the § 1983 plaintiff must prove to establish that the defendant's

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Compl. ¶¶191;296, App.75;105, and Ex. 83. Dckt.8. There remains an important question here; if Mitchell was fit enough to get two of his three children back under his custody, why hold X.M. who had already voiced a desire to return home? Any perceived threat to X.M. by Mitchell would necessarily apply to A.M. and Bryce, but did not.

> conduct may be conscience shocking. Mere negligence is never sufficient. Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold. [*County of Sacramento v. Lewis,* 523 U.S. 833, 848–49 (1998)]. The deliberate indifference standard "is sensibly employed only when actual deliberation is practical." *Lewis,* 523 U.S. at 851. By contrast, the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.

Id. at 978 (some internal quotation marks and citations omitted).

This Court has opined that "[a] defendant can be held liable for violating a right of intimate association only if the plaintiff shows an intent to interfere with the relationship." *Reasonover v. St. Louis County, Mo.,* 447 F.3d 569, 585 (8th Cir. 2006) (citations omitted). "In applying the Lewis [intent-to-harm] standard, 'only a purpose to cause harm *unrelated to the legitimate object of* [the government action in question] will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.' " *Helseth v. Burch,* 258 F.3d 867, 872 (8th Cir. 2001) (en banc), *quoting Lewis,* 523 U.S. at 836. And, they succeeded. The allegations of the amended complaint assert that Boreland and other Appellee-Defendants *intended* to keep X.M., A.M., and Bryce from Mitchell. The verbal attacks and threats—which were carried out—were only the beginning. Amend. Compl. *e.g.,* ¶68 App.41 ("I am going to do everything in my power to see that the children are never returned to you."); ¶70 App.41 ("Why are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children.").

While parents have a liberty interest in the "care, custody, and management of their children," children as alleged in the underlying complaint also have corresponding rights as "persons" under our Constitution. *Swipies v. Kofka,* 419 F.3d 709, 713–14 (8th Cir. 2005) (liberty interest of natural parents in the care, custody, and management of their child) (citations omitted). But, it is recognized that "this interest is 'limited by the state's compelling interest in protecting a child.'" *Finnegan*, 899 F.3d at 627.

"Generally, mere verbal threats made by a state-actor do not constitute a § 1983 claim." *King v. Olmsted Cty.*, 117 F.3d 1065, 1067 (8th Cir. 1997). In *King*, the Court held that "a threat constitutes an actionable constitutional violation only when the threat is so brutal or wantonly cruel as to shock the conscience ... or if the threat exerts coercive pressure on the plaintiff and the plaintiff suffers the deprivation of a constitutional right." *Id.* at 1067. There, social services workers allegedly "interfered with [Mr. and Mrs. King's] right to familial relations by coercing and manipulating them with threats that Social Services would take [two of their children] unless the Kings 'cooperat[ed] with what the government wanted to do to [another one of their children].'" *Id.* The Court reasoned that the threats did not constitute an actionable constitution violation because the threats were not so brutal or wantonly cruel to shock the conscience and the threats did not exert coercive pressure on the Kings because the Kings did not act on these statements. *Id.* at 1067–68. Hence, this Court

found that the social workers did not exhibit any signs that they would act on these threats. *Id.*

However, from the perspective of Mitchell, X.M., A.M., and Bryce as alleged in their amended complaint, Dakota County government officials did act on their threats, particularly X.M. who was seized for 22 months. The entire amended complaint alleges the lengths to which government officials sought to keep X.M. from his father and succeeded for 22 months. The same is true for A.M. and Bryce albeit for five months. In other words, the allegations assert a deliberate interference since, throughout the time period, the government officials had time for deliberation. *Lewis,* 523 U.S. at 851. Moreover, the core element of the asserted claims also involve the challenges to the constitutionality of the governing child protection statutes.

The amended complaint concerns, in part, the deprivation of familial association between child and parent and parent and child. The length of time for each child's and parent's respective separations of their right of association were unduly violated. This was no minimal infringement. A.M. and Bryce were returned to Mitchell's custody five months after their seizure and only after a criminal plea bargain that led to a civil remedy for these two children. *Id.* ¶¶ 182; 184; 189.App.72-74. X.M. would be returned 22 months later, but under more dubious circumstances. As alleged, government officials further intended to keep X.M. from Mitchell through an ill-advised petition to terminate Mitchell's parental rights returning X.M. to the felon Campos. *Id.* ¶¶289; 291.App.104. Only upon Mitchell's pro se jurisdictional motion

that led to the success of X.M. finally being released, did government officials relinquish their seizure of the child. The facts alleged also reveal the plausibility of a severe abuse of power.

VI. Government officials made false representations to the court resulting in the extraordinary length of time X.M. was deprived of familial association.

Both the Supreme Court and this Court have recognized a liberty interest which parents and children have in each other's companionship. *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, 927 (8th Cir. 1987), citing *Lehr v. Robertson,* 463 U.S. 248, 258 (1983); *Myers v. Morris,* 810 F.2d 1437, 1462–63 (8th Cir. 1987). "Familial relationships have been protected from many forms of governmental intrusion. *Id.* citing, *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) (ordinance making it unlawful for grandmother to live with grandson declared unconstitutional); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (recognized fundamental interest of parents in guiding their children's future). The underlying amended complaint confronts governmental attempts to directly affect the parent-child relationship by means such as terminating parental rights and purposefully keeping the child from the parent. *Id.*

Mitchell alleged, also on behalf of his children and in particular X.M., that county officials violated the "integrity of the family unit [as] found protect[ed] in the Due Process Clause of the Fourteenth Amendment." *Stanley,* 405 U.S. at 651. "The interruption of this familial tie—even temporarily—can occur 'only with rigorous protections for the individual liberty interests at stake.'" *Bell v. City of Milwaukee,* 669

F.2d 510, 512 (7th Cir. 1984). The amended complaint asserts allegations as to how, once Dakota county officials had custody of X.M., they intentionally misrepresented to the court the desire of X.M. to return home to Mitchell. Amend. Compl. *e.g.* ¶¶195-97; 199; 270.App.76-77;78;98. The allegations assert continuing misrepresentation of facts to obtain judicial authorization to retain custody of X.M. and ultimately to terminate Mitchell's parental rights, not to mention the county's desire to transfer custody to Campos in Spain despite her known felony criminal record *involving previous criminal efforts to take her children from Mitchell.* Amend. Compl. *e.g.,* ¶¶33; 46–61; 288–90.App.33;37-39;103-04.

VII. It should be legally unacceptable that government officials may classify black men as unfit to be parents because Black families are too quick to spank their children.

Boreland's statements about black men as unfit parents should cause pause. It is not only reflective of her personal animus, but, as inferred by the factual allegations asserted, as the culture of the department she serves—child protection: "Why are black families so quick to spank their children? You are unfit to be parents and don't deserve to have children." Amend. Compl; ¶¶70; 480.App.42;138. The amended complaint not only alleges Boreland's statement as discriminatory, but specifically alleges the disparity of treatment by child protection social services towards blacks and other minorities. *Id. e.g.,* ¶¶478–80.App.138. *See also,* ¶ 72 App.42 (Boreland explaining her personal black family experiences with her African-American brother-in-law and other relatives).

The Equal Protection Clause requires that the government "treat" all similarly situated people alike." *Barstad v. Murray County*, 420 F.3d 880, 884 (8th Cir. 2005). Where a plaintiff has not shown discrimination based on membership in a class or group, the Supreme Court's "cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

And, while it is true that the use of threats or derogatory language of sufficient severity can, in some circumstances, amount to a constitutional violation actionable under 42 U.S.C. § 1983, the bar for such claims, however, is high. *See Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986). "Verbal threats and name calling usually are not actionable under § 1983." *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (citing *Martin v. Sargent*, 780 F.2d 1334, 1338-39 (8th Cir. 1985)). This is true even where the language used is discriminatory or demonstrates animus against a protected group. *See Black Spotted Horse v. Else*, 767 F.2d 516, 517 (8th Cir. 1985). However, while Mitchell may have been personally offended, paragraph 479 of the amended complaint documented disparate treatment between minorities and white parents and children.

Likewise, Section 1981 provides a remedy "against private actors who intentionally discriminate on the basis of race or ethnicity." *Bologna v. Allstate Ins. Co.,* 138 F.Supp.2d 310, 322 (E.D.N.Y.2001) (citing, *inter alia,* 42 U.S.C. § 1981; *Runyon v.*

McCrary, 427 U.S. 160, 168–75 (1976). To establish a claim under § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the statutorily enumerated activities. *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1087 (2d Cir.1993), *cert. denied,* 516 U.S. 824 (1995). The enumerated activities include the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). The phrase "full and equal benefit of all laws" includes the protections afforded under the U.S. Constitution. Boreland was sued in her official and individual capacity.

"Proving discriminatory purpose is no simple task." *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 511 (8th Cir. 2015). "To show discriminatory purpose, the claimant must show the official's decision to enforce the law was at least partially based on [ethnicity]." *Bell*, 86 F.3d at 823. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one [ethnicity] than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). A statistical disparity in treatment alone may be sufficient in the "rare" case where it is "so 'gross' or 'stark' or 'dramatic' that it alone will constitute prima facie proof of purposeful discrimination." *Inmates of Neb. Penal & Corr. Complex v. Greenholtz*, 567 F.2d 1368, 1375 (8th Cir. 1977). A "clear pattern" that

is "unexplainable on grounds other than [ethnicity]" may also supply proof of discrimination in "exceedingly rare cases." *Friends of Lake View Sch. Dist. Incorporation No. 25 v. Beebe*, 578 F.3d 753, 762 (8th Cir. 2009).

The amended complaint specified Boreland's discriminatory purpose—to remove Mitchell's children from an unfit parent because he is black, unworthy of having children, and his cultural ethnicity, according to her, is to spank children: "Why are all black families so quick to spank…." Amend. Compl. ¶480 App.138; *See also e.g.,* ¶¶70; 478-480.App.42;138. For instance, the amended complaint also referenced Department of Human Services reports since 2002 which reflect racial disparity between African-Americans and white parents and children. *Id.* ¶479.App.138. The alleged disparity referenced in the Department's own records should be sufficient evidence, with Boreland's comments about Mitchell and as a member of the black-family class of spankers, of (1) Boreland's exercising discretion to enforce the challenged child protection laws on account of race-showing the discriminatory effect and discriminatory purpose. *United States v. Armstrong,* 517 U.S. 456, 465 (1996). And (2), the allegations reflect selective enforcement of the challenged child protection laws as racially motivated and that other parents, such as white parents receive preferential treatment (*See* Amend. Compl. ¶479, App.138 regarding Department reports of disparity treatment between races).

In short, under the standards of Rule 12(b)(6), it is plausible that Boreland's statement is reflective of Dakota County government officials toward minorities, their

culture, and their treatment under governing child protection laws. Throughout the amended complaint, Mitchell alleged that Boreland and her co-Appellee-Defendants either approved of her methods or collaborated to adversely affect the constitutional protections he and his children should have been afforded. Amend. Compl. *e.g.,* ¶¶ 134–40; 249; 252; 500 (disregarding the misguided characterizations).App.57-58;90;91.

Additionally, the amended complaint challenges the governing Minnesota statutes that require a government official to take into account the "child-rearing practices of the culture" and the disparate impact on African-American children over white children. Amended Comp. ¶¶403–16.App.125-27. Again, Mitchell does not need to prove his legal theory at this stage of the proceedings. However, he has alleged sufficiently the factual basis for his discriminatory equal protection claims.

VIII. County officials did seek to "poison" Mitchell's marriage to exert a favorable outcome to keep X.M. from him, including efforts to terminate his parental rights.

This Court has acknowledged that the right to marriage has "been cast as a substantive due process right, and as an associational right." *Singleton v. Cecil,* 133 F.3d 631 (8th Cir. 1998), *rev'd on other grounds,* 155 F.3d 983 (8th Cir. 1998*), aff'd en banc,* 176 F.3d 419 (8th Cir. 1999), *cert. denied,* 528 U.S. 966 (1999) (citation omitted). In such circumstances, this Court has determined that when reviewing an intimate association, right-to-marry claim, the key question is whether the government "directly and substantially interfere[d] with the ... right to enter and maintain [a] marital relationship." *Id.*

In other words, the right to marry "does not invalidate every state action that has some impact on marriage.'" *Id.* at 634. "Rather, there must be evidence that the government 'significantly discouraged' a marriage, made a marriage 'practically impossible,' or 'acted with the goal of poisoning' a marriage." *Id.* at 635 (citation omitted).

Mitchell's amended complaint alleged, in sometimes pain-staking detail, the efforts of county officials in poisoning his marriage. Allegations reveal actual email correspondence in which Boreland sought to break-up the marriage between Mitchell and Litvinenko. Amend. Compl. ¶145.App.59. Boreland went so far as to contact Litvinenko's former partner Suiren Ter-Saakov and requesting him to commence a New Jersey court action for custody of their child M.L. *Id.* ¶¶144–146.App.59. The government's intent was to fracture the Mitchell family unit. This would require Litvinenko to resign her then current assignment in Minnesota and return to New Jersey to defend herself. *Id.* ¶147.App.59. Notably, Ter-Saakov did file an action, something he had never tried to do before to gain custody of M.L. but for Boreland. *Id.* ¶148 and ¶¶510, 513.App.60;146.

Additionally, Boreland, without a court order, demanded Litvinenko to remove herself from the Mitchell home immediately. *Id.* ¶¶79; 128; 513.App.45;56;146. The threat became overwhelming when Boreland told Litvinenko that if she did move out of the family home, she would remove her child M.L. from her custody and place the child in a foster home. *Id.* ¶¶ 83–85.App.45-46. *See also, id.* ¶¶80–82.App.42.

Meanwhile, Boreland would accuse Litvinenko of child abuse and eventually file a CHIPS petition to gain custody of M.L. and then dismissed it. *Id.* ¶179.App.72. As alleged, although governmental officials did not have the authority to do so, Boreland, P'Simer, and Akolly demanded Mitchell and Litvinenko remain separated. *Id.* There were no reasonable grounds for the accusations resulting in a forced separation between husband and wife for five months. *E.g.* ¶¶ 513–14.App.146-47. Further, Appellee-Defendants Coyne, Kopesky, Stang, and Yunker approved of the actions. *Id.* ¶516.

IX. Immunity defenses are not available to the Appellee Defendants to avoid either declaratory or monetary liability for the state claims asserted.

With the district court's dismissal of Mitchell's federal civil rights claims, there was no issue regarding the fact that the Appellee-Defendants are not immune from §§1981 and 1983 liability based upon the allegations of the underlying amended complaint.[13] Ord. 18-22. App.18-22. But, the district court did opine that the

[13] Federal law generally, provides, "officials are entitled to absolute immunity from civil rights suits for the performance of duties which are 'integral parts of the judicial process' as long as the judicial function was granted immunity under common law at the time § 1983 was enacted." *Dornheim v. Sholes*, 430 F.3d 919, 925 (8th Cir. 2005) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). The question of whether immunity applies turns on the specific conduct at issue, and whether the individuals were performing duties that were quasi-judicial in nature. *Robinson v. Freeze,* 15 F.3d 107, 109 (8th Cir. 1994). However, for instance, they are not entitled to absolute immunity in civil rights suits from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute." 514 F.3d at 908 (quoting *Miller*, 335 F.3d at 896). Likewise,

Appellee-Defendants were entitled to immunity from liability regarding the state tort claims. *Id.*

Under the doctrine of official immunity, "a public official charged by law with duties which call for the exercise of his [or her] judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Vassallo ex rel. Brown v. Majeski,* 842 N.W.2d 456, 462 (Minn. 2014) (citations omitted). Official immunity is intended to enable public employees to perform their duties effectively, without fear of personal liability that might inhibit the exercise of their independent judgment. *Anderson,* 678 N.W.2d at 655. The "immunity [is] from suit, not just from liability." *Sletten v. Ramsey Cnty.,* 675 N.W.2d 291, 299 (Minn. 2004). Official immunity can apply to any act that involves an exercise of independent judgment, even at the "operational level." *Anderson,* 678 N.W.2d at 657.

However, the applicability of official immunity turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial and, if ministerial, whether any ministerial duties were violated; and (3) if discretionary, whether the conduct was willful or malicious. *See Mumm v. Mornson,* 708 N.W.2d 475, 490 (Minn. 2006) (citing *Elwood v. Rice County,* 423 N.W.2d 671, 679 (Minn. 1988).

Mitchell's amended complaint alleges conduct well outside of the government

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qualified immunity protects "public officials from § 1983 damage actions if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Bradford v. Huckabee,* 394 F.3d 1012, 1015 (8th Cir. 2005).

officials' legitimate role as quasi-prosecutorial advocates in the proceedings before family court. Because the allegations of Mitchell's amended complaint assert that government officials used unconstitutional standards, fabricated evidence, and otherwise made false statements to the court in executed submissions, those actions are not similar to discretionary decisions about whether to prosecute or to keep custody of Mitchell's children for the length of time each were subjected to. They constitute willful conduct to deceive the court through executed documents made under oath. Throughout the amended complaint are examples of allegations of false or fabricated evidence made or omitted to the court. *See e.g.,* Amend. Compl. ¶197; ¶¶158; 161; 197-198(a), (b), (d); 200; 332; 341–42; 350.App.65-66;77-78;80-81;112-14;116. Try as we might, we cannot conceive of circumstances in which the Appellee-Defendant social workers would not know and understand that they could not use fraudulent behavior in *any* court setting to interfere with a person's fundamental constitutional liberty interest. *See also, Hardwick v. County of Orange*, 844 F.3d 1112, 1120 (9th Cir. 2017).

Moreover, other allegations assert that the conduct was willful or malicious. It cannot be forgotten that from the start Boreland sought to do whatever was in her "power to see that the children are never returned to [Mitchell's] custody." *E.g.,* Amend. Compl. ¶68.App.41. Her position, adopted and approved by her superiors and colleagues, was based upon beliefs regarding black families: "Why are all black families so quick to spank their children? You are unfit to be parents and don't

deserve to have children." *Id. e.g.,* ¶¶70; 72; 134–40; 480.App.41;42;57-58;138. X.M., in particular, in custody for 22 months, was a victim of the government officials' willful conduct as alleged. Likewise, Mitchell alleges that the Appellee-Defendants conspired with others to deprive him and his children of their constitutional rights, alleging that the conspiracy was committed through acts that were outside the scope of their judicially ordered functions. *Id.* ¶¶546–51 (Count XV).App.154-56. Mitchell lists examples of their acts. *Id. e.g.,* ¶549.

The district court asserts that the amended complaint is rooted in individual interactions and hence, no proof of widespread policy. Ord. at 16. Indeed, while most of Mitchell's interactions were with separate government officials, the allegations do assert and reveal notice, the widespread knowledge, and acceptance of the conduct complained of. *E.g.,* Amend. Compl. Ex. 9; Dckt.8, ¶¶589–590.App.162. It is well established that the removal of children from their parents' custody violates a constitutional right if the removal occurs without reasonable suspicion of child abuse. *See Heartland Acad. Cmty. Church v. Waddle,* 427 F.3d 525, 534 (8th Cir. 2005); *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005). X.M. had been separated from his father for 22 months with an effort by the same officials to terminate Mitchell's parental rights in an attempt to transfer custody to the felon Campos knowing for months they had no authority to do so. That is also willful conduct—to continually deprive X.M. to be reunited with his family. To impose hardship on a parent is one thing, but to impose the constitutional hardship on a child is another.

The district court opined that the Appellee-Defendants CHIPS pursuit was "grounded in an objectively, legally reasonable basis" to grant them immunity. Ord. at 22. Not so. The underlying complaint, in part, challenges the constitutionality of state statutes regarding pre-and post-deprivation proceedings in which government officials equate ordinary spanking in correcting the behavior of a child as child abuse. And this case exposes intentional willful misconduct to deprive X.M. of his constitutional rights for 22 months A.M. and Bryce for five months, and those of their father Mitchell. Immunity cannot be a shield when government officials have publically waved their swords to pierce into the heart of the Appellant-Plaintiffs' constitutional rights.

CONCLUSION

The district court decision granting the Appellant-Defendants' motion to dismiss should be reversed. The matter should be remanded to the district court for further proceedings in accordance with this Court's opinion.

Dated: May 2, 2019

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