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 – Petitioners,

v.

Dakota County Social 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; County of Dakota; Pamela Wheelock, in her official capacity as Acting Commissioner of Minnesota Department of Human Services,

Defendants/Appellees – Respondents.

PETITION FOR REHEARING EN BANC

June 17, 2020

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INTRODUCTION

This proceeding includes a question of exceptional importance upon which the United Supreme Court and the courts of appeal are divided:

> Whether the panel erred by applying the "shock the conscience" test under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) for child protection services' liability instead of strict scrutiny review under *Troxel v. Granville,* 530 U.S. 57, 65–66 (2000) and its predecessors, when Minnesota's statutes chill constitutionally-protected parental discipline.

STATEMENT OF THE CASE

The George Floyd matter shows something is wrong in Minnesota. And, it's not just the police. Minnesota's child protection services unconstitutionally violate human rights, too. It's not an accident that the petitioner in this case, Dwight Mitchell, is also a black man.

As the Eighth Circuit quoted respondent Dakota County Child Protection Services, black parents are "quick to spank their children" and "don't deserve to have children":

> In a private meeting room outside of the courtroom where an emergency hearing was held, Boreland [of Dakota County Child Protection Services] told Mitchell, "I am going to do everything in my power to see that the children are never returned to your custody." After Mitchell told her that Campos and the children were lying about the abuse, Boreland responded: "Why are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children."[1]

[1]Op. at 3

In Minnesota, compared to white children, based on child population estimates, African-American children were 3.0 times more likely to be seized by CPS.[2] Children identified as two or more races were 4.8 times more likely to be seized by CPS.[3] (59.9 percent of those children identified as two or more races, identified one race as African-American/Black).[4] This racial disparity has been acknowledged and consistent in each Department of Human Services annual, out-of-home-placement report for the last ten years; yet, Minnesota has done little to ameliorate the racial disparity.

Successful executive Dwight Mitchell has always been a fit black parent. After the seizure of his children, which Mitchell disputed, Mitchell submitted to the government-required evaluations and passed. Two psychologists evaluated Mitchell and recommended, three months after the seizure, that the children be immediately returned to Mitchell. At five months after the seizure, CPS recognized Mitchell as a fit parent by returning his 6-year old son A.M. But, the seizure of his 10-year old son X.M. inexplicably lasted another year-and-a-half. In total, CPS seized X.M. for 22 months based on a single instance of spanking which did not warrant medical attention.

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[2]Minnesota's Out-of-home Care and Permanency Report, 2017 (Minnesota Department of Human Services (Nov.2018) at 2; located at: https://www.leg.state.mn.us/docs/2018/mandated/181111.pdf

[3]*Id.*

[4] *Id.* at 16

The panel's decision chose to avoid, rather than adjudicate, the petitioners' constitutional claims against Minnesota's CPS statutes chilling parental discipline. The petitioners were denied meaningful judicial review. The panel's avoidance was the result of errors in three subject areas. First, the court should have applied strict scrutiny review to the constitutional claims against the Minnesota statutes chilling parental discipline instead of the shock the conscience test. Second, the court should have recognized associational standing. Third, the court should not have applied qualified immunity.

Minnesota's civil statutes §§ 260C.007, subds. 5, 6, & 13; 260C.301, subd. 1; and 626.556, subd. 2 prohibit all parental discipline by defining it as "child abuse." Even ordinary parenting yelling invites CPS interference and termination of parental rights. *Id.* The unconstitutionally low standard causes the government's admitted racial disparities because African-American parents, particularly, have a more aggressive view of parental discipline.[5]

Additionally, in the Mitchell family's case, CPS was so committed to breaking up this black family—"I am going to do everything in my power to see that the

[5] According to the University of Chicago's General Social Survey, which has been asking Americans about disciplining children "with a good, hard spanking" since 1986, the latest data, through 2016, show that about 74% strongly agree or agree with that sentiment; however, African-Americans are, on average, about 11 percentage points more likely than whites, including Hispanics, to favor corporal punishment. University of Chicago General Survey data can be found at https://gssdataexplorer.norc.org/variables/646/vshow.

children are never returned to your custody"[6]—that it engaged in patterns of judicial deception to ensure continued seizure of X.M. for 22 months. Such interference with parental rights, statutory and judicial deception, violates the U.S. Supreme Court's doctrine of parental rights expressed in *Troxel* and its predecessors.[7]

The panel decision does not follow the U.S. Supreme Court's jurisprudence on parental rights in that governmental interference with parental rights is subject to strict scrutiny under *Troxel* and its predecessors. Instead, the Eighth Circuit[8] and several other courts of appeals[9] have rejected strict scrutiny under *Troxel*, even though *Troxel* was decided in 2000, because the 1998 case *County of Sacramento* mandated the "shock the conscience" test for damages claims against the police. Thus, a split exists between the U.S. Supreme Court and the courts of appeals on whether claims against child protection services should be governed by the U.S. Supreme Court's strict

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[6] Op. at 3.

[7] "*Troxel* and its predecessors" include: *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Meyer v. Nebraska,* 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535 (1925); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978); *Parham v. J. R.,* 442 U.S. 584, 602 (1979);*Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997).

[8] The panel's opinion at page 8 relies on *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 980 (8th Cir. 2013) which applied *County of Sacramento* instead of strict scrutiny under *Troxel* and its predecessors.

[9] The other courts of appeal applying *County of Sacramento* "shock the conscience" test instead of *Troxel* and its predecessors' strict scrutiny include the Second, Third and Eleventh Circuits. *Southerland v. City of New York,* 680 F.3d 127, 151 (2nd Cir. 2012); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir. 1999); and *Maddox v. Stephens*, 727 F.3d 1109, 1119 (11th Cir. 2013).

scrutiny test of *Troxel* and its predecessors or the shock the conscience test of *County of Sacramento*.

In their complaint, Mitchell and his children brought damages claims, including a nominal damages claim[10], based on Minnesota's statutes chilling constitutionally-protected parental discipline. The parents' association, including 3,459 Minnesota parents, sought prospective relief against the state and local defendants as well.[11] Forty-six association members filed declarations in support of the lawsuit alleging Minnesota statutes unconstitutionally interfere with their parental rights.[12] The association has already assisted parents in rescuing seven Minnesota children from CPS seizures.[13]

The amended complaint was dismissed by the District Court based on the shock the conscience test, lack of associational standing and qualified immunity. The District Court's decision was affirmed by the Eighth Circuit panel on May 19, 2020. In this petition, petitioners seek rehearing en banc.

[10] Corrected Amended Complaint at 144 (Dkt. 8).
[11] Mitchell Dec. at 2 (Dkt. 45).
[12] Kaardal Dec. Exs. 1-46 (Dkt. 46).
[13] Mitchell Dec. at 2 (Dkt. 45).

STATEMENT OF ISSUES

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellants petition the Court for a rehearing en banc of the panel's 3-0 decision of this appeal. The questions presented in this petition are:

1. Whether the panel erred by applying the "shock the conscience" test under *County of Sacramento* for child protection services' liability instead of strict scrutiny review under *Troxel* and its predecessors when Minnesota's statutes chill constitutionally-protected parental discipline.
2. Whether the panel erred by determining that an association of 3,459 Minnesota parents did not have standing to make pre-enforcement claims for prospective relief against enforcement of Minnesota's civil statutes §§ 260C.007, subds. 5, 6, & 13; 260C.301, subd. 1; and 626.556, subd. 2 which prohibit all forms of parental discipline by defining them as "child abuse."
3. Whether the panel erred by applying qualified immunity to Dakota County which is not eligible for qualified immunity because it is a county, by applying qualified immunity to the state and county public officials on a Rule 12 motion to dismiss when instead it should have been treated as an affirmative defense, and by applying Eleventh Amendment immunity to the state officials' legally-unauthorized misconduct.

ARGUMENT

The panel's decision leaves no path for Minnesota parents and their association to sue under 42 U.S.C. § 1983 against unconstitutional CPS statutes and CPS misconduct. According to the U.S. Supreme Court decisions in *Troxel* and its predecessors, the legal issues presented here are of exceptional importance as they relate to the federal courts providing legal protection to Minnesota's parents and children from unconstitutional CPS interference with their families.

I. The panel's decision avoided meaningful constitutional review of Minnesota's statutes chilling parental discipline in Minnesota by making errors in the three subject areas of strict scrutiny review, associational standing and qualified immunity.

The panel's decision avoids meaningful review of the Mitchell family's and the associational parents' constitutional claims against enforcement of Minnesota's civil statutes §§ 260C.007, subds. 5, 6, & 13, 260C.301, subd. 1, and 626.556, subd. 2, which prohibit Minnesota parents from disciplining their children. Minnesota's statutes incorporate parental discipline into its statutory definition of "child abuse."[14]

But, the U.S. Supreme Court in *Troxel* instructed the federal courts that there has been and should continue to be a consistent, nation-wide commitment to parental

[14]In these proceedings, Appellees have inaccurately represented to the Court that Minnesota's civil statutes do not include parental discipline in its statutory definitions of "child abuse"—but they do. *See* Minnesota Statutes §§ 260C.007, subds. 5, 6, & 13, 260C.301, subd. 1, and 626.556, subd. 2. For a detailed discussion of how Minnesota law includes parental discipline in its definition of "child abuse", see Appellees' Reply brief at 7-14.

rights under the Due Process Clause as stated not so long ago by the U.S. Supreme Court:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Troxel, 530 U.S. at 65 (plurality) (citations omitted).

But, in direct contradiction, the Eighth Circuit panel's application of the "shock the conscience test," qualified immunity and lack of standing leave parents and parents' associations with virtually no path under 42 U.S.C. § 1983 to vindicate the parental rights affirmed in *Troxel*.

The constitutional concern is that fit parents using ordinary physical discipline, according to Minnesota Statutes §§ 260C.007, subds. 5, 6, & 13, 260C.301, subd. 1, and 626.556, subd. 2, are committing "child abuse," and are subjected to child protection proceedings. In turn, the threat of child protection proceedings deters—chills—Minnesota parents from disciplining their children—a continuing violation of their constitutionally-protected parental rights.

II. Strict scrutiny, not the shock the conscience test, should apply to Fourteenth Amendment challenges to state child protection statutes chilling constitutionally-protected parental discipline.

The panel erred by applying the shock the conscience test instead of strict scrutiny review to Fourteenth Amendment challenges to state child protection statutes chilling constitutionally-protected parental discipline:

> To state a substantive due process claim against a state official, a plaintiff must demonstrate that a fundamental right was violated and that the official's conduct shocks the conscience. *Folkerts v. City of Waverly*, 707 F.3d 975, 980 (8th Cir. 2013). Whether conduct shocks the conscience is a question of law. Id. Conscience shocking conduct only includes "the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." *White v. Smith*, 696 F.3d 740, 757–58 (8th Cir. 2012) (quotation marks omitted).

Op. at 8.

To the contrary, "fit parents" have Fourteenth Amendment rights under the U.S. Supreme Court's precedents which recognize the constitutional presumption that fit parents act in the best interests of their children. In *Troxel,* the Court summarized that parental rights have for more than seventy-five years been given substantive protection under the Fourteenth Amendment. *Troxel*, 530 U.S. at 65. The Seventh Circuit, relying on *Troxel*, stated there is no reason for the state to be involved in the parent-child relationship when there is a fit parent:

> In assessing the reasonableness of the defendants' actions in this case, we begin with the constitutional presumption that "fit parents act in the best interests of their children," *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054, and stress 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, 120 S.Ct. 2054.

Doe v. Heck, 327 F.3d 492, 521 (7th Cir. 2003). More recently, in 2013, the Court in *Adoptive Couple v. Baby Girl* re-stated the constitutional "presumption that fit parents act in the best interest of their children." 133 S.Ct. 2552, 2582 (2013) (citation omitted).

Specifically, the Court in *Troxel* determined that Washington Statutes § 26.10.160(3)(1994), regarding visitation rights to children, as applied to Granville and her family, violated her Due Process Clause right to make decisions concerning the care, custody, and control of her daughters. *Troxel,* 530 U.S. at 67, 73. First, the Court stated that the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 65 (citations omitted).

Second, the Supreme Court held that Washington's breathtakingly broad statute regarding court-ordered visitation to children effectively permits a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. *Id.* at 67. A parent's estimation of the child's best interest was accorded no deference. *Id.* at 69-70.

Third, the Supreme Court noted that a combination of factors compelled the conclusion that Washington Statutes § 26.10.160 (3), as applied in that case, exceeded the bounds of the Due Process Clause. *Troxel* at 67-73.

Importantly, the four-justice plurality opinion in *Troxel* is supported by two concurring opinions. Under the *Marks*[15] analysis, the narrowest holding appearing to be supported by five justices would include Justice Thomas' opinion in *Troxel*. This means that, implicitly, strict scrutiny would be applied regarding parental rights as "fundamental" and, hence, applicable to substantive due process analysis. To be sure, the four-judge plurality did not reference "strict scrutiny" which Justice Thomas acknowledged. *Troxel,* 530 U.S. at 80 (Thomas, J. concurring).

Similarly, Minnesota statutes unconstitutionally regulate parenting by prohibiting ordinary parental discipline. In Minnesota, a parent cannot discipline his or her child in ordinary ways, verbally or physically, without CPS interference. In sharp contrast, Minnesota's public school teachers are immunized for use of reasonable force to "correct" students. Minnesota's parents are subjected to CPS proceedings for use of reasonable force to correct their children.[16] Additionally, Minnesota's private school educators, unlike Minnesota's parents, may use corporal punishment to discipline students.[17]

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[15] *Marks v. United States*, 430 U.S. 188, 193 (1977).

[16] Minnesota Statutes § 121A.582 ("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 ..."). See also Minnesota Statutes § 626.556, subd. 2(k).

[17] Minnesota statutes prohibit public school educators, but not private school educators, from using corporal punishment. However, Minnesota's ban prohibits public teachers from use of corporal punishment, but authorizes their reasonable use of force to "correct" students. Compare Minnesota Statutes § 121A.582, quoted above, with Minnesota Statutes § 121A.58, subd. 2 ("Corporal punishment not

Meanwhile, the U.S. Supreme Court has opined that public school officials may constitutionally administer corporal punishment to students. *Ingraham v. Wright,* 430 U.S. 651, 652 (1977).

In many other states, parental corporal punishment is legally authorized.[18] For example, Oklahoma Statutes 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).

The Eighth Circuit's approach contradicts the holding of *Troxel* and its predecessors requiring strict scrutiny to be applied to adjudicate the constitutionality of state statutes regulating parenting. Instead, the panel applied the "shock the conscience" test. The Second, Third and Eleventh Circuits has done the same thing.

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allowed. An employee or agent of a district shall not inflict corporal punishment or cause corporal punishment to be inflicted upon a pupil to reform unacceptable conduct or as a penalty for unacceptable conduct").

[18]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).

Southerland v. City of New York, 680 F.3d 127, 151 (2nd Cir. 2012); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir. 1999); and *Maddox v. Stephens*, 727 F.3d 1109, 1119 (11th Cir. 2013).

Therefore, the panel failed to properly adjudicate the constitutionality of the Minnesota statutes chilling constitutionally-protected parental discipline. The panel erred by using the "shock the conscience" test instead of strict scrutiny review; this mistake prevented the meaningful constitutional review required by *Troxel* and its predecessors.

III. The panel erred by determining that an association of 3,459 Minnesota parents did not have standing to make pre-enforcement constitutional claims for prospective relief against enforcement of Minnesota's civil statutes §§ 260C.007, subds. 5, 6, & 13, 260C.301, subd. 1, and 626.556, subd. 2, which chill constitutionally-protected parental discipline.

The panel erred on associational standing:

> The speculative future action alleged in the plaintiffs' complaint is not enough to confer standing on any individual member of the association.

Op. at 5.

To establish Article III standing, a plaintiff must show, *inter alia,* an "injury in fact," which must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). When challenging a law prior to its enforcement, a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a

credible threat of prosecution thereunder." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979). 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"). Moreover, according to the U.S. Supreme Court in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270-71 (2015), the lower court must go beyond the allegations in the complaint and afford a meaningful opportunity to the association to prove a member has standing before dismissing a case for lack of associational standing. *See Osborn v. U.S.,* 918 F.2d 724, 730 (1990) (A court facing fact questions relating to the court's jurisdiction may order an evidentiary hearing "at which witnesses may testify.").

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-167 (2014), the U.S. Supreme Court held standing existed for a pre-enforcement constitutional challenge of a statute prohibiting false campaign speech. First, Petitioners alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest" by pleading specific statements they intend to make in future election cycles. *Id.* at 161-162. Second, Petitioners intended future conduct was also "arguably … proscribed by [the] statute." *Id.* at 162-163. Third, the threat of future enforcement was substantial. There was a history of past enforcement of the Ohio statute. The past enforcement of

a statute against the same conduct is good evidence that the threat of enforcement is not "chimerical." *Id.* at 163-167*, quoting Steffel v. Thompson,* 415 U.S. 452 (1974).

In this case, although Dwight Mitchell is the founder of the parents' association, the parents' association is much more than the Mitchell family. The parents' association includes 3,459 Minnesota parents.[19] Forty-six association parents filed declarations in support of the lawsuit alleging Minnesota statutes unconstitutionally interfered with their parental rights.[20] The association has already assisted parents in rescuing seven Minnesota children from CPS.[21] During the course of this litigation, judicial notice was submitted to the district court on the association's inaugural winning case of Amanda Weber who is one of the forty-six association parents who filed declarations in support of the lawsuit.[22] The association decided to join Dwight Mitchell in this lawsuit.

And, the parents' pre-enforcement claims in the complaint against the Minnesota statutes reflect the same standing as shown in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-167 (2014), against the Ohio statutes. First, the parents allege "an intention to engage in a course of conduct arguably affected with a constitutional interest" (*id.* at 161-162) by pleading in their complaint that they wanted

[19] Mitchell Dec. at 2 (Dkt. 45).
[20] Kaardal Dec. Exs. 1-46 (Dkt. 46).
[21] Mitchell Dec. at 2 (Dkt. 45).
[22] Kaardal Dec. Ex. 46 (Dkt. 45); Plaintiffs' supplemental authorities letter (Dkt. 51), *citing In the Matter of the Welfare of the Child of: Amanda Sky Ann Weber and Javoi Laquand Payne,* Morrison County Court File No. 49-JV-18-786 (2018).

to engage in ordinary parental discipline involving constitutionally-protected parental discipline:

> 372. Under the federal Constitution, parents have a constitutional right to use corporal punishment to discipline or correct a child. It is a fundamental right under the Constitution.

Corrected Amended Compl. at 96 (Dkt. 8).

Second, the parents alleged that their intended future conduct to discipline their children was also "arguably … proscribed by [the] statute" (*Susan B. Anthony List* at 162-163) by making the following allegations in their complaint:

> 375. Minnesota's laws terminating parental rights prohibit parental corporal punishment to discipline or correct a child.

Corrected Amended Compl. at 96 (Dkt. 8).

Third, the parents alleged threat of future enforcement is substantial (*Susan B. Anthony List* at 163-167) in the following allegations in the complaint:

> 376. By banning corporal punishment used to discipline or correct a child, Minnesota's laws violate the parents' constitutional rights to use corporal punishment to discipline or correct their children.
>
> 377. Because of Defendants' actions, SCPS and its members, including the Mitchell family, have suffered deprivations of rights guaranteed to them by the Fourteenth Amendment's Due Process Clause, which protects parental rights to discipline children as fundamental rights.

Corrected Amended Compl. at 96 (Dkt. 8).

Plus, as evidenced in the complaint's allegations regarding Mitchell and the 46 declarations filed by the association parents (Kaardal Dec. Exs. 1-46 (Dkt. 46)) in opposition to the motion to dismiss, there is a history of past enforcement of

Minnesota's civil statutes §§ 260C.007, subds. 5, 6, & 13, 260C.301, subd. 1, and 626.556, subd. 2, against Minnesota parents based on parental discipline. Such past enforcement against the same conduct is good evidence that the threat of enforcement is not "chimerical." *Steffel* at 459.

IV. The Eighth Circuit panel erred by applying immunity.

The Eighth Circuit erred in its immunity analysis for three reasons. Op. at 14-15. First, qualified immunity is an affirmative defense and not grounds for rule 12 dismissal *Gomez v. Toledo*, 446 U.S. 635 (1980). On all the facts alleged, the defendants must meet their burden of establishing their entitlement to qualified immunity as an affirmative defense, which in this case, the defendants failed to do. Second, qualified immunity is not a legal defense for a county. *Owen v. City of Independence, Missouri*, 446 U.S. 993 (1980); since Dakota County is a defendant, the decision must be reversed because counties do not benefit from qualified immunity. Third, qualified immunity does not apply if no public official action is required to cause the constitutional violation because there is an exception from Harlow qualified immunity for "ministerial tasks" of the public officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982); *Davis v. Scherer*, 468 U.S. 183, 196, n. 14 (1984). Here, no ministerial actions are even required; the mere presence of the public officials enforcing Minnesota's statutes chills constitutionally-protected parental discipline.

Additionally, none of the defendants enjoy Eleventh Amendment immunity against the association's claims for prospective relief. Although a state has Eleventh

Amendment immunity against § 1983 suits for monetary damages, the U.S. Supreme Court decision in *Ex parte Young* allows a court to enjoin a state official from enforcing an unconstitutional state law and so to adjudicate a challenged law's constitutionality in a suit against the State official. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (*citing Ex parte Young*, 209 U.S. 123 (1908)). Similarly, any absolute or any other immunity that applies would be limited to duties performed within the scope of the public officials' work. Here, there are allegations that the public officials exceeded their legal authority; for example, the amended complaint contains allegations that state defendants Sirr, a guardian ad litem, and Derby, a public defender, exceeded their scope of work to conspire to tortiously interfere with the Mitchell family to cause the 22-month seizure of X.M. Corrected Amended Complaint at 85-89 (Dkt. 8). If Sirr and Derby had acted within their scope of duties, they would have, at some point, joined the Mitchell's side during the 22-month unconstitutional seizure of X.M.[23] They didn't.

CONCLUSION

Further appellate review is required to resolve the conflict which exists between the U.S. Supreme Court and the courts of appeal. The Court should grant the

[23] The Court also erred in its analysis of the Uniform Child Custody Jurisdiction and Enforcement Act, Minnesota Statutes § 518D.101, et seq. (UCCJEA) Op. at 8, n. 4. The UCCJEA covers both family law and child protection cases; so, the Dakota County litigation should never have proceeded without a New Jersey jurisdictional hearing first. *See* Minn. Stat. §§ 518D.202 (exclusive, continuing jurisdiction); 518D.204 (temporary emergency jurisdiction); and 518D.209 (information to be submitted to the court).

petition to determine whether the panel erred by applying the "shock the conscience" test under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) for child protection services' liability instead of strict scrutiny review under *Troxel v. Granville,* 530 U.S. 57, 65–66 (2000) and its predecessors, when Minnesota's state statutes chill constitutionally-protected parental discipline.

Dated: June 17, 2020

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CERTIFICATE OF COMPLIANCE

I certify that I am a current member of this Bar in good standing.

This Petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(c) and Rule 27(d).

> The Petition contains 3,818 words, Federal Rule of Appellate Procedure 27(d)(2)(A).

This Petition complies with the typeface requirements of Federal Rule of Appellate Procedure Rule 27(d)(1)(E).

> The Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Garamond Font.

This Petition has been scanned for viruses and malware and the best of my knowledge are free from viruses or malware.

I hereby certify that on June 17, 2020, I electronically filed the Petition for Rehearing En Banc, with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I hereby certify that the electronic version is identical to the paper copies.

Dated: June 17, 2020

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