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.

APPELLANTS' REPLY BRIEF

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Dwight Mitchell and his children's[1] amended complaint is adequately pled to survive the challenges of Dakota County's[2] 12(b)(6) motion to dismiss. They have met their obligation for "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations;" however, "a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell A. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007). "[A] plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims ..., rather than facts that are merely consistent with such a right.' " *Gregory v. Dillard's, Inc.,* 565 F.3d 464, 473 (8th Cir. 2009) (en banc) (quoting *Stalley v. Catholic Health Initiative,* 509 F.3d 517, 521 (8th Cir. 2007)).

Dakota County cannot state the claims asserted are insufficient to provide it with fair notice of the substance of each claim and the grounds upon which each rests.

Moreover, the district court's decision *did not* address the specific constitutional merits of the statutes identified at issue. The district court's decision did, however,

[1] Unless specifically identified otherwise, reference to "Dwight Mitchell and his children" refer to the Appellants Dwight Mitchell, X.M. and A.M., and Bryce Mitchell. Co-Appellant association, Stop Child Protection Services From Legally Kidnapping, is referred to as "SPSC."

[2] "Dakota County" references all Appellees, Dakota County Social Services and the governmental officials identified, and the Commissioner of the Minnesota Department of Human Services.

dismiss all claims under broad principles of law that were addressed accordingly. These included: standing under the Declaratory Judgment Act; failure to state a claim for constitutional challenges under procedural due process, substantive due process, equal protection, and freedom of association. Or. Granting Defs. Mot. to Dismiss 6–8; App. 6–8. Mitchell and his children addressed each of these principles of law with specific citations to the record, amended complaint, and exhibits.[3]

I. The monetary damages sought regarding the constitutional claims survive since the district court did not dismiss Counts I through VI, except for lack of standing for declaratory relief.

Dakota County does not dispute Mitchell and his children may still seek monetary damages for the alleged prior violations of their constitutional rights. Minn. Dept. Human Serv. Rsp. Br. 11–14; Dakota Cty Rsp. Br. 14–38. The district court *did not* dismiss Counts I through VI for lack of standing for monetary damages. ADD. 6–7. The claims have survived.

As this Court recently stated, "'Absent a sufficient likelihood that [it] will again be wronged in a similar way, [MFA] is no more entitled to an injunction than any other citizen of [Missouri].'… If MFA wants to vindicate what happened to it in 2014,

[3] The voluminous exhibits were purposefully omitted from the appendix. The voluminous pages and exhibits, and admittedly, some of a repetitive nature, remain part of the record. The need for adding the hundreds of pages to the appendix would serve little purpose since citations to them were limited and yet electronically available in the district court record. *See* Civil Doc., USDC Court File No. 18-CV-1091 WMW/BRT; APP. 170–182. The critical document, the amended complaint, is the core document along with the district court's decision. *See* APP. 1–169.

a claim for damages would be more appropriate." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 800 (8th Cir. 2016) (citation omitted). And, Mitchell and his children made a claim for monetary damages. Moreover, under each claim, references to 42 U.S.C. § 1983 are also made. As this Court recognized, "it is clearly established that the removal of children from their parents' custody violates a constitutional right if the removal occurs without reasonable suspicion of child abuse. *Stanley v. Finnegan*, 899 F.3d 623, 627 (8th Cir. 2018). The district court did not dismiss Counts I through VI, where Mitchell and his children sought monetary damages under § 1983 allegations.

The association, SCPS, stands in a similar position.

Instead, Dakota County argues that they cannot assert their monetary damages for only facial constitutional violations under the Declaratory Judgment Act. *E.g.,* Minn. Dept. of Human Serv. Rsp. Br. 14; Dakota Cty Rsp. Br. 38–39. Yet, the "actual controversy" for monetary damages still exists for Mitchell and his children, if not under the Declaratory Judgment Act, then for the violation of their respective civil rights. However, the association, SCPS, still can seek declaratory relief even under Dakota County's own stated standard: "(1) an injury; (2) a causal connection; and (3) redressability." *Id.* 11 (citation omitted). Dakota County fails to challenge the facts alleged regarding its voluntary stopping of the alleged illegalities; hence, the claims asserted cannot be deemed moot. *Id.* 11–14; 38–39.

There has been no litigation process to date where Dakota County can "'make it' absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Mitchell Princ. Br. 18 (citation omitted). The "heavy burden" based upon its own behavior remains on Dakota County, *not* on the association at the amended complaint or Rule 12 stage of the proceedings. *Id., citing Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 189 (2000) and *Charleston Housing Authority v. U.S. Dept. of Agric.,* 419 F.3d 729, 740 (8th Cir. 2005).

Dakota County did not explain how it has met this "heavy burden" that the allegations regarding the constitutional challenges of the illegality of the application of state child-protection statutes regarding parental discipline would not recur to interfere with both parental and child protected rights. Here, under all circumstances, when disciplinary actions are taken through corporal punishment, the parental acts are subject to Dakota County investigation and prosecution. The irony of course, is that the parent is given no statutory defense.

And, this is the essence of the lawsuit. The child-protection statutes are so self-contradictory or vague, parents are uncertain as to which corporal disciplinary acts are deemed unreasonable without a showing of a prescribed threshold of harm that can lead to the termination of the rights of both the parent and the child. Here, Dakota County has equated the corporal punishment of spanking to "physical abuse" even if temporary redness occurs on the child's bottom. Granted, no child wants to be punished. No child of any age wants to be spanked. Spanking may be humiliating,

but so are other forms of discipline. But, here, for example, when corporal punishment is involved, Dakota County and the Department disregarded or ignored exculpatory evidence to allow for its continued 22 month seizure of X.M. Dakota County does not make any connection from the act of corporal punishment to mental injury to justify actions that can lead to the termination of rights for both parent and child.

While Mitchell and his children may have left Minnesota, members of the SCPS association have not. They remain "citizens of Minnesota." Amend. Compl. ¶ 4; APP.4. The members are parents who have been affected by child protection services in Minnesota. *Id.* Mitchell and his children's experience with Dakota County officials remain the prime example of the constitutional infirmities of the statutes at issue. Because members have remained in Minnesota, as no allegation asserts they have left the state, the parents and their children remain subject to Minnesota law and remain subject to those laws as the children remain minors. *See e.g.,* Amend. Compl. ¶¶ 368; 378; 388; 401; 415. Nowhere does Dakota County assert that once a parent and child is subject to a CHIPS[4] petition and the matter resolved, that the parent and child cannot be subject to another CHIPS petition again, even for the same or previous allegation of "abuse"—disciplinary spanking for example.

[4] Child in need of protection or services.

The association members, as alleged, have been and are subject to the statutes at issue. Not every parent in Minnesota has been subjected to a CHIPS petition.[5] But, in this association, the members have. "Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974). The specific statutes at issue here are not generalized grievances about the conduct of government officials, but specifically the lack of a constitutional standard resulting in the specific application of the statutes resulting in the removal of children for acts of corporal discipline. *Am. Legion v. Am.*

[5] According to the American Health Association, 37.4 percent of American children are subject to child protection services investigations. Notable is a conclusion of the report, "Lifetime Prevalence of Investigating Child Maltreatment Among US Children," "We estimate that 37.4% of all children experience a child protective services investigation by age 18 years. Consistent with previous literature, we found a higher rate for African American children (53.0%) and the lowest rate for Asians/Pacific Islanders (10.2%)." https://ajph.aphapublications.org/doi/10.2105/AJPH.2016.303545 (last visited, July 1, 2019).

Humanist Assn., 17-1717, 2019 WL 2527471, at *3 (U.S. June 20, 2019) *citing Schlesinger,* 418 U.S. at 220–21.

Moreover, as explained in Mitchell's and his children's principal brief, each relevant claim incorporates the amended complaint's previous paragraphs, and references the association accordingly. Mitchell, his children, and the SCPS have standing.

II. The statutory provisions at issue are unconstitutional because there is no defense for the parent to use reasonable force in the discipline of their children.

Dakota County asserted that Mitchell's children were in need of protection or services under § 260C.007, subdivisions 6(2)(i); (2)(ii); (2)(iii), and (9):

- (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2,
- (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13,
- (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15…
- (9) is one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home….

The underlying issue and facial constitutional challenges relate to the limitation imposed by the legislature in 2010 as applied to subdivision (2)(i), but not to either subdivisions (2)(ii), (iii), or (9). Indeed, the legislature has stated under § 626.566, subdivision 2(k) that "abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury." Minn. Sess. Laws-2010, ch. 281. However, that limitation is specific to subdivision (2)(i), but not to other provisions.

Under subdivisions (2)(ii) and (2)(iii), references to subdivision 5, is not a limitation, but an expansive definition of "child abuse" each providing a different and sometimes overlapping definition under criminal statutory law (which do not include any affirmative defense for the use of reasonable force): "'Child abuse' means an act that involves a minor victim that constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.322, 609.324, 609.342, 609.343, 609.344, 609.345, 609.377, 609.378, 617.246." § 260C.007, subdivision 5. The same subdivision also cites section 626.556, subdivision 2 as a definition of "child abuse." While the definition includes the use of "reasonable and moderate physical discipline of a child" by a parent, because of the use of the disjunctive "or," it is unavailable under subdivisions (2)(ii) and (iii) because of the explicit legislative limitation of its use under (2)(i). And, as for subdivision 9, there is no available defense as explained. Thus, the facial challenges regarding the subdivisions of (2)(ii) and 2(iii) (and subdivision 9) as referenced apply. Under no circumstances, when a CHIPS petition asserts these

specific subdivisions, does a parent have available to him or her the legislative defense of reasonable and moderate physical discipline of a child.

Notably, the legislative limitation under subdivision (2)(i) in 2010, occurred after the Minnesota Supreme Court decision in *In re Welfare of Children at N.F.,* 749 N.W.2d 802, 210 (Minn. 2008). *See* Minn. Dept. of Human Serv. Rsp. Br. 22–23. Hence, the applicable rationale of the decision is cabined to the statute as then enacted. *See e.g., Melillo v. Heitland,* 880 N.W.2d 862, 865 (Minn. 2016) .

Thus, Dakota County's referenced argument that Minnesota's definition of "child abuse" under § 260C.007 for purposes of civil seizure of children permits corporal punishment is based on three unpersuasive authorities: § 609.379; § 626.556, subd.2; and *In re Welfare of Children at N.F.* First, Minnesota Statutes §260C.007, subdivision 5 fails to incorporate 609.379, the parental "authorized use of force" criminal defense, leaving 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. Notably, § 609.379 states that it only applies to criminal proceedings, including § 260C.045, but not to civil proceedings such as § 260C.007:

> Subd. 2. **Applicability.**
>
> This section applies to sections 260B.425, 260C.425, 609.255, 609.376, 609.378, and 626.556.

Thus, there is a facial violation of both the Seizure and Due Process Clauses.

Second, the references in Minnesota Statutes §260C.007, subdivisions 5 and 6, to § 626.556, subdivision 2's definitional limitation of "physical and sexual abuse" to exclude some corporal punishment, are partially excepted by the text of subdivisions 5 and 6. In subdivision 5, any limitation in § 626.556, subdivision 2 only applies to Clause 2, not Clauses 1 and 3:

> Subd. 5. **Child abuse.**
>
> "Child abuse" means an act that involves a minor victim that [Clause 1] constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.322, 609.324, 609.342, 609.343, 609.344, 609.345, 609.377, 609.378, 617.246, or [Clause 2] that is physical or sexual abuse as defined in section 626.556, subdivision 2, or [Clause 3] 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.

(Emphasis added.) The disjunctive "or" and the text "as defined in § 626.556, subdivision 2" reveals the limitations of § 626.556, subdivision 2, as it applies only to Clause 2 and not Clauses 1 and 3. Since Clauses 1 and 3 are not similarly-worded to allow for corporal punishment, there is a facial violation of the Seizure and Due Process Clauses.

Similarly, in subdivision 6, any limitation in § 626.556, subdivision 2 only applies to section (2)(i), not to sections (2)(ii) and (2)(iii).

> Subd. 6. **Child in need of protection or services.**
>
> "Child in need of protection or services" means a child who is in need of protection or services because the child:… (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2, (ii) resides with or

> has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13, (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15;

(Emphasis added.) The disjunctive "or" and the text "as defined in § 626.556, subdivision 2" shows that the limitations of section 626.556 are limited to section (2)(i), but not sections (2)(ii) nor (2)(iii). Since section (2)(ii) and (2)(iii) are not similarly-worded to allow for corporal punishment, there is a facial violation of the Seizure and Due Process Clauses.

Third, the Minnesota Supreme Court decision in *In re Welfare of Children at N.F.* in 2008 was decided prior to a 2010 amendment to section 260C.007 which makes it clear that the § 626.556, subdivision 2 limitations only apply to section 260C.0007's section (2)(i) of subdivision 6, not to sections (2)(ii) and (2)(iii). Under Minnesota case law, an appellate court decision interpreting a pre-amended statute is considered "cabined" as a limited precedent. *Mellillo,* 880 N.W.2d at 865. The 2010 amendment to subdivision 6 made a significant change to subdivision 6, section 2. The 2008 text considered in *In re Welfare of Children at N.F.* was:

> (2)(i) has been a victim of physical or sexual abuse, (ii) resides with or has resided with a victim of domestic child abuse as defined in subdivision 5, (iii) resides with or would reside with a perpetrator of domestic child abuse or child abuse as defined in subdivision 5, or (iv) is a victim of emotional maltreatment as defined in subdivision 8.

The 2010 amendment amended the text to read:

> (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2, (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13, (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15;

Minn. Sess. Laws 2010, ch. 281, sec. 1 (emphasis added). By the legislature adding the text "as defined in section 626.556" to section 2(i) and with the disjunctive "or", the limitations of section 626.556 do not apply to sections (2)(ii) and (2)(iii). Therefore, Dakota County's arguments based on *In re Welfare of Children at N.F.*, a 2008 case, are inapposite because subsequent amendments made it clear that the limitations of section 626.556 only apply to subdivision 6's section (2)(i) and do not apply to sections (2)(ii) and (2)(iii). No one falsely represented "to the Court that reasonable corporal punishment is prohibited by Minnesota law." Minn. Dept. of Human Serv. Rsp. Br. 21. Corporal punishment is not available as a defense against false accusations of child abuse by government officials in a child seizure proceeding.

Dakota County also tries to deflect the continuing seizure of X.M. and A.M., and Bryce Mitchell by stating that it did not "seize" the children—the police did. Dakota Cty. Rsp. Br. 27. However, the County did continue the seizure for over 21 months of X.M., and five months for A.M. and Bryce based upon the initial seizure and despite having no evidence to support the continuing seizure for the subsequent months separating father from sons and sons from their father. It was not the police who continued the seizure, but Dakota County officials: "The Fourth Amendment

applies in the context of a seizure of the child by a government agency official *during* a civil-abuse or maltreatment investigation." Mitchell Princ. Br. 24 citing *SPhillips v. County of Orange,* 894 F. Supp.2d 345, 359–60 (S.D.N.Y. 2012) *quoting Kia P. v. McIntyre,* 235 F3d 749, 762 (2d Cir. 2000) (emphasis added). Hence, Fourth Amendment analysis is inclusive as to the moment of seizure and the continuing of that seizure. *Id.* citing *Stanley v. Finnegan,* 899 F.3d 623, 628 (8th Cir. 2018).

Dakota County also misrepresents the facts as alleged in the amended complaint regarding the children's seizure. X.M. did not state he was "abused;" he stated that he was "spanked." Dakota Cty Rsp. Br. 27; *compare* Amend. Compl. ¶¶ 29 and 31. Notably, there was no evidence of imminent harm. Meanwhile, the self-serving allegations of the County in its motion to transfer legal and physical custody to X.M.'s mother, Eva Campos, and that Mitchell told two unidentified social workers that they should look to Campos for permanent placement of X.M. instead of reunification, contradicts all allegations of the amended complaint *and* what the County *knew* about Campos *before* its continued seizure of X.M. Dakota Cty. Rsp. Br. 27 and Cty. App. 139.

Moreover, at the time, Dakota County *knew* the state district court did not have jurisdiction to transfer physical and legal custody over that of the New Jersey courts, yet pursued its course of action until finally challenged and then virtually admitted its wrongful acts. The amended complaint served notice Dakota County does not deny its knowledge of Campos and the New Jersey district court jurisdiction to justify the

continued seizure of X.M. for over 21 months (who had voiced a desire to be reunited with his father early in the process) and its attempt to transfer legal and physical custody to the mother.

III. The Appellees raise no new arguments to suggest the constitutional claims should be dismissed and the district court decision affirmed in all respects.

Both Dakota County and the Minnesota Department of Human Services raised substantially the same arguments regarding why they believe Mitchell's and his children's claims should be dismissed. Those arguments have been addressed in the principal brief. However, there are a couple of additional points to address.

Neither the County nor the Department recognize the constitutional rights of the children. They appear unmoved by the children's claims and unmoved by the continued unjustified five-month seizures of A.M. and Bryce. They have no regard to the amended complaint allegations of X.M. that the County, with Department participation, for over 21 months rejected his pleas to be reunited with his family while the County, as alleged, continued making misrepresentations to others, including the state district court, of X.M.'s situation resulting in his deprivation of rights.

Neither the County nor the Department explain their disregard of exculpatory evidence to deprive Mitchell and his children of their substantive and due process rights. They cannot hide behind qualified or absolute immunity. First, the constitutional rights of both Mitchell and his children are "clearly established." "The

removal of children from their parents' custody violates a constitutional right if the removal occurs without reasonable suspicion of child abuse." *Stanley v. Finnegan,* 899 F.3d 623, 627 (8th Cir. 2018). The amended complaint alleges that the County disrupted the familial integrity; thus, it is not entitled to qualified immunity, because the actions taken were not properly founded upon a reasonable suspicion of child abuse. *Id.* The issue is whether the allegations in the amended complaint, taken as true and viewed in favor of Mitchell and his children, stated a plausible claim that Dakota County lacked reasonable suspicions of child abuse to seize the children and continue that seizure for over 21 months. *Id.*

The amended complaint alleged that Dakota County and its officials acted under the color of state law. Yet, the County continued the seizure knowing of exculpatory evidence and of Campos's history regarding her desire and criminal behavior to obtain custody of her children. Dakota County officials forced the continued seizure of Mitchell's children. This necessitates the repetition of this Court's maxim related to seizures and applicable here: "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.* at 628. The amended complaint raises a fair inference that Dakota County was aware of the substantial exculpatory evidence developed during its investigation before making its decision to continue the seizure for over 21 months. *E.g.,* Amend. Compl. ¶¶44; 62; 65–66; 89; 110; 112; 134. App. 37; 40–42; 46; 53; 54; 57. In other words,

reasonable suspicion of child abuse was not clearly established at the time to justify either the initial seizure or continued seizure especially for X.M. for over 21 months. *Finnegan,* 899 F.3d at 629.

CONCLUSION

The Mitchells' amended complaint is not perfect. However, it is sufficient to provide the necessary allegations to give notice and factually support the constitutional allegations asserted, including standing for all Appellants. The district court dismissed the amended complaint without prejudice indicating that the allegations continue to have merit. But, the rationale for the dismissal is not substantiated under the law. Therefore, the district court decision should be reversed.

Dated: July 1, 2019

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