No. 18-____

In the Supreme Court of the United States

NATHANIEL BRENT AND ROBERT BRENT,

Petitioners,

v.

WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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JANUARY 7, 2019

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QUESTIONS PRESENTED

1. This Court has made clear that the *Rooker-Feldman* Doctrine is simply an application of 28 U.S.C. § 1257. Does the *Rooker-Feldman* Doctrine bar a 42 U.S.C. § 1983 damages claim that claims that the administrative policy of allowing a probation officer approve non-appealable, non-final, ex-parte orders in the name of a judge without any judicial oversight violated Plaintiffs' constitutional rights?

2. In the instant case, the "State Defendants" did not raise the issue of immunity under *Martin v. Children's Aid Society*, 215 Mich. App. 88 (1996) for over five years after they were served with the complaint and not until after they had filed two previous Rule 12 Motions, lost an appeal, and filed two answers to the complaint. Are all potentially dispositive affirmative defenses to be treated as a failure to state a claim for the purposes of Fed. R. Civ. P. 12(g)(2) and (h)(1)?

3. With the circuit courts split, is qualified immunity to be granted to a defendant that creates their own exception to the Fourth Amendment until the relevant Circuit Court finally finds that no exception exists?

4. In the instant case Plaintiff alleged that the ex-parte order to remove children was facially deficient for a number of reasons, including that the order used a "reasonable grounds" standard instead of the "probable cause" standard contained in the Fourth Amendment. Is the relevant order facially deficient under the Fourth Amendment standards?

PARTIES TO THE PROCEEDING

Petitioners and Plaintiffs-Appellants Below

- Nathaniel Brent
- Robert Brent

Respondents and Defendants-Appellees Below

- Mia Wenk
- Shevonne Trice
- Monicia Sampson
- Joyce Lamar
- Charlotte McGehee
- Heather Decormier-McFarland
- Leslie Smith
- Emina Biogradlija
- Michael Bridson
- Detroit Police Department
- Two unknown Police Officers

Respondents and Defendants-Appellees Who Have Been Dismissed from the Case and No Longer Have an Interest in the Outcome of this Petition

- Nicolas Bobak
- Anthony Crutchfield
- Judy Hartsfield
- Wayne County Department of Human Services

- State of Michigan Department of Human Services
- Wendolyn Greene
- Judson Center
- The Children's Center
- MethoDist Children's Home
- Noel Chinavare
- Michael Chinavare

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The Judgment and Opinion of the United States Sixth Circuit Court of Appeals, dated August 23, 2018, is recommended for publication and is reproduced below at App.1a and App.3a. A previous unpublished Sixth Circuit Opinion, dated February 6, 2014, remanding proceedings to the district court is reproduced below at App.79a.

JURISDICTION

This Court has jurisdiction over the instant petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). The Sixth Circuit entered judgment in this case on August 23, 2018. This opinion has been published as *Brent v. Wayne County Dept. Of Human Services*, 901 F.3d 656 (6th Cir. 2018). Petitioners filed a timely motion for rehearing en banc on September 5, 2018, which was denied on October 11, 2018. This orders are included in the appendix. Defendant The Children's Center also filed a motion for rehearing on September 5, 2018. This motion has not been ruled upon, however the motion became moot due to the settlement and stipulated order of dismissal regarding The Children's Center entered in the District Court on November 8, 2018 (Dist. ECF Doc 299).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND JUDICIAL RULES

- **U.S. Const. amend. IV**

  The right of the people to be secure in their persons, houses, papers, and effects,[a] against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

- **U.S. Const. amend. XIV, § 1**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- **28 U.S.C. § 1257**

  (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being

repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

- **42 U.S.C. § 1983**

  Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- **MCL 712A.10**

  (1) Except as otherwise provided in subsection (2) and sections 14, 14a, and 14b of this chapter, the judge may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging

that a child is within the provisions of this chapter, if there is no objection by parties in interest. The probation officer or county agent designated to act as referee shall do all of the following:

(a) Take and subscribe the oath of office provided by the constitution.

(b) Administer oaths and examine witnesses.

(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition.

- **Fed. R. Civ. P. 12 (relevant portions)**

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

[. . .]

(g) JOINING MOTIONS.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

- **MCR 3.991**

(A) General

(1) Before signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by subrule (B).

(2) If no such request is filed within the time provided by subrule (B)(3), the court may enter an order in accordance with the referee's recommendations.

(3) Nothing in this rule prohibits a judge from reviewing a referee's recommendation before the expiration of the time for requesting review and entering an appropriate order.

(4) After the entry of an order under subrule (A)(3), a request for review may not be filed. Reconsideration of the order is by motion for rehearing under MCR 3.992.

(B) Form of Request; Time. A party's request for review of a referee's recommendation must:

(1) be in writing,

(2) state the grounds for review,

(3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and

(4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed.

STATEMENT OF CASE

A. Relevant Facts

On January 19 2010 The Michigan Department of Human Services received a report that Plaintiff Robert Brent had run away from home wearing only a pair of shorts (Dist. ECF Doc 127 Pg Id 3626). The

report was assigned to Defendant Mia Wenk. Prior to conducting her investigation, Ms. Wenk spoke with the source of the complaint (Officer Coleman) whom informed her that the incident in question was due to poor decision making on the part of Robert (Dist. ECF Doc 127 Pg Id 3629). Wenk then visited the Plaintiffs home on January 20, 2010 Plaintiff Nathaniel Brent gave limited consent for Ms. Wenk to interview Robert in the living room. Ms. Wenk exceeded this consent by demanding to go to Roberts bedroom and inspecting the rest of the home over Nathaniel Brent's objections (Dist. ECF Doc 114 Pg Id 2300). Defendants Wenk Decormier and Sampson conducted another search of Plaintiffs' home on January 21, 2010. This time when Nathaniel objected Ms. Sampson stated he had not right to object to the search. (Dist. ECF Doc 114 Pg Id 2316) Defendants also secretly took photos of the home. (Dist. ECF Doc 114 Pg Id 2316)

On February 18, 2010 Ms. Wenk filed a petition with the state family court (Dist. ECF Doc 114 Pg Id 2307), and had a probation officer rubber stamp Defendant Judge Smith's name authorizing and ex-parte emergency removal order (Dist. ECF Doc 114 Pg Id 2305). This was done pursuant to Judge Smith's policy of allowing probation officers to approve orders in Judge Smith's name without any judicial review. (Dist. ECF Doc 1 Pg Id 11 and Doc 114 Pg Id 2305) Wenk then enlisted the aid of the Detroit Police Department by claiming that several attempts to remove the children had failed (Dist. ECF Doc 120-6 Pg Id 3019). The Children were removed from the Brent home that day by Defendant Wenk and the Detroit Police Officer Defendants (Dist. ECF Doc 1 Pg Id 11 and Doc 114 Pg Id 2306, and 2343), over Plaintiffs'

objections and after Plaintiff Nathaniel Brent pointed out several defects in the warrant including but not limited to the fact that the order used "reasonable grounds" instead of "probable cause" (Dist. ECF Doc 222 Pg Id 5224).

B. Proceedings in Lower Courts

Plaintiff Nathaniel Brent filed his original complaint on February 22, 2011 (Dist. ECF Doc 1) and served the various State Defendant on February 28, 2011 (*see generally* Dist. ECF Doc 7-11). The District Court had original jurisdiction over the case pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) On May 12, 2011 the State Defendants filed their first Rule 12 Motion (Dist. ECF doc 50). On November 28, 2011, the District Court dismissed all claims against judicial defendants on the ground of judicial immunity and denied the rest of the motion without prejudice. (Dist. ECF doc 113). Plaintiff filed his first amended Complaint on December 7, 2001 (Dist. ECF 114) and a motion for reconsideration regarding Defendant Judge Smith on December 12, 2011 (Dist. ECF 115). The "State Defendants" filed their second Rule 12 motion on December 21, 2011 (Dist. ECF 120). On November 15, 2012 the District Court denied Plaintiff's motion for reconsideration finding Plaintiff's claims against Judge Smith were barred by *Rooker-Feldman* and partially denied the State Defendants Rule 12 motion (Dist. ECF 163). The individual State Defendants appealed the denial of federal and state immunity on December 14, 2012 (Dist. ECF 168). The Sixth Circuit entered it order on February 6, 2014 (*Brent v. Wenk*, 555 F. App'x 519 (6th Cir. 2014). The Court granted qualified immu-

nity in regards to the Fourth Amendment claims relying on their decision in *Andrews v. Hickman County, Tenn.*, 700 F.3d 845 (2012) that "it was not evident under clearly established law whether the State Defendants were even required to comply with the strictures of the Fourth Amendment" (*Id* at 863). The Sixth Circuit also denied immunity on the State Law claims finding the defendants have failed to cite the authority that allegedly authorized their actions. Plaintiff's petition to this Court was denied on November 17, 2014 (*Brent v. Wenk* 135 S.Ct. 675 (2014)). The Sixth Circuit issued its mandate on April 16, 2014 (Dist. ECF Doc 192). The State Defendants did not file their answer to the complaint until August 14, 2014 (Dist. ECF Doc 200). This was 120 days after the mandate was issued and 189 days after their claim of immunity was denied by the Sixth Circuit.

On October 14, 2014 the case was reassigned to Judge Levy. Plaintiff filed a second amended complaint on March 7, 2016 (Dist. ECF doc 222) The City of Detroit Defendants filed their answer on March 24, 2016 (Dist. ECF Doc 224) and the State Defendants filed their answer on March 31, 2016 (Dist. ECF Doc 225). On May 31, 2016 the State Defendants filed their third Rule 12 motion (Dist. ECF Doc 230) and the City Defendants filed their first rule 12 motion (Dist. ECF Doc 231). To the State Defendants own admissions this was the first time they raised the defense of immunity under *Martin v. Children's Aid Soc.*, 215 Mich. App. 88, 544 N.W.2d 651 (1996). (Dist. ECF Doc 238 Pg Id 5414 and Doc 268 Pg Id 5696). The Court granted the City's motion (Dist. ECF doc 250) and denied reconsideration (Dist. ECF doc 261). The Court originally granted the State Defendants' claim of Martin immu-

nity (Dist. ECF doc 249) then reversed its decision on reconsideration (Dist. ECF Doc 261). State Defendants filed an appeal (Dist. ECF Doc 265) then sought reversal of the order appealed from in the District Court (Dist. ECF Doc 268) which was granted by the District Court (Dist. ECF Doc 272). Plaintiffs moved to vacate the order on the ground of lack of jurisdiction while the issue was pending on appeal (Dist. ECF Doc 272). This motion was denied on May 9. 2017 (Dist. ECF Doc 280). This order dismissed all remaining claims in the case. Plaintiffs filed their notice of appeal on July 7, 2017 (Dist. ECF doc 281). The appeals were consolidated and the Circuit Court on August 23, 2018 entered a published opinion (*Brent v. Wayne County Dept. of Human Services*, 901 F.3d 656 (6th Cir. 2018). The court ruled as relevant to this petition that 1) Plaintiffs' damages claims against Judge Smith were barred by the *Rooker-Feldman* doctrine (*Id.* at 674,675) 2) That it was not clear that a social worker could not execute a warrant she knew contained false statements and lacked probable cause (*Id.* at 685). 3) That "defendants may assert immunity defenses for the first time in post-answer dispositive motions, even if they previously failed to raise those same defenses in pre-answer dispositive motions" (*Id.* at 693). And 4) The order to remove children was not facially deficient (*Id.* at 685, 696-697). Plaintiffs filed a motion for rehearing on September 5, 2018 (6th Cir. Doc 58) which was denied on October 11, 2018 (6th Cir. Doc 62). Defendant The Children's' Center also filed a motion for rehearing on September 5, 2018 (6th Cir. Doc 59). The Sixth Circuit did not rule upon this motion, however the issue became moot on November 8, 2018 when a stipulated order of dismissal regard-

ing this Defendant was entered in the District Court (Dist. ECF doc 299) This petition now follows.

REASONS FOR GRANTING THE PETITION

I. *ROOKER-FELDMAN* DOCTRINE SHOULD NOT BAR PLAINTIFF'S CLAIMS

This Court has emphasized that "under what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006). This Court has never extended this doctrine to Administrative practices that involve non-final, non-appealable ex-parte orders. This Court has also explicitly held that this doctrine only applies were a party is seeking appealing review of a state court judgement. (*Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005)) However, the Sixth Circuit still continues to expand the doctrine far beyond the purposes of 28 U.S.C. § 1257.

Relevant to this petition Plaintiff's claims against Judge Smith are straight forward and to the point. Judge Smith created an administrative policy allowing other to authorize orders in Judge Smith's name and this policy violated Plaintiff's rights protected under the Fourth and Fourteenth Amendments of the U.S. Constitution. The orders in question are only relevant to the fact that they were issued using the challenged policy. Put plainly the orders were the result of the constitutional injuries not the source of those injuries.

A. No Meaningful Review of the Ex-Parte Order Is Allowed

First and foremost due to the fact that the ex-parte orders are issued in the name of Judge Smith, Plaintiffs were denied their right of judicial review of the orders as provided by MCR 3.991. Thus, to the extent the Sixth Circuit and Judge Smith relies on MCL 712A.10 that allows the Judge to appoint a probation officer as a referee, such fails to find any authority to allow such an appointed referee to issue an order in the name of a judge. Further such assumes facts not in evidence as Judge Smith has never claimed she actually officially appointed any probation officer as a referee.

Similarly an ex-parte removal order is not subject to appeal, and in the instant case as well as other the issue became moot on appeal due to the children being returned and the Circuit Court terminating jurisdiction over the case (*In re Brent Minors*, No. 298720 (Mich. Court of Appeals, Feb. 7, 2012) and *In the Matter of A. Godboldo-Hakim*, Nos. 305858, 308040 (Mich. Ct. App. July 17, 2012)). Thus, Plaintiffs sole means of seeking review is a suit authorized by 42 U.S.C. § 1983.

II. RULE 12(g)(2) PROHIBITS THE USE OF AN AFFIRMATIVE DEFENSE THAT WAS NOT RAISED IN PREVIOUSLY FILED RULE 12 MOTIONS TO BE USED IN A LATTER MOTION UNDER RULE 12(c)

Fed. R. Civ. P. 12(g)(2) makes clear that multiple rule 12 motions are prohibited unless it falls under one of the exceptions of rule 12(h)(2) or (3). To avoid this, several Circuits have expanded "failure to state

a claim" to encompass any affirmative defense. (*See English v. Dyke*, 23 F.3d 1086 (6th Cir. 1994) finding qualified immunity is a failure to state a claim; *Ennenga v. Starns*, 677 F.3d 766 (7th Cir. 2012) statute of limitations; *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007) statute of limitations)

However this Court has repeatedly distinguished failure to state a claim from other defenses. For example in *Gomez v. Toledo*, 446 U.S. 635 (1980) this explicitly ruled that the question of failure to state a claim and qualified immunity are two separate issues. (*Id* at 640). Although a complaint may be subject to dismissal when an affirmative defense appears on its face. "Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract." *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910 at 921 (2007).

If any potentially dispositive affirmative defense is allowed to be raised as failure to state a claim to avoid the limitations contained in Rule 12(g)(2) then the rule has no meaning except to those defenses contained in Rule 12(b)(2)–(5), as the rules purpose of preventing piece-meal litigation would be lost.

The facts and procedural history of the instant case demonstrate how a defendant can prolong litigation for years by using this practice. As admitted by counsel for the governmental social workers, they did not raise the issue of immunity under *Martin v. Children's Aid Society*, 215 Mich. App. 88, 97, 544 N.W.2d 651 (1996), until they filed the motion that is at issue

here (Dist. ECF Doc 230). "But the State Defendants did not raise Martin immunity prior to their motion for judgment on the pleadings and never asserted the issue on appeal" (Dist. ECF Doc 268 Pg Id 5696). During this five year period of time between Defendants being served with the complaint and the filing of their motion, These same defendants filed two other motions under Rule 12(b)(6) (Dist. ECF Doc 50 and Dist. ECF Doc 120) lost an appeal regarding their claims of governmental immunity (*Brent v. Wenk*, 135 S.Ct. 675 (2014) "As with Brent's IIED claims, the defendants have failed to cite the authority that allegedly authorized their actions." and filed two answers to the complaints (Dist. ECF Doc 200 and Dist. ECF Doc 225) yet to their own admission martin immunity was not raised until they filed their third Rule 12 motion.

Further the delays caused by this practice are still continuing as the District Court has authorized further delays to allow yet another Rule 12(c) Motion to be filed (Dist. ECF Doc 303). Thus, this practice has already created a seven year delay in the proceedings with no end in sight.

III. *ANDREWS V. HICKMAN COUNTY, TENN.*, 700 F.3D 845 (6TH CIR. 2012) AND ITS PROGENY SHOULD BE PARTIALLY OVERRULED

In the instant case social workers were granted Qualified immunity in regards to Plaintiffs' Fourth Amendment claims based upon *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015) (*Brent v. Wayne County*, 901 F.3d 656, at 685 (6th Cir. 2018) *Barber* itself was controlled by *Andrews v. Hickman County, Tenn.*, 700 F.3d 845 (6th Cir. 2012) (*see Barber* at 846) The Andrews Court held "it was not evident under clearly

established law whether the State Defendants were even required to comply with the strictures of the Fourth Amendment." (*Andrews* at 863). In this same opinion the Sixth Circuit stated "Given the presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, we agree that a social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement." (*Id* at 859) The Sixth Circuit in essence found that since it was not clear that no special needs exemption existed, the social workers were entitled to qualified immunity.

First this is contrary to the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." (*Jerman v. Carlisle, McNellie, Rini, Kramer*, 130 S.Ct. 1605, 1611 (2010) quoting *Barlow v. United States*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (opinion for the Court by Story, J.). This is especially true where the Sixth Circuit expressly found that "Although the State Defendants do not cite any authority for their contention, their argument seems to imply that social workers engaging in their statutorily mandated investigative functions are not governed by the same requirements of the Fourth Amendment that apply to law enforcement officers or other state actors." (*Andrews* at 858) Further, the Sixth Circuit completely ignored the fact that any "special needs" must be "divorced from the State's general interest in law enforcement" *Ferguson v. Charleston*, 532 U.S. 67, 79 (2001). In fact one of the cases cited in *Andrews* specifically stated "it was not until after the February 2000 events in this case that the Supreme Court began to state that the special need must be "divorced" from the state's general

interest in law enforcement." *Gates v. Texas Dept. of Protective & Reg. Services*, 537 F.3d 404, 425 (5th Cir. 2008). All of the cases relied on by the Sixth Circuit were regarding events that occurred before this Court's decision in *Ferguson (Gates* events occurred in 2000; *Roska v. Peterson,* 328 F.3d 1230 (10th Cir. 2003) events occurred in 1999; *Wildauer v. Frederick Cnty.,* 993 F.2d 369 (4th Cir. 1993) events occurred in 1988; *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) events occurred in 1994; *Good v. Dauphin County Social Services*, 891 F.2d 1087 (3rd Cir. 1989 (events occurred in 1987). In contrast the events in *Andrews* occurred in 2008 and the events in the instant case occurred in 2010 well after this Court's clarification that any "special needs" exemption had to be divorced from the general interest in law enforcement.

A. The Circuit Courts Are Split Regarding the Immunity Question after Rejection of a Special Needs Exception

The circuit courts are split regarding if qualified immunity should be granted for a failed claim of a special needs exemption. The Third, and Ninth Circuits deny immunity holding "a public official may not manufacture immunity by inventing exceptions to well settled doctrines for which the case law provides no support." (*Calabretta quoting Good*) However the Second, Fifth, Sixth and Tenth Circuits have all granted qualified immunity because there was no previous rejection of this claimed "special need" (*See Good, Gates, Andrews, Roska*). Thus, there remains a conflict if qualified immunity attaches solely because the claimed "special needs" exception was not previously ruled upon. If this Court does not address this issue

it leaves defendants with the ability to create their own exceptions to constitutional law and be entitled to immunity until such time as a court finally rules upon that self-proclaimed exception.

This would also appear to be in direct conflict with this Courts' unwillingness to "complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). Thus, for the purposes of qualified immunity it makes no difference that the defendants were social workers instead of being police officers, nor does it make a difference that they were investigating possible child neglected other than any other criminal offense and or attempt to ensure compliance with state law.

IV. Reasonable Grounds Standard Is Facially Deficient Under the Fourth Amendment

The Brents raised several issues regarding the deficiencies of the order to remove the children. The Sixth Circuit addressed many of these issues, however the failed to address the issue of the standard of proof stated in the order itself. The Brents raised this issue in the District Court (Dist. ECF Doc 247 Pg Id 5483), in their initial brief on appeal (6th Cir. case no. 17-1811 doc. 33 Pg Id 34) and in their motion for rehearing (6th Cir. case no. 17-1811 doc 58 Pg Id 9), yet the Sixth Circuit failed to even mention this in their opinion.

Although this Court has found in certain circumstance not relevant here, that probable cause does not

need to be particularized (*Camara v. Municipal Court,* 387 U.S. 523 (1967)) holding that area inspections does not need to be directed at a particular residence), It has never departed from the general concept that "In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." (*Id* at 534).

Reasonable Grounds and probable cause are not synonymous. The difference is in the descriptive terms "reasonable" and "probable". These indicate different levels of certainty. Although reasonable grounds or suspicion is all that is necessary to conduct a limited search for weapons in public (*Terry v. Ohio*, 392 U.S. 1 (1968)), probable cause is required to go any further (*Id.*). Indeed one need to go no further than any dictionary to discover the differences. Merriam-Webster. com/dictionary defines reasonable as "not extreme or excessive, moderate, fair" conversely it defines probable as "establishing a probability, likely to be or become true or real". Put plainly what is reasonable simple means it is a possibility, but what is probable means that it is likely. There should be no question as to why our founders choice to require that "no warrants shall issue, but upon probable cause" (Fourteenth Amendment of the US. Constitution) Thus, any warrant that on its face uses a standard that is less than "probable cause" is obviously deficient on its face.

CONCLUSION

Wherefore and for the above stated reasons, Petitioners request this Court grant the instant petition so that this Court can address 1) the limitations on the application of the Rooker-Feldman Doctrine, 2) address the proper application of Fed. R. Civ. P. 12(g)(2) and (h)(1) with respect to potentially dispositive affirmative defenses not raise in a defendants previous Rule 12 motions, 3) Resolve the conflict between the Circuit Courts regarding if a failed attempt to create a special needs exception entitles the defendant to qualified immunity, and 4) answer the question of if a warrant is facially invalid when on its face it uses a standard less than probable cause.

Respectfully submitted,

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JANUARY 7, 2019

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