UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M., Bryce Mitchell and Stop Child Protection Services from Legal Kidnapping, Plaintiffs, v. Dakota County Social Services, et al., Defendants.	Court File No. 18-CV-1091 WMW/BRT Judge Wilhelmina M. Wright **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO STATE'S AND COUNTY'S MOTIONS TO DISMISS**

Plaintiffs Mitchell family members and Stop Child Protection Services from Legally Kidnapping (SCPS) file this opposition to the State's and County's motions to dismiss.

BACKGROUND

SCPS, founded in 2017, is an association-plaintiff in this lawsuit.[1] Dwight Mitchell is the founder and President of SCPS.[2] SCPS's mission is to advocate and litigate for parents who have unconstitutionally lost their children to Minnesota's child protection services (CPS).[3] SCPS, as an association, has adopted and follows a mission statement, recruits victims, communicates with victims, and, upon request, participates in administrative and litigation processes to rescue victims from CPS.[4] SCPS has initiated and continues a

[1] Amended Complaint (AC) ¶4; Mitchell Decl. ¶2. In response to the State challenging SPCS's standing, in lieu of an evidentiary hearing, SCPS simultaneously submits supportive declarations.
[2] *Id.* ¶3.
[3] *Id.* ¶4.
[4] *Id.* ¶5.

petition drive, educates the public and advocates for legislative reform.[5] So far, the petition has 5,975 signatures.[6] The association has 3,459 members.[7] 46 SCPS members who have had their parental rights terminated, either temporarily or permanently, have submitted declarations in support of this lawsuit.[8] To date, SCPS has assisted parents in rescuing a total of 7 children from CPS.[9] In addition to this lawsuit, SCPS is assisting parents in CPS litigation all over Minnesota--including a recent attempted intervention in a Morrison County District Court child protection proceeding based on neglect and medical neglect.[10]

ARGUMENT

The Court should reject the state's and county's arguments that the amended complaint should be dismissed.

I. The plaintiffs' claims should not be dismissed for lack of standing.

The State's memorandum at pages 6 through 8 argues for dismissal based on lack of standing. The State argues that SCPS members: "have not plausibly pleaded a threat of repeated injury" (p. 6); do not "face a real and immediate threat of repeated injury" (p. 7) and have "no concrete or non-hypothetical future injury" (p. 8). Further, the state argues that Plaintiffs have identified over ten separate provisions of four Minnesota statutes as being facially unconstitutional is attempting to make the court a "forum for generalized grievances" with Plaintiffs lacking a personal stake in the outcome (p. 8).

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[5] *Id.* ¶6.
[6] *Id.* ¶8.
[7] *Id.* ¶9.
[8] *Id.* ¶10;Kaardal Decl. Exs. 1-46.
[9] Mitchell Decl. ¶11.
[10] *Id.* ¶7;Kaardal Decl. Exs. 47-53.

To the contrary, SCPS's facial claims are straightforward; Minnesota laws terminating parental rights, temporarily or permanently, violate the constitutional standards expressed in federal court decisions. *Alsager v. District Court of Polk County, Iowa* (Juvenile Division), 545 F.2d 1137 (8th Cir. 1976) (Iowa governmental actions violated constitutionally-protected parental rights). *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927 (8th Cir. 1987). SCPS members suffer real and immediate threat of repeated injury because their children are retained, are being retained or will be retained under Minnesota's CPS laws.

A. SCPS as an association has standing to bring its constitutional claims.

"Actions brought by organizations that borrow members' standing have become a routine feature of contemporary litigation." Organization Standing, 13A Fed. Prac. & Proc. Juris. § 3531.9.5 (3d ed.) The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) provided a general rule:

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The requirements for organization standing are less onerous than for a class action. *See* 13A Fed. Prac. & Proc. Juris. § 3531.9.5.

1. The SCPS members would otherwise have standing to sue in their own right.

"The standing of individual members is evaluated as if they had brought suit directly. Standing is regularly recognized once member injury is shown." 13A Fed. Prac. & Proc. Juris. § 3531.9.5 (3d ed.). To establish Article III standing, a plaintiff must show (1) an

"injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992) (internal quotation marks omitted).

Federal courts have recognized standing of the following groups based on borrowed-member standing: NAACP in *NAACP v. Button*, 371 U.S. 415, 428 (1963); regional stock exchanges in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n. 3 (1977); an organization dedicated to helping the nation's elderly in *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 (1981); wildlife conservation groups in *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 n. 4 (1986); three organizations claiming that an environmental impact statement was required in *Andrus v. Sierra Club*, 442 U.S. 347 (1979); the ACLU Foundation in *ACLU Nebraska Foundation v. City of Plattsmouth*, Nebraska, 358 F.3d 1020, 1031 (8th Cir. 2004); and an organization representing those refused appointment as volunteer deputy registration officials in *Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985).

a. SCPS members, both in a post-enforcement and pre-enforcement setting, suffer injury from Minnesota's statutes terminating parental rights.

SCPS members, both in a post-enforcement and pre-enforcement setting, suffer injury from Minnesota's statutes terminating parental rights. As to post-enforcement challenges, in *Alsager,* 545 F.2d 1137 (1976), the Eighth Circuit held that government actions under Iowa's laws terminating parental rights violated the parents' constitutional rights causing injury. *Alsager* involved plaintiffs in federal court making a post-enforcement challenge of Iowa's laws. Similarly, Minnesota's statutes terminating parental rights violate

the SCPS members' constitutional rights causing injury. Specifically, the 46 SCPS members signing declarations in support of this opposition memorandum have had their parental rights permanently or temporarily terminated.[11] These SCPS members have standing for this post-enforcement challenge because the government today is restricting the parent's rights.

As to pre-enforcement challenges, the Supreme Court has held that a plaintiff has standing 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). *See Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2342–43 (2014); *Steffel v. Thompson,* 415 U.S. 452, 459 (1974); *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128–129 (2007); *Virginia v. American Booksellers Assn. Inc.,* 484 U.S. 383 (1988); *Holder v. Humanitarian Law Project,* 561 U.S. 1, 15 (2010); *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011). Thus, parents with minor children in Minnesota have standing to challenge Minnesota's statutes terminating parental rights because the statutes affect their constitutionally-protected parenting conduct. For example, SCPS members intend to engage in the act of ordinary parental bottom spankings to discipline. But, they would not do so, despite their constitutional right to do so, in fear of a CPS state court proceeding to take their children away—as in the Mitchell case. Such modification of parental conduct is sufficient injury for a pre-enforcement challenge.

[11] Kaardal Decl. Exs. 1-46.

b. The allegations that Minnesota statutes terminating parental rights unconstitutionally affect parents supports a "causal connection between the injury and the conduct complained of"—similar to *Alsager.*

The allegations that Minnesota statutes terminating parental rights unconstitutionally affect parents supports a causal connection between the injury and the conduct complained of. In *Alsager,* 545 F.2d 1137, the Eighth Circuit held that the government's actions under Iowa's laws terminating parental rights violated the parents' constitutional rights causing injury. Similarly, Minnesota's statutes terminating parental rights violate the SCPS's members' constitutional rights causing injury.

c. A judgment issued here like the one in *Alsager* regarding Iowa's laws shows a great "likel[ihood]" that the injury "will be redressed by a favorable decision."

A judgment issued here like the one in *Alsager* regarding Iowa's laws shows a great likelihood that the injury will be redressed by a favorable decision. After the District Court made an initial ruling that federal declaratory relief would be inappropriate, 384 F.Supp. 643 (1974), the case was reversed and remanded, 518 F.2d 1160 (8th Cir. 1975). On remand, the District Court, 406 F.Supp. 10 (1975), held that the Iowa parental termination statutes were unconstitutionally vague both on their face and as applied, that the parents were deprived of substantive due process by failure of state authorities to show a "high and substantial degree of harm" to the children, and that the parents were denied procedural due process when they were given inadequate notice of the termination proceeding and a standard of proof was employed requiring a mere preponderance of the evidence. The Eighth Circuit, 545 F.2d 1137 (1977), affirmed the entry of declaratory judgment and adopted the district court opinion as to the as-applied claims, but expressly reserved the facial claims. In this case, a

district court order granting prospective relief against Minnesota's laws terminating parental rights, either facially or as-applied, will stop on-going constitutional injuries to plaintiffs.

2. The interests SCPS seeks to protect are germane to the organization's purpose.

The mission of the SCPS is to stop Minnesota's CPS from unconstitutionally interfering with the parent-child relationship. One way SCPS accomplishes its mission is participating in litigation against CPS.[12] So, this lawsuit is germane to the organization's purpose.

3. Neither the claims asserted by SCPS nor the relief requested by SCPS requires the participation of individual members in the lawsuit.

The SCPS has limited its participation in the lawsuit to the facial constitutional challenges of Minnesota's laws terminating parental rights. So, no participation of individual members is required.

B. The Mitchell family members have standing to bring their claims.

The Mitchells have standing because they seek damages for purported injury and seek a declaratory judgment that the County's invoice for violative services is null and void.

II. The motion to dismiss for failure to state a claim should be denied.

Both the federal claims and state law claims state claims "upon which relief can be granted." Fed.R.Civ.Proc. 12(b)(6). The State's and County's memoranda are not applying the complete legal standard for dismissing a complaint under Rule 12; plaintiffs are only required at the Rule 12 stage to show the factual basis, not the legal basis, for all their claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[12] Mitchell Decl. ¶7;Kaardal Decl. Exs. 47-53.

Beyond *Iqbal-Twombly,* the Supreme Court has been clear about Rule 12 standards for challenges to inadequate legal theories: "Having informed the city of the factual basis for their complaint, they [the plaintiffs] were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Johnson v. City of Shelby, Miss.,* 135 S.Ct. 346, 346-47 (2014)(citation omitted). Federal pleading rules call for only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). A federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164 (1993). In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. *City of Shelby, Miss.,* 135 S.Ct. at 346-47.

A. Like the Iowa laws in the *Alsager* case, Minnesota's laws terminating parental rights, temporarily or permanently, are unconstitutionally vague.

The State's memorandum at pages 9 through 10 errs in arguing that Plaintiffs' unconstitutional vagueness claim must be dismissed because it is not a First Amendment claim. The Supreme Court in *Papachristou v. City of Jacksonville*, struck down the city's vagrancy ordinance not only because it was so broad and vague that it failed to give an ordinary reader fair notice of what was prohibited—the traditional void-for-vagueness standard—but also because it conferred excessive arbitrary discretion on those who enforced the law. 405 U.S. 156, at 162–70 (1972). In *FCC v. Fox Television Stations, Inc.*, the Supreme Court held that a finding of liability under an unannounced administrative policy implementing a federal statutory ban on televised obscenity was unconstitutional under the

void-for-vagueness doctrine. 567 U.S. 239, 253–54, 258 (2012). In *Alsager*, 406 F. Supp. 10, the district court found provisions of Iowa's laws terminating parental rights to be unconstitutionally vague. Specifically, the district court held that Iowa parental termination standards of "necessary parental care and protection," Sec. 232.41(2)(b), and of "(parental) conduct . . . detrimental to the physical or mental health or morals of the child," Sec. 232.41(2)(d), to be unconstitutionally vague. The court stated, "[t]he Alsagers were not given fair warning of what was and was not prohibited by the Iowa law." 406 F. Supp. at 20.

Accordingly, certain provisions of Minnesota's child-protection statutes, similar to Iowa's child protection statutes in *Alsager*, are unconstitutionally vague because they do not give ordinary people "fair warning" of the specific conduct that they prohibit:

- Minn. Stat. § 260C.007, subd. 5, subd. 6(2)(i)–(iii), (4), (5), subd. 13;
- Minn. Stat. § 260C.301, subd. 1, (b)(2), (4), (5); and
- Minn. Stat. § 626.556, subd. 2(f), (k).

These Minnesota laws terminating parental rights are so standardless that they invite arbitrary enforcement—and, thus, are unconstitutionally vague.

B. The statutes terminating parental rights unconstitutionally authorize separation of a parent from a child based on corporal punishment used to discipline a child.

The State's memorandum at pages 11 and 12 errs in asking the Court to dismiss Count II regarding a parent's right not to be separated from a child because of the exercise of the constitutional right to use corporal punishment to discipline a child. Although the state concedes a right for a parent to "the care, custody and management of the child" (p.

11), the State alleges that Minnesota's laws terminating parental rights do not "prohibit all forms of physical discipline" and, therefore, Count II is based on a "false premise."

Section 260C.007's failure to incorporate section 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 CHIPS proceeding in which the parent is accused on the theory that the corporal punishment is an assault or malicious punishment. Section 260C.007, subd. 5, expressly incorporates the elements of fifth degree assault in section 609.224 and incorporates the elements of malicious punishment in section 609.377; however, section 260C.007 does not incorporate the criminal "authorized use of force" defenses from section 609.06 or 609.379.

In other words, a child-welfare worker or a court in a CHIPS proceeding might treat an ordinary bottom-spanking as an assault or malicious punishment, even if a court would not treat it as an assault or malicious punishment in a criminal case. Section 609.224, subd. 1, which is incorporated into section 260C.007, subd. 5, provides 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 criminalizes commonplace parental corporal punishment. Section 609.02, subd. 7, contains this definition of bodily harm, which applies to section 609.224: "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." This means that if a spanking causes any pain at all, then the spanking causes "bodily harm." Similarly, section 609.377, which is incorporated into section 260C.007, subd. 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," subd. 7, also contains the definitions of two grades of bodily harm: "substantial bodily harm," subd. 7a, and "great bodily harm," subd. 8. So section 609.377's criminalization of "excessive" punishment causing "less that substantial bodily harm" implies that any "bodily harm" no matter how slight is enough to result in criminal liability. So, both sections 609.224, subd. 1, and 609.377, subds. 1–2, criminalize commonplace parental corporal punishment. So, under Section 260C.007, subd. 5, which incorporates the elements of fifth degree assault in section 609.224 and incorporates the elements of malicious punishment in section 609.377, but, does not incorporate the criminal "authorized use of force" defenses from section 609.06 or 609.379, a child is CHIPS if the parent gives an ordinary bottom spanking to discipline a child.

Even if Section 260C.007, subdivision 5 incorporated the "authorized use of force" defenses from section 609.06 or 609.379 (which it doesn't), subdivision 5 would still be unconstitutional because the malicious punishment statute, section 609.377 is facially unconstitutional because the state must have the burden of showing the parent injured the child beyond what the constitution protects as to corporal punishment disciplining the child: temporary marks and transient pain. Instead, sections 609.06 and 609.379 creates a burden on the parent to prove the affirmative defense of constitutionally-protected corporal punishment to discipline the child—which is unconstitutional because the burden must be on the state to show that the parent maliciously punished the child beyond temporary marks and transient pain.

The State at pages 11 and 12 cites two statutes and one case which are inapposite. First, the State omits legal text of the exception found in Minnesota Statutes § 626.556, subd. 2(k) for physical discipline. The State wrote:

> Minn. Stat. § 626.556, subd. 2(k). "Abuse does not include reasonable and moderate physical discipline of a child[.]"

However, § 626.556, subd. 2(k) states:

> 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.**

(Emphasis added.) By omitting the phrase "which does not result in an injury," which is undefined in the section 626.556, the State misleads the Court that CHIPS proceedings can not be based on corporal punishment to discipline a child. Second, the State cites section 609.379 that "reasonable force may be used upon or toward the person of the child[.]" without referencing that section 609.379 has a provision making its criminal defense only applicable in certain criminal proceedings—not in a section 260.007 CHIPS proceeding:

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

Subdivision 2's single reference to section 260C.425 proves the point. Section 260C.425 defines as a crime making a minor child a CHIPS. So, section 609.379, subdivision 2, makes the "lawful use of force" defense apply in a criminal proceeding under section 260C.425, but not for a civil CHIPS proceeding under chapter 260C.007. Third, the State cites to the case *In re of Welfare of Children at N.F.,* 479 N.W.2d 802, 810 (Minn. 2008) for the proposition that Minnesota does not ban "all corporal punishment of children by their parents." Yet, this

decision has been superseded by recent pertinent legislative amendments resulting in the decision being "cabined."[13]

Notably, the Supreme Court has upheld the constitutionality of corporal punishment administered by public schools. *Ingraham v. Wright*, 430 U.S. 651 (1977). Accordingly, approximately fifteen states, according to one source, authorize public-school corporal punishment: North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Louisiana, Texas, Missouri, Arkansas, Missouri, Arizona, and Wyoming.[14] Parental corporal punishment is also legally authorized in many states.[15] For example, Oklahoma Statutes tit. 10A, section 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).

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[13]*See Mellillo v. Heitland,* 880 N.W.2d 862, 866 (Minn. 2016) (a Minnesota Supreme Court decision interpreting a statute, which has subsequently been amended, is "cabined.")
[14]Education Week, "Is corporal punishment an option in your state?", available at https://www.edweek.org/ew/section/multimedia/states-ban-corporal-punishment.html (last viewed July 23, 2018).
[15]Gunderson Center for Effective Discipline, available at http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/punishment-vs-abuse/(last viewed July 23, 2018).

Yet, federal courts have not resolved the federal constitutionality of CPS intervention based on a parent's use of corporal punishment to discipline a child; it is a straightforward legal issue presented for this District Court to decide.

C. Like the Iowa laws in the *Alsager* case, Minnesota's laws violate substantive due process.

The State's memorandum at pages 12 through 13 errs in asking the Court to dismiss Count III regarding SCPS's substantive due process claim. The State argues that it has an "undisputable compelling interesting in protecting children from abuse" (p. 12), that Minnesota's law terminating parental rights are "sufficiently narrowly-tailored to the State's compelling interest" (p. 12) and that "the law presumes that a child's best interest is served by remaining in the custody of their parents, a presumption that must be overcome before terminating parental rights. *In re Martinson,* 177 N.W.2d 808, 810 (Minn. 1970)."

To the contrary, Minnesota's laws do not satisfy strict scrutiny; they are not narrowly tailored to meet a compelling state interest. In *Alsager*, 406 F. Supp. 10, the district court held that provisions of Iowa's child protection statutes violate the parents' substantive due process rights. Strict scrutiny requires that laws permitting the termination of parental rights, permanently or temporarily, be narrowly tailored to meet a compelling state interest. Specifically, the court held that Iowa parental termination standards of "necessary parental care and protection," section 232.41(2)(b), and of "(parental) conduct . . . detrimental to the physical or mental health or morals of the child," section 232.41(2)(d), violated the parents' substantive due process rights. The court stated "that terminations must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." 406 F. Supp. at 23-24.

Similarly, section 260C.007, subdivision 6 (4) and (5) violate strict scrutiny because they do not include a "threshold of harm" to justify separating the child from the parent. Subdivision 6(4) follows subdivision 6 (3). Clause (3) defines CHIPS to include the child being "without…other required care for the child's physical or mental health or morals…" Clause (4) defines CHIPS to go further and require "special care" made by the child's "physical condition, mental or emotional condition." Clause (4)'s "special care" appears to go beyond clause (3)'s "required care" in a CHIPS determination. But, neither clause (3), nor clause (4) are linked to a threshold of harm. Absent a threshold of harm being prevented, clauses (3) and (4) are impermissibly regulating parental conduct or manners without protecting children Clauses (3) and (4) fail strict scrutiny because they authorize government to separate a child from a parent based on a lack of "required care" or "special care", as defined, but where there is not constitutionally sufficient harm to the child being prevented.

Clause (5) also violates strict scrutiny. Clause (5) on "medical neglect" states that CHIPS status includes a child who is "medically neglected, which includes, but is not limited to…" Then, clause (5) goes on to specifically deal with the situation of an infant with a disability which is a life-threatening condition. There is no more definition to medical neglect. Subdivision 2(g)(7) of section 626.556 circularly incorporates clause (5) of section 260C.007 defining "neglect" to include "medical neglect as defined in section 260C.007, subdivision 6, clause (5). The "medical neglect" definition is so sparse that it requires adherence to all medical opinions—even if the opinion is inferior or differs. Absent a threshold of harm being prevented, clause (5) impermissibly regulates parental conduct or manners at the bedside, hospital and clinics without protecting children Clause (5) fails strict

scrutiny because it authorizes government to separate a child from a parent where there may be medical neglect, as defined, but where there is not constitutionally sufficient harm to the child being prevented.

Additionally, Minnesota's definition of CHIPS, which authorizes governmental interference in the parent–child relationship, includes provisions that prohibit a single parent's use of corporal punishment to discipline a child. In this case, each defendant told Mitchell, directly or indirectly, that all corporal punishment—even an ordinary bottom-spanking—is legally prohibited in Minnesota. Deterring a parent's corporal punishment to discipline a child under threat of losing that child, Minnesota Statutes § 260C.007, subds. 5–6, 13, violates strict scrutiny.

Further, section 260C.301 on permanent termination of parental rights violates strict scrutiny. To begin, subdivision 1 states the court "may" terminate parental rights if any of the legal conditions are satisfied. Such total judicial discretion is itself constitutionally disturbing.

Section 260C.301 (b) (2), (4) and (5) violate strict scrutiny. Clause (2) violates strict scrutiny because a parent's rights can be terminated based on a parent who "substantially…refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to…" Clause (2) violates strict scrutiny because a parent's rights may be terminated because "duties" are not being fulfilled, even though the child is not being harmed. Clause (3) violates strict scrutiny because a parent's rights can be terminated because a parent "is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the

child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child." Clause (3) violates strict scrutiny because a parent who does not "care appropriately" may have parental rights terminated, even though the child has not been harmed. Finally, clause (5) violates strict scrutiny because parental rights may be terminated if after "the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement," even though the child has not been harmed. Clause 5's phrase "correct the conditions leading to the child's placement" violates strict scrutiny because it is not legally connected to some ongoing harm to the child.

Also, there are underinclusiveness problems. First, the State allows corporal punishment in private schools. Minnesota Statutes § 626.556, subdivision 2(k) "Abuse does not include the use of reasonable force by a teacher, principal, or school employee as allowed by section 121A.582" is not restricted by "which does not result in injury." Only parents, not private school employees, have the restriction on discipline "which does not result in injury." Second, the State allows corporal punishment in some cultures, but not in others. Subdivision 2(r) states that corporal punishment is legally authorized in cultural communities where corporal punishment as a child-rearing practice is accepted and not injurious "to the child's health, welfare, and safety." If the State were sincere about its stated compelling state interest of protecting children from all corporal punishment, the laws would ban corporal punishment in private schools and all cultures—but they don't.

Finally, the State's argument regarding the presumption of best interests in favor of parental custody should be rejected. Section 645.26, subdivision 1, states that in Minnesota particular laws control over general laws. In turn, since section 260C.007 lays out specific parental standards, it controls over a general best interest presumption in favor of parents. So, the general presumption does not save the constitutionality of the otherwise constitutionally-defective provisions.

D. Like the Iowa laws in the *Alsager* case, Minnesota's laws violate procedural due process.

The State's memorandum at pages 14 through 16 errs in asking the Court to dismiss Count III regarding SCPS's procedural due process claim. The State concedes that the termination of parental rights "must be accomplished by procedures meeting the requirements of the Due Process Clause" (p. 14). First, the State argues that, although a state prosecutor must disclose exculpatory information, the state in child protection proceeding does not; the State believes that the procedural rules must only "not preclude exculpatory information from being produced" (p. 14). Second, the state argues that parents can challenge the government's reunification plans by bringing motions to dismiss under Rule of Juvenile Protection Procedure 15.04 contradicting Rule 15.04 which is limited, after the admit/deny hearing to "the following grounds: (a) lack of jurisdiction over the subject matter; (b) lack of jurisdiction over the child…" Third, the State argues that the presumption that reasonable efforts have failed if "a child has resided out of the parental home under court order for a cumulative period of 12 months within the preceding 22 months" is constitutional despite a 15-month foster care presumption being held unconstitutional by the Illinois Supreme Court in *In re H.G.*, 757 N.E.2d 864 (Ill. 2001).

In *Alsager*, the district court found that Iowa's laws terminating parental rights violated the parents' procedural due process rights. Specifically, the court held that Iowa parental termination standards of "necessary parental care and protection," Sec. 232.41(2)(b), and of "(parental) conduct…detrimental to the physical or mental health or morals of the child," Sec. 232.41(2)(d), violated the parents' procedural due process rights. 406 F. Supp. at 24-25.

Similarly, Minnesota laws violate procedural due process. First, the statutes do not require the child-protection agency to produce exculpatory information to the court and to the parents. Since the child protection agency serves a dual role in attempting to reunite the family and, in certain cases, to terminate parental rights, the Due Process Clause requires the agency to submit to parents and to the court all exculpatory information—as a prosecutor would under *Brady*. "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *U.S. v. Bagley*, 473 U.S. 667, 675 (U.S. 1985). Similarly, child protection agencies, who implement reunification plans unlike prosecutors, are subject to the constitutional duty to provide exculpatory information, like prosecutors, when terminating parental rights.

Second, as explained in the void-for-vagueness section above, the Minnesota laws terminating parental rights do not give fair warning to the parent that their child may be determined as CHIPS and their parental rights may be terminated as a result. The parent of ordinary intelligence would not know that they would lose their children to CPS under the statutes if they engaged in parental discipline, care, medical treatment, duties and conditions. These parents would not know that CPS regulates parental conduct and manners beyond

protecting children from harm. For example, as to termination of parental rights, Minnesota Statutes § 260C.301, subd. 1(b)(5), authorizes termination of parental rights if "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." This sentence violates procedural due process because it is not specific about what harm is being avoided by a permanent separation of the parent from the child. Specifically, the phrase "conditions leading to the child's placement" is not linked to any specific on-going harm that justifies separating parent and child.

Third, after the out-of-home placement based on the parent's corporal punishment, the statute prohibits any parental challenge to inadequacy of the agency's reunification plans. Rule 15.04 of the Rules of Juvenile Protection Procedure, titled "Motion to Dismiss Petition," does not allow a parent to challenge the inadequacy of the agency's reunification plan. Instead, the only motions to dismiss allowed after the admit/deny hearing, when adequacy of reunification efforts becomes an issue, are subject matter jurisdiction and personal jurisdiction issues. Then, after the children are in out-of-home placements, Minnesota Statutes § 260.012(g) limits the right to challenge the adequacy of reunification efforts until after "the court has determine[d] that reasonable efforts for reunification are not required because the court has made one of the prima facie determinations under paragraph (a)". However, among the prima facie determinations allowed in Minnesota Statutes § 260.012(a) for the Court to approve the County stopping reunification efforts is "(7) the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." So, circularly, the parent's right to challenge the adequacy of reunification services in court is delayed until the agency presents

to the court a successful prima facie case that further reunification services are unreasonable under the circumstances. But, if the government doesn't prevail on its prima facie case against further reunification efforts, then the parent never has an opportunity to challenge the adequacy of the government's reunification effort in court.

Fourth, clause (5) also includes an unconstitutional presumption in favor of the government if the child has been in foster care for 12 of the preceding 24 months, a filed out-of-home placement plan has not corrected the conditions leading to the child's placement, and the government has made reasonable efforts to rehabilitate parent and reunite the family. A similar presumption of unfitness based on length of foster care was found unconstitutional by the Illinois Supreme Court in *In re H.G.*, 757 N.E.2d 864 (Ill. 2001). The length of the child's stay in foster care—12 months in Minnesota as opposed to 15 months in Illinois—has nothing to do with the parent's ability or inability to safely care for the child. The length of the child's stay in foster care—as well as the other criteria provided in the Minnesota statute—are beyond the parent's control. So, Minnesota's presumption of "unfitness" based on length of foster care is just as unconstitutional as Illinois's presumption of "unfitness" based on length of foster care.

E. Minnesota's child-protection statutes requiring consideration of the parent's and child's culture violate the Equal Protection Clause.

The State's memorandum at page 16 errs in asking the Court to dismiss Count V that Minnesota's laws violate strict scrutiny under the Equal Protection Clause. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Flittie v. Solem,* 827 F.2d 276, 281 (8th Cir. 1987); *Peck v. Hoff,* 660 F.2d 371, 372 (8th Cir. 1981). The State's sole argument is the claim that the multiple references in section 626.556, subdivision 2, which

are incorporated into section 260C.007, to treat differently a person from another "culture" do not involve race. But, the statutory provisions violate strict scrutiny; the provisions are not narrowly tailored to meet a compelling state interest.

Section 626.556, subd. 2(r) on its face requires a culture's child-rearing practices to be taken into account:

> (r) Persons who conduct assessments or investigations under this section shall take into account accepted child-rearing practices of the culture in which a child participates and accepted teacher discipline practices, which are not injurious to the child's health, welfare, and safety.

Further, section 626.556, subd. 2(f) and 2(g) requires government officials when determining "mental injury" and "neglect", respectively, to give "due regard to the child's culture."

The problem with CPS considering culture in its decision-making is that the government's own reports already confirm Minnesota's child protection services have a disparate impact on African-American children.[16] CPS's consideration of a "culture's child-rearing practices" disproportionately affects African-Americans who favor corporal punishment more than whites. Since 1986, the University of Chicago has been asking Americans the following question in its annual General Social Survey: "Do you strongly agree, agree, disagree or strongly disagree that it is sometimes necessary to discipline a child with a good, hard spanking?"[17] The latest data, through 2016, show that about 74% strongly

[16] *See, e.g.,* Minnesota Child Welfare Disparities Report (Feb. 2010) available at http://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/Disparities_-_Minnesota_Child_Welfare_Disparities_Report_(DHS)_(February_2010).pdf (last viewed July 23, 2018)

[17] University of Chicago General Survey data can be found at https://gssdataexplorer.norc.org/variables/646/vshow.

agree or agree with that sentiment;[18] however, African-Americans are, on average, about 11 percentage points more likely than whites, including Hispanics, to favor corporal punishment.[19]

As was the case with the Mitchell family, County employee Boreland followed subdivision 2(r) when she told Mitchell that black parents were quick to spank their children, were unfit parents and didn't deserve to have their kids. Under subdivision 2(r), Boreland told Mitchell and his wife she was going to do everything she could do to take Mitchell's children away from that black culture. Then, the State and County defendants did exactly that; they did everything they could to take Mitchell's children away. Mitchell won his family members back, but only after 22 months of separation.

F. Section 260C.007, subd. 6(2)(i)–(iii) providing greater derivate protection for children residing with an abused child than the direction protection provided for the abused child is unconstitutional because it does not meet the rational basis test.

The State's memorandum at pages 13-14 errs in asking the Court to dismiss Count VI regarding SCPS's rational basis test claim against section 260C.007, subd. 6(2)(i)–(iii) for providing more protection for children residing with an abused child than protection for the abused child. *United States v. Carolene Products Co.,* 304 U.S. 144 (1938) (rational basis test is legal standard for constitutional review in commercial matters). The State argues that Count VI "sets forth a confusing hypothetical" without engaging in interpreting section 260C.007, subd. 6(2)(i)–(iii) itself. To the contrary, section 260C.007, subd. 6(2)(i)–(iii)'s provision for greater derivative protection for children residing with an abused child than direct protection

[18] *Id.*
[19] *Id.*

for an abused child lacks a rational basis required under the Due Process Clause. Under subd. 6(2)(ii), child *A* could be a CHIPS because he resides with child *B* who has been victimized in some way, even if child *B*'s victimization does not confer CHIPS status on child *B*. Similarly, under subd. 6(2)(iii) child *A* could be a CHIPS because he resides with a person who has committed "child abuse" or "domestic child abuse" against child *B*, even if the act constituting "child abuse" or "domestic child abuse" does not constitute "physical or sexual abuse" of child *B* and hence is not reason for treating child *B* as a CHIPS under subd. 6(2)(i). The universe of acts conferring derivative protection is broader than the universe of acts conferring direct protection—which fails the rational basis test.

G. The Mitchell family's as-applied federal claims and state law claims are claims upon which relief could be granted.

The State's memorandum at pages 23-32 and the County's memorandum at pages 11-25 and 31-43 address the Mitchell family's as-applied federal claims, Counts VII-XVII, and the Mitchell family's state law claims, Counts XVIII-XXV.

Counts VII, VIII and IX are the Mitchells' procedural and substantive due process claims based on the County's unlawful removal of X.M. for 22 months and A.M. for 5 months, violation of Uniform Child Custody Judgment and Enforcement Act, Minnesota Statutes, chapter 518 (UCCJEA), fabricated evidence and deception in judicial proceedings, violation of familial integrity and association. The arguments above relating to SCPS's facial claims are incorporated herein by reference. The State's memorandum at pages 23-25 and the County's memorandum at pages 12-16 and 22-23 fail to address that the Eighth Circuit decision in *Alsager,* 545 F.2d 1137 (1976), which affirmed judgment in favor of the Alsager parents on as-applied procedural and substantive due process claims. The *Alsager* decisions

refute all of the defendants' arguments that the Mitchells have not made a proper as-applied substantive and procedural due process claims. Therefore, the motion to dismiss must be denied as the U.S. Supreme Court indicated in the *City of Shelby, Miss.* case, "Having informed the city of the factual basis for their complaint, they [the plaintiffs] were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* 135 S.Ct. 346, 346-47 (2014) (citation omitted).

As to Count X, to prevail on an equal protection claim, Mitchell must establish that his treatment was "invidiously dissimilar" to the treatment received by other similarly-situated persons. *Peck v. Hoff,* 660 F.2d 371, 372 (1981); *Flittie v. Solem,* 827 F.2d 276, 281 (8th Cir. 1987). The State's memorandum at pages 25-26 and the County's memorandum at pages 19-21 deny that Mitchell has pled a proper equal protection claims. The Mitchell family has alleged sufficient facts at the Rule 12 stage of the proceedings to show the Mitchell family was treated in an "invidiously dissimilar" manner compared to white families.

The Amended Complaint details the County's policies as expressed by Boreland. Boreland, a County employee, ridiculed Mitchell "why are all black families so quick to spank their children", reprimanded Mitchell that black parents "are unfit to be parents and don't deserve to have children" and warned that she was going to do everything in her power for the County to retain Mitchell's children. (AC ¶¶ 68-73). Boreland was taking into account Mitchell's black "culture" and that black people were "quick to spank their children" as she must under Minnesota Statutes § 626.556, subd. 2(r). Consistent with subdivision 2(r) and Boreland's statements, the County then went on to retain A.M. for 5 months and X.M. for 22 months because of Mitchell's black "culture" and "child-rearing practices."

The County, under subdivision 2(r) and based on Boreland's statements, proceeded more severely because Mitchell as a black man participated in a black culture of being quick to spank children. For the first time in its memoranda, the County at pages 20 and 21 of its memorandum, distances its policies from Boreland's statements based on subdivision 2(r)'s requirement of taking culture into account. However, during the Mitchell CPS proceeding, none of the state and county participants in the proceedings against Mitchell, including the attorneys and the guardian ad litem at the time, cared enough to call out the State for subdivision 2(r) and Boreland's statements thereunder. Instead, the Mitchell family received invidiously dissimilar treatment: 22 months of family separation for a first-time, single-offence, ordinary bottom-spanking

Further, the County's employees' remarks were not "stray remarks" as the County's memorandum argues at pages 20 and 21. Boreland stated that she would do everything she could to stop Mitchell from having custody of his kids and stated that blacks are unfit parents and don't deserve to have children—completely consistent with subdivision 2(r). The County's so-called "stray remarks" were carrying out a government statute of taking "culture", in this case "black culture", into account.

As to Count XI, the Mitchells' "class of one" equal protection, to prevail, a class-of-one plaintiff must provide a specific and detailed account of the nature of the preferred treatment of the favored class especially when the state actors exercise broad discretion to balance a number of legitimate considerations. *Nolan v. Thompson,* 521 F.3d 880, 884 (8th Cir. 2005); *Domina v. Van Pelt,* 235 F.3d 1091, 1099 (8th Cir. 2000); *Klinger v. Dep't of Corrections,* 31 F.3d 727, 731 (8th Cir. 1994). The County's memorandum at page 22 argues that the

Mitchells have not pled sufficient facts to make a claim upon which relief could be granted. But, the Mitchell family has alleged sufficient facts at the Rule 12 stage of the proceedings to show the Mitchell family did not receive the preferred treatment everyone else received. The Amended Complaint at paragraph 500 details the defendants' different and inferior treatment toward Mitchell by individual defendants Boreland, Akolly, Swank, P'Simer, Sirr, Scott, Yunker, Stang, Coyne, Kopesky. The unlawful and conspiratorial actions of these individual defendants led to a completely disproportionate result: separation of A.M. for 5 months and X.M. for 22 months for a single, first-time use of constitutionally-protected corporal punishment to discipline a child. The specific, detailed allegations contained in Count XI are exactly what is required to survive a Rule 12 motion for a class-of-one equal protection claims. The Rule 12 motion should be denied because the Amended Complaint provides a specific and detailed account of the nature of the invidiously dissimilar treatment of the Mitchell family compared to the preferred treatment of the favored non-black class.

Count XII contains the Mitchells' First Amendment and due process claims based on violation of fundamental right of marriage and intimate association. The Supreme Court has recognized "that the right to marry is part of the fundamental `right of privacy' implicit in the Fourteenth Amendment's Due Process clause," *Singleton v. Cecil*, 133 F. 3d 631 (8th Cir.), quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1977)), and that government action must interfere directly and substantial "with family choices before it is unconstitutional." *Gorrie v. Bowe*n, 809 F.2d 508, 523 (8th Cir.1987) (citation omitted). See *Doe v. Heck*, 327 F.3d 492, 524-25 (7th Cir. 2003); *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 474 (7th Cir. 2011); and *Dupuy v. Samuels*, 462 F.Supp.2d 859 (N.D. Ill. 2005).

The County's memorandum at pages 16-17 errs in requesting Count XII's dismissal. The County acknowledges that "associational rights" must be weighed "against the state's interest in infringing on those rights" (p. 16) and "Mitchell no doubt had a protected interest in associating with his wife" (p. 17). *See Roberts v. United States Jaycees,* 468 U.S. 609, 620 (1984); *Reasnover v. St. Louis Cnty., Mo.,* 447 F.3d 569, 585 (8th Cir. 2006); *Singleton v. Cecil,* 133 F.3d 631, 635 (8th Cir. 1998). But, the County errs in arguing for Rule 12 dismissal based on the contested allegation that the County Defendants had a legitimate interest in protecting his wife's child ML from the "physical abuse" Mitchell's children suffered. To the contrary, Mitchell's claims, which must be assumed to be true at this Rule 12 stage of the proceedings, are that the County's charge of "physical abuse" was based on constitutionally-protected use of corporal punishment to discipline a child. So, the County had no constitutional reason to separate Mitchell from his wife and her child ML. But, the County did anyway.

Further, the complaint alleges Boreland intentionally acted with the goal of poisoning and wrecking Plaintiffs' marriage to Litvinenko by conspiring with ML's father, Litvinenko's former partner, in a plot to force Litvinenko to return to New Jersey for proceedings of "ML" in a New Jersey custody battle. The forced separation continued for the entire additional five months that the couple was required to remain in Minnesota, as Plaintiff fought to regain custody of his children. The couple was not able to live together again until they physically left Minnesota and returned to New Jersey. All of the Defendants knew of the illegally forced separation, condoned and/or ratified it, and refused to intervene to stop it. The state had no interest as it relates to Litvinenko and ML, dismissed Litvinenko case, and Litvinenko and ML never requested or required the states assistance or interest. In fact,

just the opposite occurred, Litvinenko and ML pleaded not to be separated from the very beginning and provided the reasons why. All of this has been corroborated with New Jersey and Apple Valley police reports, New Jersey CP&P documentation, DCSS documentation and emails to and from Defendants.

As to Count XIII, the Mitchells' *Monell* claims, the County's memorandum at pages 23-25 err in arguing these claims should be dismissed. The County's memorandum quotes plaintiffs' legal theories from Amended Complaint, paragraph 525, then categorically denies paragraph 525's *Monell* legal theories, and then asks the Court to dismiss the *Monell* legal theories. To the contrary, the Mitchells state a valid municipal liability claim against the County based upon more their Amended Complaint and dozens of exhibits. Plaintiffs' plead sufficient facts in support of several municipal liability theories: (1) direction of the unconstitutional conduct by policymaking officials; (2) acquiescence in and/or ratification of the unconstitutional conduct by policymaking officials; and (3) deliberate indifferent failure to train and/or supervise. Also, Plaintiffs' municipal liability claims are not based on respondent superior. See, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

First, even a single instance of unconstitutional conduct can give rise to municipal liability if the conduct was at the direction of a policymaking official. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); *Atkinson v. City of Mountain View, Mo.*, 709 F. 3d 1201 (8th Cir. 2013). In fact, policymaking authority can be delegated to subordinates so that the subordinates are then empowered as policymaking officials. *Brockinton v. City of Sherwood*, 503 F. 3d 667 (8th Cir. 2007) ("A supervisor may be held individually liable under § 1983 if he

directly participates in the constitutional violation or if he fails to train or supervise the subordinate who caused the violation"). In the case at bar, Plaintiffs allege that Coyne and Kopesky are policymaking officials pursuant to Minnesota law and/or delegation of authority from the Commissioner MN DHS or Dakota County Board of Commissioners. Plaintiffs also allege that Coyne and Kopesky directed the various unconstitutional actions, and that they participated in the meetings at which several other of the individual Defendants, including all of the Supervisors named in this action, unilaterally determined that Plaintiff could not have any contact with the children or wife. This constitutes sufficient direct involvement on the part of Coyne and Kopesky to establish government liability.

Second, if such officials ratify the unconstitutional conduct already caused by their subordinates, the government is liable under§ 1983. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification [is] chargeable to the municipality because their decision is final."); *Herrera v. Valentine*, 653 F. 2d 1220 (8th Cir. 1981) ("Where senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the superior's inaction amounts to deliberate indifference or to tacit authorization of the offensive acts."); *Speer v. City of Wynne*, Ark., 276 F. 3d 980 (8th Cir. 2002) ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."). Here, Plaintiffs sufficiently plead that they complained multiple times to Coyne and Kopesky and the other Supervisor Defendants, but

that they took no action and, therefore, ratified and acquiesced in the unconstitutional conduct.

Third, governmental liability may also be based on a deliberate indifferent failure to train, even without proof of other instances of unconstitutional conduct, where: (1) a violation of federal rights may be a highly predictable consequence of a failure to equip government officials with specific tools or skills to handle recurrent situations; and (2) the likelihood of recurrence and predictability of the violation of a citizen's rights could justify a finding that the policymakers' decision not to train a government employee reflected deliberate indifference to the obvious consequence of the policymakers' choice - namely, a violation of a specific constitutional or statutory right. *Board of County Commissioners of Bryan County v. Br*own, 520 U.S. 397, 409 (1997). Several courts have recognized post *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that, based on judicial experience and common sense, that allegations similar to those made in the case at bar, and which have been asserted before a plaintiff has the opportunity to engage in discovery, are more than sufficient to satisfy the plausibility standard and withstand a motion to dismiss. See, e.g., *Gleason v. East Norriton Township*, No. 11-cv-6273, 2012 WL 3024011 at *8 (E.D. Pa. Jul. 24, 2012). Based on the allegations set forth in the Amended Complaint in this action, it is reasonable to infer that absent adequate training regarding UCCJEA, sharing exculpatory evidence, not fabricating evidence, probable cause, reasonable suspicion of imminent danger, misrepresentation and/or omissions and judicial deception, it is highly predictable that children will be unconstitutionally separated from their families. Likewise, it is reasonable to infer that absent adequate training these unconstitutional acts will continue to take place.

As to Count XIV, the Mitchells' supervisory claims are also challenged by defendants. Defendants claim DCSS Supervisors did not owe the Mitchell family members. But, the Case Plan and Reunification Plan defines the duties owed to Plaintiff and his children by DCSS. DCSS Supervisors Stang and Yunker reviewed and signed all documents and were responsible for supervising the implementation and execution of the plans. Additionally, "Yunker" and "Stang" signed all court reports acknowledging that Case Plan and Reunification Plan were being followed although both had first had acknowledge that they had NOT been followed, nor implemented, nor executed as required by the Department and DCSS policy and law, and that Plaintiff had been denied visitation for twenty-two months despite numerous court orders allowing visitation. Despite this knowledge, the supervisory defendants failed to stop or correct the injury, and condoned / ratified the continued unconstitutional practices for twenty-two months.

As to Count XV, XVI and XVII, the Mitchells' federal conspiracy claims, the State's memorandum at pages 26-27 err in denying a viable claims under Rule 12. As the Eighth Circuit noted in *White v. McKinley*, "the existence of a conspiracy to deprive the plaintiffs of their constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims." *White v. McKinley* 519 F.3d 806, 816 (8th Cir. 2008) The Amended Complaint sufficiently alleges a civil rights conspiracy under Section 1985 and Section 1986. *See Brandon v. Lotter,* 157 F.3d 537, 539 (8th Cir. 1998); *King v. Dingle,* 702 F. Supp. 2d 1049, 1078 (D.Minn. 2010). It is well-established that not all members of a conspiracy need to know each other in order to participate in a conspiracy. *US v. Bascope-*

Zurita, 68 F. 3d 1057 (8th Cir. 1995). Nor is it necessary for a conspirator to know "the identity of his co-conspirators or the exact role which they play in the conspiracy. *US v. McCarthy*, 97 F. 3d 1562 (8th Cir. 1996).As stated in the Amended Complaint and above, Plaintiff have pled allegations supporting a civil rights conspiracy claim. First, all of the defendants conspired and reached an agreement to transfer the custody of XM and BM to their biological mother in Spain. Second, the government officials planned this with the intent to deprive Plaintiffs of their constitutional rights. Third, there was a valid New Jersey Custody court order in place which defendants were aware of, which they intentionally violated to illegally usurp subject matter jurisdiction. Fourth, government officials wrote numerous deceptive reports in furtherance of their plot. Fifth, government officials petitioned to terminate Mitchell's parental rights without even attempting to prove him an unfit parent and against all DCSS expert advice. Sixth, AM and XM were illegally retained for five months, and twenty-two months, respectively by DCSS, thereby unnecessarily separating the family. The conspiracy lasted over twenty-two months; discussions and meetings of the minds between government officials happened on numerous occasions. Plaintiff-children were a party to these government official discussions and will testify to these discussions. Plaintiff-children will testify that the defendants had the power to prevent or aid in preventing the commission of the conspiracy and that none acted to prevent the conspiracy.

Count XVIII is Mitchells' intentional infliction of emotional distress claim upon which relief can be granted. Four elements must be proved in a claim for intentional or reckless infliction of emotional distress. These are: "(1) the conduct must be extreme and

outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe." *Hubbard v. United Press Intern. Inc.,* 330 N.W.2d 428, 438–39 (Minn. 1983).

The State's memorandum at pages 28-29 and the County's memorandum at pages 31-32 argue that the Plaintiffs have failed to allege extreme and outrageous conduct and severe emotional distress. "Extreme and outrageous" conduct must be "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (*quoting Haagenson v. National Farmers Union Prop. & Casualty Co.,* 277 N.W.2d 648, 652 n. 3 (Minn.1979)). The *Restatement* emphasizes that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46 cmt.j (1965).

As to extreme and outrageous conduct, the government's argument fails for the following reasons. First, the Amended Complaint clearly alleges the conspiracy, illegal retention, deprivation of visitation of X.M. for twenty-two months, deprivation of contact of A.M. for five months, wrongful initiation of termination of parental rights proceeding, attempt to transfer custody without jurisdiction, attempt to transfer custody to a psychologically disturbed biological mother against the recommendations of DCSS's own expert opinions, and an entire proceeding was fraught with judicial deception. These acts were intentional because DCSS knew within two weeks that all the allegations of long-term abuse were false based upon official state records; yet, the defendants continued with their actions for twenty-two months with no justifiable reason. This governmental conduct was

surely "extreme and outrageous" as if illegally having his child ripped away from his care and custody for twenty-two months based on an ordinary bottom-spanking wasn't enough.

The governmental conduct caused severe emotional distress. As to severe emotional distress, the Amended Complaint, paragraphs 573-575, alleged the Mitchells' severe emotional distress arose from the government official's actions in separating the Mitchell family causing a marital dissolution, 5 month separation from A.M. and 22 month separation from X.M. Further, for example, paragraph 218 states Mitchell suffered from post traumatic stress syndrome (PTSD), a severe major depressive disorder, sleeplessness, headaches, fatigue, malaise, irritability, inability to focus, a generalized fear of authority figures, loss of appetite, loss of weight and resulting work disability. So, the Amended Complaint satisfies the requirement the severe emotional distress requirement as well.

Counts XIX and XX are the Mitchells' state law negligence claim. The State's memorandum at pages 29-30 and the County's memorandum at pages 35-38 err in arguing that these claims should be dismissed. The elements of negligence under Minnesota law are duty, breach, causation and injury. *Varga v. U.S. Bank Nat'l Assn.*, 952 F.Supp.2d 850, 861 (D.Minn. 2013). The defendants' principal arguments relate to whether government officials owe Mitchell and/or his children a duty. *Funchess v. Cecil Newman Corp.,* 632 N.W.2d 666, 672 (Minn. 2001). The State argues that the State only owed a duty of care to the Mitchell children, not Mitchell. The County argues that DCSS workers and DCSS supervisors do not owe Mitchell nor the children a duty of care. To the contrary, once the government takes possession of a child, it owes a duty of care to both the parent and the minor children. According to the Minnesota Supreme Court, the case plan and reunification plan define the

duties owed to the parent(s) and child(ren) by the governmental defendants. See *Olson v. Ramsey County*, 509 N.W.2d 368 (Minn. 1993). The state defendants and county defendants did not properly create and follow a Case Plan and Reunification Plan as ordered by the court, and required by law, nor obtain the correct signatures and agreement as required. In turn, the government officials did not properly implement a Case Plan and Reunification Plan. Instead, the defendants recklessly flew by the seat of their pants resulting in the unlawful detention of Plaintiffs' children, including 22 unnecessary months for X.M. So, at this Rule 12 stage of the proceedings, all elements of the negligence claims have been met; duty, breach, causation and injury.

Count XXI is the Mitchells' state law negligent infliction of emotional distress claim. To sustain a claim for negligent infliction of emotional distress, the Mitchells must show that each one of them "(1) was within a zone of danger of physical impact; (2) reasonably feared for [his] own safety; and (3) suffered severe emotional distress with attendant physical manifestations." *Stead–Bowers*, 636 N.W.2d at 343 (Minn. App. 2001). "The zone of danger requirement may be replaced by an intentional tort such as defamation ...." *Oslin v. State*, 543 N.W.2d 408, 417 (Minn. App. 1996). In this case, the Mitchell family members assert the negligence elements as stated in Counts XIX and XX and that the "intentional infliction of emotional distress" intentional tort as a substitute for the "zone of danger" requirement.

The State's memorandum at pages 28-29 and the County's memorandum at pages 39-41. Both the State and County argue that the zone of danger requirement has not been met without considering the intentional tort of intentional infliction of emotional distress as a "replacement" for the zone of danger requirement. If they had, the defendants would have

seen this requirement is met as evidenced by the arguments above supporting the intentional infliction of emotional distress claim (Count XVIII). The State and County also argue that no legal duty existed, that no breach of duty to A.M. or X.M. occurred, and that no physical manifestation of injury is alleged. However, similar to the discussion above regarding negligence, the governmental officials owed a duty of care to each of the Mitchell family members based on the case and reunification plan that the Court ordered, but the government officials did not properly complete. The breach occurred because the government officials did not implement a proper case and reunification plan. Finally, regarding the physical manifestation of injury, paragraphs 594-597 cover it and incorporate paragraphs such as paragraph 218, quoted above, including specific physical manifestations arising from the government officials' conduct. So, the Amended Complaint satisfies the requirements for negligent infliction of emotional distress.

Counts XXII, XXIII and XXIV are the Mitchells' state law malicious prosecution, abuse of process claims and false imprisonment claims. "The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect — the improper use of a regularly issued process. 52 Am. Jur. 2d *Malicious Prosecution* § 2, at 187 (1970), quoted in Malicious Prosecution, Black's Law Dictionary (10th ed. 2014). The defendants are liable for both malicious prosecution and abuse of process because Dakota County District Court did not have jurisdiction under the UCCJEA; instead,

the New Jersey trial court had jurisdiction. First, to prove a malicious prosecution action, a plaintiff must prove:

> (1) the suit must be brought without probable cause and with no reasonable ground on which to base a belief that the plaintiff would ultimately prevail on the merits; (2) the suit must be instituted and prosecuted with malicious intent; and (3) the suit must ultimately terminate in favor of the defendant.

Jordan v. Lamb, 392 N.W.2d 607, 609 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Oct. 29, 1986). Here, all the requirements are satisfied. The defendants violated the UCCJEA by filing in Minnesota rather than New Jersey; so, defendants brought their suit without probable cause in a court without jurisdiction. As detailed in the complaint, the defendants instituted and prosecuted against the Mitchell family with malicious intent—resulting in 22 month detention for a first-time, single-offense of corporal punishment to discipline a child. Ultimately, the suit terminated in the Mitchell's favor.

The abuse-of-process claim requires a determination of whether the legal process "was used to accomplish an unlawful end for which it was not designed or intended, or to compel a party to do a collateral act which he is not legally required to do." *Kittler & Hedelson v. Sheehan Props., Inc.*, 203 N.W.2d 835, 840 (1973). These requirements are also satisfied since the defendants used a legal process, a CHIPS proceeding against the Mitchells in Minnesota court, for an unlawful end: to avoid New Jersey court proceeding under UCCJEA. The defendants acted without proper jurisdiction because they used the Minnesota court orders to compel the Mitchell family to do collateral acts which they were not required to do without a New Jersey court order transferring jurisdiction.

The State's arguments at pages 30-31 and the County's arguments at pages 41-43 against malicious prosecution and abuse of process purposefully omit the point that under

UCCJEA the Dakota County District Court never had jurisdiction. Because the Dakota County District Court had no jurisdiction, no immunities apply for the defendants. If the State and County wanted to avoid malicious prosecution and abuse of process claims, they should have followed UCCJEA and applied to the New Jersey Court for a transfer of jurisdiction to Minnesota. Without such a New Jersey trial court order, the State and County are liable on these facts for malicious prosecution and abuse of process.

False imprisonment consists of three elements: (1) words or acts intended to confine a person; (2) actual confinement; and (3) awareness by the person that he or she is confined. *Eilers v. Coy*, 582 F.Supp. 1093, 1096 (D.Minn. 1984). The County's memorandum at page 32 errs in arguing that the elements are satisfied for A.M.'s and X.M.'s false imprisonment claim. However, they are because under UCCJEA the Dakota County District Court never had jurisdiction. Because the Dakota County District Court had no jurisdiction, no immunities apply for the defendants. If the State and County want to avoid A.M.'s and X.M.'s false imprisonment claims, they should have followed UCCJEA and applied to the New Jersey Court for a transfer of jurisdiction to Minnesota. Without such a New Jersey trial court order, the State and County are liable on these facts for malicious prosecution and abuse of process. Furthermore, the State's arguments at page 43 is based on the two year statute of limitations in section 541.07(1) which is inapposite because the A.M. and X.M. are still minors. Section 541.15 tolls the statute of limitations when "plaintiff is within the age of 18 years."

Finally, Count XXV is the Mitchells' claim for declaratory judgment against the County's June 2018 invoice for foster care services for A.M. and X.M. The invoice is for

$16,840.20. The Mitchells argue that they owe nothing for the County's unconstitutional and violative services. The Court has jurisdiction over the "case" or "controversy" involving the County's invoice because the Mitchells are saying the County's invoice is for the provision of unconstitutional services.

IV. The state's and county's immunity defenses must be rejected.

The state's and county's memoranda err in claiming that the amended complaint should be dismissed based on immunity defenses at this stage of the proceeding. The amended complaint at paragraphs 299-360 provide the facts why none of the immunities apply for any of the defendants. The state's arguments for immunities are at pages 16-23 of its memorandum. The county's arguments for immunities are at pages 25-31 and 43-47 of its memorandum. To the contrary, the immunity defenses do not warrant dismissal of the amended complaint.

First, since SCPS's claims include claims for prospective relief, no immunities apply for the state and county defendants to those claims per the doctrine of *Ex parte Young*, 209 U.S. 123 (U.S. 1908). Accordingly, State defendants Piper, Sirr, and Derby are not entitled to Eleventh Amendment immunity. AC¶¶303-18. The State's arguments at pages 19-21 of its memorandum based on immunity should be rejected. The amended complaint alleges unconstitutional state policies and unconstitutional actions taken by Piper as Commissioner of Department of Human Services (and Jesson before her), Sirr and Derby. They and their offices are being sued for injunctive and prospective declaratory relief. Thus, per the doctrine of *Ex parte Young*, they may be sued in their official capacity on those federal constitutional claims because the Plaintiffs seek prospective relief.

Second, Minnesota has waived sovereign immunity in Minnesota Statutes § 626.556, subdivision 5, for State and County officials who knowingly or recklessly make false reports. AC¶302. The same statute also creates liability for persons who make false reports. "[F]alse reports under the provisions of this section" include false reports under Minn. Stat. §626.556, subd. 2 which has been incorporated in the CHIPS definition under Minn. Stat. §260C.007. The Mitchells have alleged false reporting; so, the immunities do not apply at this state of the proceeding.

Third, State defendant Sirr is not entitled to guardian ad litem immunity. AC¶¶319-26. *See Dornheim v. Sholes,* 430 F.3d 919, 925 (8th Cir. 2005) (absolute quasi-judicial immunity applies to guardian ad litem). The State's arguments at 16-17 should be rejected. Guardians ad litem quasi-judicial immunity would not protect Sirr for any acts performed beyond the scope of his duties which is exactly what is alleged in the amended complaint. Sirr acted outside his statutory responsibilities as detailed in AC¶¶319-26. So, Rule 12 dismissal is not warranted.

Fourth, State defendant Derby is not entitled to public-defender immunity. AC¶¶327-36. *See McDonald v. Stewart,* 182 N.W.2d 437, 440 (Minn. 1970). The State's arguments at 17-19 should be rejected. Public defenders quasi-judicial immunity would not protect Derby for any acts performed beyond the scope of her duties under color of state law which is exactly what is alleged in the instant case with specificity. Sirr acted outside his statutory responsibilities as detailed in AC¶¶327-36.

Fifth, County defendants Swank and Scott are not entitled to absolute immunity. AC¶¶337-45. The County's arguments at pages 25-26 of its memorandum should be

rejected. *Winslow v. Smith,* 696 F.3d 716, 739 (2012). Prosecutorial immunity would not protect Swank and Scott from liability arising from the pre-prosecution investigative functions (similar to police officers), conspiracy, and any acts performed beyond the scope of her duties which is exactly what is alleged in the instant case with specificity. These allegations against Swank and Scott are found in AC¶¶337-45. .

Sixth, Boreland and P'Simer are not entitled to absolute immunity. AC¶¶346-53. The County's arguments at pages 26-27 of is memorandum should be rejected. To the contrary, defendants Boreland and P'Simer are not entitled to absolute immunity with regard to Plaintiffs' claims. Boreland and P'Simer do not have absolute immunity because they are not prosecutors. Testimonial immunity does not encompass non-testimonial acts of fabricating evidence. Boreland's and P'Simer's actions are investigative and administrative actions of the child welfare workers. The material allegations in this regard are in AC¶¶346-53. Therefore, Boreland and P'Simer are not entitled to absolute immunity for their actions.

Seventh, the County-defendants are not entitled to qualified immunity. AC¶¶354. The County's arguments at pages 27-31 of its memorandum should be rejected. The County defendants are not entitled to qualified immunity because they violated Plaintiffs' clearly established rights as a matter of law. *See City & Cnty. of San Francisco, Calif. V. Sheehan,* 135 S.Ct. 1765,1775 (2015). The allegations in this regard are in AC¶¶354. On the facts alleged, the county defendants must meet their burden of establishing their entitlement to qualified immunity at trial.

Eighth, Boreland, P'Simer, Akolly, Yunker, Stang, Coyne and Granger-Kopesky specifically are not entitled to any immunity as further detailed in AC¶¶355-60. Further, the

immunity defenses raise material disputed facts for trial; so, the Rule 12 motions should be denied as premature.

V. The State's and County's other arguments do not warrant dismissal of the amended complaint.

The County's arguments at pages 47-49 do not support dismissal of the complaint. The County errs in arguing that the claims are not appropriate for declaratory judgment. For the reasons explained above, the claims are justiciable. SCPS and the Mitchell family have definite and concrete assertions of rights emanating from the *Alsager* interpretation of the Constitution, involving a genuine dispute between SCPS and the State and County, and is capable of resolution by judgment as in the *Alsager* case. The County's assertion that DCSS, as a department of Dakota County, is not a proper defendant requires more discovery before plaintiffs would agree to dismiss DCSS. The State and County err to argue that the Court should not exercise supplemental jurisdiction under 28 U.S.C. §1367(a), (c) (providing supplemental jurisdiction of state law claims) because it would be proper to do so. The State's and County's other arguments do not support dismissal.

CONCLUSION

For these reasons, the Court should deny the state's and county's motions to dismiss.

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