UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dwight D. Mitchell, individually and on behalf of his children X.M., A.M., and BRYCE MITCHELL; and STOP CHILD PROTECTION SERVICES FROM LEGALLY KIDNAPPING,

Plaintiffs,

vs.

Dakota County Social Services, *et al.*

Defendants.

Civil File No. 0:18-cv-1091 (WMW/BRT)

STATE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

State Defendants submit this Reply in support of their Motion to Dismiss. As described in their initial memorandum, as well as by the County[1], Plaintiff's Complaint should be dismissed as to the State Defendants for numerous, independent reasons. While Plaintiffs disagree that dismissal is appropriate, they provide no factual basis or authority to salvage their claims. Indeed, numerous arguments presented by State

[1] The County Defendants filed a similar motion to dismiss supported by a well-reasoned memorandum and reply. (Docs. 16, 47.) State Defendants hereby incorporate by reference the arguments contained in these memoranda pertaining to procedural due process, substantive due process, conspiracy, equal protection, absolute immunity, qualified immunity, supplemental jurisdiction, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, malicious prosecution, abuse of process, official immunity and statutory immunity, all of which apply equally to the State Defendants. (Doc. 16 at 11-16, 17-21, 25-48; Doc. 47.)

Defendants are either entirely unaddressed, or the opposition fails to cite any apposite legal authority, resulting in waiver. *Molasky v. Principal Mut. Life Ins. Co.*, 149 F.3d 881, 885 (8th Cir. 1998) ("[I]t is not this court's job to research the law to support an appellant's argument."); *Miles v. Caldwell*, 69 U.S. 35, 44 (1864) (finding waiver when issue was not adequately argued on appeal or before trial court). Accordingly, dismissal of all claims remains appropriate.

ARGUMENT

I. ALL FACIAL CONSTITUTIONAL CLAIMS (COUNTS I-VI) MUST BE DISMISSED FOR LACK OF STANDING.

In their initial memorandum, State Defendants established that Plaintiffs lack standing to assert their facial[2] constitutional claims. (Doc. 27 at 5-8.) Plaintiffs have not plausibly pleaded a threat of repeated injury, which is required to obtain standing to obtain injunctive relief (*i.e.*, the only relief available for facial constitutional claims). Mitchell and his children are not citizens of Minnesota and there are no facts in the Complaint describing the nature of SCPS or its membership. (*Id.*)

In claiming standing, Plaintiffs attempt to gloss over the fact that they lodge six separate facial constitutional claims, all of which are extremely broad, vague, and pertain to ten separate provisions of four Minnesota statutes. (Doc. 27 at 8.) These claims are

[2] In response, Plaintiffs now assert that Counts I-VI are facial and as-applied claims. (Doc. 44 at 7.) That, however, is not what the Complaint states (Doc. 8 at Prelim. Statement), nor what Plaintiffs have previously told this Court. (Doc. 9 at 1 (referring to Counts I-VI as "constitutional facial challenges").) Plaintiffs cannot amend their Complaint in opposing State Defendants' Motion to Dismiss. *See generally* Fed. R. Civ. P. 15.

anything but "straightforward," as Plaintiffs claim, and Plaintiffs cannot plausibly plead standing simply by asserting that SCPS members are "parents with minor children in Minnesota" previously affected, in an unknown manner, by an unspecified Minnesota child-protection statute. (Doc. 44 at 3, 5.) General parental concern, or even a parental preference for corporeal punishment, is not enough. (Doc. 27 at 8.) Rather, Plaintiffs must plausibly allege their standing, for each of their six facial constitutional claims, because standing is a claim-specific inquiry. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). Plaintiffs have failed to even attempt to do so.

Plaintiffs further ignore that because Counts I-VI are facial constitutional claims, they must plead a plausible "real and immediate threat of repeated injury" in the future. (Doc. 27 at 6.) Plaintiffs have not done this. It is entirely speculative to claim that any association member would use corporal punishment, in the future, to such an extent that renewed CHIPS proceedings are commenced. (*Id.* at 8, n.2.) Particularly because Minnesota statutes, on their face, do not prohibit reasonable physical discipline. (*Id.* at 11-12.)

Implicitly admitting that the Complaint is insufficient to plead standing, Plaintiffs submit 46 declarations of SCPS members, plus a declaration from Mitchell, to support standing. (Docs. 45-46.) These declarations, however, cannot be considered for purposes of State Defendants' facial challenge to subject-matter jurisdiction. *Semler v. Klang*, 603 F. Supp. 2d 1211, 1219-20 (D. Minn. 2009) ("If the defendant brings a facial challenge . . . the Court reviews the pleadings alone[.]").

To overcome a facial subject-matter jurisdiction challenge, Plaintiffs must "adequately allege" a basis for the Court to exercise jurisdiction. *Smith v. Ghana Commercial Bank, Ltd.*, No. CIV. 10-4655 DWF/JJK, 2012 WL 2930462, at *3 (D. Minn. June 18, 2012), adopted, No. CIV. 10-4655 DWF/JJK, 2012 WL 2923543 (D. Minn. July 18, 2012), aff'd (Dec. 7, 2012). Plaintiffs have not done so for the reasons previously described. (Doc. 27 at 5-8.)

Regardless, such declarations, even if considered, are insufficient to withstand a factual (as opposed to facial) jurisdictional challenge. To overcome a factual challenge, Plaintiffs must bring forth evidence to establish standing by a preponderance of the evidence. *Semler*, 603 F. Supp. 2d at 1220. The declarations, however, are all the same (with minor variances) and do not establish a factual basis to support standing for the numerous, broad facial constitutional challenges at issue here. Rather, and at best, these declarations all appear to allege as-applied procedural due process claims. (Doc. 46 at Exs. 1-46.)

And, while Plaintiffs assert that their members intend to "engage in the act of ordinary parental bottom spankings" (Doc. 44 at 5), no such allegation is contained in the Complaint, nor the declarations. Regardless, Minnesota statutes *do not* prohibit such discipline when reasonable and not resulting in injury. (Doc. 27 at 11-12.) Accordingly, an intent to spank is not sufficient to establish standing for the facial constitutional claim actually alleged in this case, which is a claimed right to physically injure a child. Accordingly, because Plaintiffs lack standing, all their facial constitutional claims should be dismissed for lack of subject-matter jurisdiction.

II. THE STATUTES ARE NOT UNCONSTITUTIONAL IN "EVERY CONCEIVABLE APPLICATION."

Plaintiffs also fail to cite to any authority indicating that any Minnesota statute is unconstitutional in "every conceivable application." (Doc. 27 at 9.) Minnesota's child-protection statutes are specific and supported by a substantial state interest: protecting children. *(Id.* at 9, 11.) And, Plaintiffs' almost-exclusive reliance on *Alsager v. District Court of Polk County Iowa* to support their various facial challenges is misplaced. 406 F. Supp. 10 (S.D. Iowa 1975). The facial ruling of this district court opinion was not affirmed on appeal. *Alsager v. Dist. Ct. of Polk Cnty., Iowa,* 545 F.2d 1137, 1138 (8th Cir. 1976) ("[W]e decline to resolve whether the statutory provisions cited above are facially unconstitutional[.]").

Moreover, throughout their memorandum, Plaintiffs fail to cite any of the hundreds of Minnesota cases actually interpreting the Minnesota statutes at issue, relying instead on Plaintiffs' own subjective, unsupported interpretation of these statutory provisions. *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 694 (8th Cir. 2003) (rejecting facial constitutional challenge when "there is nothing on the face of the statute to prevent it from being construed and enforced in a constitutional manner."). As a result, Plaintiffs' unsupported fear of a future unconstitutional application of these statutes is entirely unfounded and not plausible.

As to Count I, the Eighth Circuit has been clear that there is no such thing as a facial vagueness challenge outside of the First Amendment context (Doc. 27 at 9-10), and the cases cited by Plaintiffs do not hold to the contrary. *See Papachristou v. City of*

Jacksonville, 405 U.S. 156 (1972) (as-applied vagueness challenge); *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (same). Moreover, while Plaintiffs claim that Minnesota's child-protection statutes are vague like the statutes at issue in *Alsager*[3], they fail to provide any reasons why, neglecting to even quote the statutory language they believe to be vague. (Doc. 44 at 9.) *Supra* at 2 (arguments not raised and supported waived).

As to Count II, which asserts a fundamental right to utilize corporal punishment, Plaintiffs claim that the State "might treat an ordinary bottom-spanking as an assault or malicious punishment[.]" (Doc. 44 at 10.) This, however, is an as-applied allegation that cannot show that the challenged statutes are unconstitutional in "every conceivable application." Moreover, Minnesota's child-protection statutes expressly allow for the reasonable use of physical punishment (Doc. 27 at 11-12), and all Minnesota child-protection laws are read *in pari materia* in this respect. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004) ("[S]tatutes relating to the same person or thing or having a common purpose should be construed together."). Plaintiffs' confusing arguments to the contrary, without citation to any Minnesota case actually interpreting these statutes, must be rejected. Indeed, State Defendants are aware of no

[3] The phrase found to be unconstitutionally vague in *Alsager* is entirely different than the various terms and phrases in Minnesota's statutes pertaining to physical child abuse. Indeed, *Alsager* addressed the purported neglect of children, not physical abuse. 406 F. Supp. at 13.

Minnesota case holding that an "ordinary bottom-spanking," alone, may serve as a basis to terminate parental rights, and Plaintiffs cite none.[4]

As to Count III, Plaintiff asserts, again relying on *Alsager* alone, that Minnesota statutes violate parents' substantive due process rights by allowing removal of children from the home without a sufficient showing of harm. (Doc. 44 at 14-15.) But, parents do not have "a constitutional right to be free from child abuse investigations." *Manzano v. S. Dak. Dept. of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995). Moreover, Minnesota law affirmatively presumes the parent to be fit.[5] (Doc. 27 at 13.) Plaintiffs' unsupported and subjective interpretation of Minnesota's statutes to the contrary, is fundamentally flawed and ignores the child's right to bodily integrity and the State's compelling interest in protecting children. (Doc. 27 at 12-13.)

As to Count IV, Plaintiffs cite to no authority outside of their repeated reference to *Alsager* and an inapposite Illinois case[6] in support of their facial procedural due process

[4] Plaintiffs also cite to nothing to support their unfortunate assertion that parents have a fundamental right to inflict "temporary marks and transient pain" upon their children. (Doc. 44 at 11.)

[5] *See e.g.*, *In re Welfare of M.A.H.*, 839 N.W.2d 730, 740 (Minn. App. 2013) ("The burden of proof is on the petitioner, who must overcome the presumption that parents are fit to be entrusted with the care of their child.").

[6] This case held a child-protection statutory presumption, presuming that a parent was unfit based upon the length of time in foster care alone, to be unconstitutional. *In re H.G.*, 757 N.E.2d 864, 872-73 (Ill. 2001). Minnesota law, which considers the amount of time a child is in foster care, is significantly different and considers various factors over which the parent has direct control before termination may occur. *See* Minn. Stat. § 260C.301, subd. 1(b)(5).

claim. (Doc. 44 at 18-21.) Indeed, Plaintiffs do not substantively address Defendants' various arguments in favor of dismissal (Doc. 27 at 14-16), which constitutes waiver. *Supra* at 2. And, no Minnesota statute expressly requires, authorizes, or condones withholding exculpatory evidence from parents, contrary to Plaintiffs' assertion. And, Plaintiffs cite to nothing holding that *Brady* applies to child-protection proceedings. (Doc. 44 at 19.)

As to Counts V and VI, Plaintiffs raise no viable argument, and cite to no authority, indicating that Minnesota statutes, on their face, violate equal protection by considering "culture"[7], or lack a rational basis in defining "child abuse" and "domestic child abuse." (Doc. 44 at 21-24.) State Defendants stand on their initial briefing on these baseless claims. (Doc. 27 at 13-14, 16.)

III. STATE DEFENDANTS TROTZKY-SIRR AND DERBY ARE IMMUNE FROM SUIT.

Plaintiffs do not substantively address or rebut State Defendants' arguments pertaining to absolute immunity. (Doc. 27 at 16-19.) Rather, Plaintiffs merely argue, without citation to any supporting law[8], that State Defendants Trotzky-Sirr and Derby are not entitled to immunity because they acted "beyond the scope" of their duties. (Doc. 44

[7] Plaintiffs' reference to disparate impact (Doc. 44 at 22), implicitly acknowledges that Minnesota's statutes, on their face, do not violate equal protection. "By definition, a facial challenge to a statute on equal protection grounds asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980).

[8] The two cases cited by Plaintiff were relied upon by State Defendants in favor of immunity and do not support Plaintiffs' position here. (Doc. 27 at 16-17.)

at 41.) This unsupported conclusion, however, even if true, does not strip Trotzky-Sirr or Derby of immunity.

As a guardian *ad litem*, Trotzky-Sirr is immune for all his discretionary actions, even if wrong, malicious, or conspiratorial. (Doc. 27 at 16-17.) All claims against Derby, on their face, relate to her exercise of professional discretion as a public defender. (Doc. 27 at 17-19.) Accordingly, all claims against Trotzky-Sirr and Derby should be dismissed as barred.

IV. MITCHELL HAS NOT PLEADED A CLAIM AGAINST COMMISSIONER PIPER.

Although Plaintiffs include Commissioner Piper as separate Defendant for Count VIII, there are no specific allegations against her and Plaintiffs' opposition refers to the Commissioner in only one paragraph. (Doc. 44 at 40.) Moreover, Mitchell does not have standing to pursue prospective relief against any Defendant, including the Commissioner. *Supra* at 2-4. Accordingly, Mitchell has not pleaded a viable claim against Commissioner Piper. (Doc. 27 at 19-21.)

V. MITCHELL'S AS-APPLIED CONSTITUTIONAL CLAIMS MUST BE DISMISSED.

Mitchell's as-applied constitutional claims must also be dismissed for the various reasons described in State Defendants' and County Defendants' memoranda. (Doc. 27 at 21-27; Doc. 16 at 11-21.) First, it is undisputed that the State is immune from suit in federal court, and State Defendants are not "persons" subject to § 1983. (Doc. 27 at 21.)

State Defendants, to the extent they are sued in their individual capacity, are entitled to qualified immunity, an argument unaddressed by Mitchell, resulting in

waiver.[9] *Supra* at 2. And, while Mitchell claims a right to discovery, "both the Supreme Court and [the Eighth Circuit] 'repeatedly have stressed the importance of resolving [qualified] immunity questions at the earliest possible stage in litigation.'" *Payne v. Britten*, 749 F.3d 697, 701 (8th Cir. 2014). Mitchell's allegations pertaining to purported procedural irregularities in State court litigation cannot form the basis of a constitutional claim. *See Forrester v. Bass*, 397 F.3d 1047, 1056 (8th Cir. 2005) ("Minnesota child welfare statute, at most, 'establishes guidelines to be followed as a matter of state law and neither confers nor embodies any constitutionally-protected right.'").

As previously described, Mitchell's § 1983 claims should be dismissed because his complaint fails to state a plausible constitutional violation under both prongs of the qualified-immunity analysis. (Doc. 27 at 23-27.) Indeed, the Eighth Circuit has recognized that weighing the interests of the parent "against the interests of the child and the state makes the qualified immunity defense difficult to overcome." *Manzano*, 60 F.3d at 510.

First, Mitchell asserts that his as-applied substantive and procedural due process claims cannot be dismissed, again relying on *Alsager*. (Doc. 44 at 24.) This case is inapposite. There, parental rights were terminated because the parents "permitted their children to leave the house in cold weather without winter clothing on, allowed them to play in traffic, to annoy neighbors, to eat mush for supper, to live in a house containing dirty dishes and laundry, and to sometimes arrive late at school." 406 F. Supp. at 22.

[9] Rather, this issue is addressed in merely one paragraph, addressing the County Defendants' arguments, alone. (Doc. 44 at 42.)

The Court found such an insubstantial basis for the termination of parental rights to violate substantive due process. *Id.*

Here, in contrast, Mitchell's rights were not terminated, but rather, the children were temporarily removed from his custody because of undisputed physical abuse. Various courts have found situations such as Mitchell's do not raise a viable substantive due process claim. *See e.g.*, *Swanson v. Swanson et al.*, No. 4:09-CV-0171-JAJ, 2009 WL 10664801 (S.D. Iowa Aug. 18, 2009); *Fitzgerald v. Williamson*, 787 F.2d 403, 408 (8th Cir. 1986).

As to procedural due process, the Court in *Alsager* found that the parents were not given adequate notice as to the actual, specific basis for the termination proceedings. *Id.* at 24-25. Once again, these facts are nothing like those here, where Mitchell was well-aware of the reasons for the possible transfer of custody: physical abuse.[10] Moreover, it is undisputed that Mitchell was provided with notice and an opportunity to be heard in his child-custody case, as the public court records (attached to the Complaint and otherwise) show.

Mitchell's equal-protection claim (Count XI) must be dismissed because his unsupported allegation of racism is woefully insufficient to state a claim. (Doc. 44 at 25-26.) (Doc. 27 at 26.) As to conspiracy, Mitchell simply alleges that all the individual

[10] *Alsager* also required a "clear and convincing" standard of proof for termination proceedings, 406 F. Supp. at 22, which Minnesota already requires. *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 665 (Minn. App. 2012) ("[F]or almost 35 years, the courts and the legislature have unequivocally and unambiguously required clear-and-convincing evidence to support the termination of parental rights.").

Defendants had a "meeting of the minds" (Doc. 44 at 32-33), but fails to address that such a meeting of the minds is not a conspiracy if the parties were working to do something legal, as was the case here. (Doc. 27 at 26-27.) Plaintiff can cite to no plausible factual allegations in the Complaint providing that any State Defendant intended to violate his rights, rather than simply do their jobs. The conspiracy claim must therefore be dismissed.

VI. THIS COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION

All of Mitchell's state-law claims against State Defendants fail for the reasons described in State Defendants prior memorandum, as well as the memorandum filed by the County Defendants. (Doc. 27 at 28-32; Doc. 16 at 31-43.) This Court, however, should decline to exercise supplemental jurisdiction over these claims. (Doc. 27 at 27-28.)

Mitchell's state-law claims fail as a matter of law. (Doc. 27 at 28-33.) In addition to the reasons previously described, State Defendants further state that: (1) Mitchell cites to no case law supporting his theory of what constitutes "extreme and outrageous conduct" for purposes of intentional infliction of emotional distress (Doc. 44 at 33-34); (2) Mitchell does not deny that his negligence claim fails because any injury as alleged in this case was caused by the children's mother (for providing false information), not State Defendants[11] (Doc. 27 at 29); (3) Mitchell's negligent infliction of emotional distress

[11] Plaintiff refers to a duty of care stemming from a Case and Reunification Plan (Doc. 44 at 36), but fails to link these documents, and the purported responsibilities stemming therefrom, to any State Defendant.

claim cannot be saved because contrary to his assertion, he has not pleaded a viable intentional tort; (4) Mitchell's request, that the Court find that the state court wrongfully exercised jurisdiction in support of his malicious prosecution/abuse of process claims (Doc. 44 at 38-39), is barred by the *Rooker-Feldman* doctrine (Doc. 27 at 24); and (5) Mitchell fails to address State Defendants' argument that his malicious prosecution claim fails because State Defendants did not "prosecute" him (Doc. 27 at 30), resulting in waiver. *Supra* at 2.

For all these reasons, Plaintiff's state-law claims fail as a matter of law.

CONCLUSION

For the foregoing reasons, and the reasons set forth in State Defendants' initial memorandum, State Defendants request that all claims against them be dismissed with prejudice.

Dated: July 31, 2018

Respectfully submitted,

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