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JUDGMENT OF THE SIXTH CIRCUIT
(AUGUST 23, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

17-1428

NATHANIEL BRENT; ROBERT BRENT,

Plaintiffs-Appellees,

v.

WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES ET AL.,

Defendants,

MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND; MONICIA SAMPSON; CHARLOTTE MCGEHEE; JOYCE LAMAR,

Defendants-Appellants.

17-1811

NATHANIEL BRENT; ROBERT BRENT,

Plaintiffs-Appellants,

v.

WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES; MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND;

MONICIA SAMPSON; CHARLOTTE MCGEHEE; JOYCE LAMAR; EMINA BIOGRADLIJA; MICHAEL BRIDSON; DETROIT POLICE DEPARTMENT; TWO UNKNOWN DETROIT POLICE OFFICERS; METHODIST CHILDREN'S HOME SOCIETY; THE CHILDREN'S CENTER; LESLIE SMITH,

Defendants-Appellees.

Nos. 17-1428/1811

On Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor

Before: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

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Nos. 17-1428/1811

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor
No. 5:11-cv-10724—Judith E. Levy, District Judge.

Before: MOORE, THAPAR, and
NALBANDIAN, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge.

This case marks the latest appeal in the nearly eight-year-long litigation between the Brent family and the various entities involved in the State of Michigan's temporary removal of Nathaniel and Sherrie Brent's children from their home in 2010. After six years and 270 docket entries, the district court ultimately entered judgment in all the various defendants' favor. We now AFFIRM in part, REVERSE in part, and REMAND this case to the district court for further proceedings consistent with this opinion.

I. Background

A. Factual Background

On January 17, 2010, fifteen-year-old Robert Brent ran away from home and arrived at a Detroit Police station wearing no shirt, no shoes, and a pair of shorts.

R. 222 (Second Am. Compl. at 5) (Page ID #5174). This ultimately led employees of Wayne County Department of Health Services ("DHS")—including child-protective-services caseworker Mia Wenk, supervisor Monica Sampson, and intern Heather Decormier-McFarland—to open an investigation into Robert's parents, Nathaniel and Sherrie Brent, for potential child abuse and child neglect. *Id.* at 5-8 (Page ID #5174-77). During the course of their investigation, DHS employees visited the Brents' home on two occasions. *Id.* During the second visit, Sampson and Decormier-McFarland allegedly took photographs of the interior of Brents' home without the Brents' consent. *Id.* at 8 (Page ID #5177).

On February 18, 2010, the DHS employees petitioned the Family Division of the Third Judicial Circuit Court for Wayne County ("Family Court") for an order authorizing the removal of the five Brent children from their home. *Id.* at 14-15 (Page ID #5183-84). Wenk drafted and submitted the petition, and Sampson and Sampson's supervisor, Joyce Lamar, co-signed the petition. *Id.* at 50 (Page ID #5220). In a page of "Allegations" accompanying the petition, Wenk detailed the poor conditions of the Brents' home, her concerns about lead-based paint on the walls, and her concerns about the Brents' youngest child, who was ten-years old and appeared to have a severe speech impediment. R. 231-1 (Petition at 2) (Page ID #5324). According to plaintiffs, Wenk knowingly included false information in the petition and withheld other relevant information. R. 222 (Second Am. Compl. at 12, 14) (Page ID #5181, 5183). Plaintiffs further allege that the Family Court judge whose signature appeared on the order, Judge Leslie Smith, never actually reviewed or approved the order. *Id.* at 12-13 (Page ID #5181-82). Instead, according to

plaintiffs, Judge Smith instituted a policy allowing probation officers to use a rubber stamp bearing her name to approve child removal orders, and that policy was purportedly followed in this case. R. 115 (Pl. Mot. for Reconsideration at 3-4) (Page ID #2376-77).

The removal order was executed that same evening. R. 222 (Second Am. Compl. at 13, 53) (Page ID #5182, 5223). Wenk allegedly enlisted the assistance of Detroit Police Officers to execute the order by falsely claiming that previous attempts to remove the children had been unsuccessful. *Id.* at 13 (Page ID #5182). When the police arrived at the Brents' home, Officer Bridson knocked on the door and told Nathaniel Brent ("Brent") that the police had a warrant to remove the children. *Id.* at 53 (Page ID #5223). Brent asked to *see* the warrant, and Officer Michael Bridson refused and stated that the police were "going to secure the area first." *Id.* He then "pushed his way past" Brent and entered the home, and Officer Emina Biogradlija followed behind him. *Id.* Five minutes later, two additional officers entered the house and showed Brent the removal order. *Id.* Brent reviewed the order and told the officers that it was facially defective, but the police officers removed the children nonetheless. *Id.* at 54 (Page ID #5224). When the youngest child attempted to hold onto his mother, one of the officers "ripped him from his mother and pushed him out the front door." *Id.* According to Brent, the Detroit Police Department's internal policy bars Detroit Police Officers from serving civil orders. *Id.*

On February 19, 2010, a preliminary hearing was held before Referee Bobak, and the court appointed guardians at litem and counsel for the parents. R. 163 (Order at 6) (Page ID #4117); R. 222 (Second Am.

Compl. at 35) (Page ID #5205). On February 24, 2010, the Family Court held a probable-cause hearing and found probable cause to authorize the petition of removal. R. 113 (Order at 3) (Page ID #2262). Also on that date, Shevonne Trice, a foster-care caseworker with the Wayne County DHS Foster Care Department, was appointed as the caseworker for the Brent family. R. 222 (Second Am. Compl. at 3, 35) (Page ID #5172, 5205).

On March 3, 2010, Trice placed Brent's male children in the home of Michael and Noel Chinavare. *Id.* at 36 (Page ID #5206). Trice allegedly drafted and gave the Chinavares a document claiming they were the temporary guardians of the children, even though neither the parents nor the court had authorized this guardianship. *Id.* Brent's male children were later placed with Methodist Children's Home Society ("Methodist"), a "residential care facility licensed and regulated by the State of Michigan for the care, treatment, and detainment of court and state wards." *Id.* at 56 (Page ID #5226).

While Brent's male children were staying at the Methodist, Robert became ill. *Id.* at 57 (Page ID #5227). On April 14, 2010, Brent and his wife learned during a family visit with their children that the facility nurse at Methodist, Mary Ann Stokes, had given Robert medication for his cough that had expired in October 2008. *Id.* The Brents immediately informed Trice, who was also at the family visit, but Trice failed to report Methodist for its allegedly medically negligent treatment of Robert. *Id.* at 41 (Page ID #5211). The next day, Brent spoke with Stokes and told her that Robert needed to be seen by a doctor as soon as possible. *Id.* at 57 (Page ID #5227). On April 16, 2010, Robert's condi-

tion worsened and he repeatedly asked to see a doctor. *Id.* After his requests were denied for several hours, Robert left Methodist and went to a hospital. *Id.* By that point, Robert was coughing up blood and was diagnosed with acute bronchitis and acute pharyngitis. *Id.* After Robert returned to Methodist, his condition initially improved and then again worsened. *Id.* at 58 (Page ID #5228). Brent and Robert repeatedly asked for Robert to see a doctor, but these requests were denied "the entire time [Robert] remained at Methodist." *Id.*

Meanwhile, Trice had transferred Brent's female children to the home of Renee Samples on April 28, 2010. *Id.* at 42 (Page ID #5212). Also on that date, Trice transferred supervision of their placement to the Children's Center. *Id.* On May 2, 2010, the Children's Center, Methodist, and Trice held a conference to set the family's visitation schedule, but neither the children nor the parents were allowed to participate in the conference. *Id.* at 42-43 (Page ID #5212-13). When Brent complained about the new visitation schedule, the Children's Center told him that this was the set schedule "whether he liked it or not." R. 114 (First Am. Compl. at 77) (Page ID #2359). A few days later, the Brents' sons were late in arriving to the family's first scheduled visit. *Id.* When the Brents complained to the Children's Center that their sons had not yet arrived, the Children's Center supervisor allegedly told the Brents that if they "didn't stop complaining she would suspend all visitation." *Id.* Also during this visit, the Children's Center supervisor told the Brents in front of their children that "if they loved their children they would take the plea deal" that had been offered. *Id.* at 78 (Page ID #2360). When

the parents refused to "admit to false allegations," the Children's Center supervisor announced that she was ending all phone contact between the parents and their female children. *Id.*

Ultimately, a trial was held in Family Court from May 11, 2010 through May 13, 2010, and a jury found that "one or more statutory grounds existed for the Family Court to exercise jurisdiction over the Brent children." R. 113 (Order at 3) (Page ID #2262). The children were released to the Brents on June 2, 2010 but remained under DHS supervision. *Id.* After finding that the conditions in the family's home had improved and that the children's needs were being met, the Family Court ended its supervision on September 10, 2010. *Id.* at 3-4 (Page ID #2262- 63).

B. Procedural History

Nathaniel Brent first filed suit in federal court on February 22, 2011, levying a variety of federal and state-law claims against seemingly every person or agency involved in the removal, custody, and care of his five children. R. 1 (Compl.) (Page ID #1-29). On November 28, 2011, the district court dismissed Brent's claims against all the "Judicial Defendants"—i.e., the Wayne County Family Court judges and referees involved in Brent's case. R. 113 (Order at 22) (Page ID #2281). Among those defendants was Judge Leslie Smith, the Wayne County Family Court judge whose stamped signature appeared on the order authorizing the removal of Brent's children. At the same time, the district court granted Brent leave to file an amended complaint, but the district court instructed Brent not to reassert any claims against the Judicial Defendants (or any other defendants who

had been dismissed from the case). *Id.* Brent filed his first amended complaint, R. 114 (First Am. Compl.) (Page ID #2283-2365), and moved for reconsideration of the district court's dismissal of his claims against the Judicial Defendants, including Judge Smith, R. 115 (Pl. Mot. for Reconsideration) (Page ID #2366-90). The district court denied Brent's motion for reconsideration on November 15, 2012. R. 163 (Order at 7-16) (Page ID #4118-27).

Also on November 15, 2012, the district court denied in part and granted in part various dispositive motions filed in response to Brent's amended complaint. As is relevant for the purposes of this appeal, the district court dismissed all claims against Methodist and all but two state-law claims against Children's Center. *Id.* at 71-72 (Page ID #4182-83). The district court held that Fourth and Fourteenth Amendment claims brought under § 1983 against the Wayne County DHS in its official capacity could proceed, as could Brent's various § 1983 and state-law claims against Wenk, Sampson, Decormier-McFarland, Trice, McGehee, and Lamar. *Id.* at 72- 73 (Page ID #4183-84).

The individual State Defendants (Wenk, Sampson, Decormier-McFarland, Trice, McGehee, and Lamar) appealed the district court's order denying them immunity under federal and state law. R. 168 (Notice of Appeal) (Page ID #4219). We held that the defendants were entitled to qualified immunity from Brent's § 1983 claims alleging that the individual State Defendants violated his Fourth Amendment rights when they exceeded the scope of his consent when speaking with Robert during the first home visit on January 20, 2010 and photographed the interior of his home without consent during the second home visit on January 21,

2010. *Brent v. Wenk*, 555 F. App'x 519, 524-27 (6th Cir. 2014). We further granted qualified immunity to the individual State Defendants from Brent's § 1983 claims alleging procedural and substantive violations of Brent's Fourteenth Amendment due-process rights in parenting and raising his children. *Id.* at 529-34. We agreed, however, with the district court's denial of state-law governmental immunity on Brent's gross-negligence and intentional-infliction-of-emotional distress claims. *Id.* at 535-37. Finally, we held that Brent lacked standing to pursue a claim against Trice under Mich. Comp. Laws § 722.633(1) for her alleged failure to report the medical neglect of Robert because Michigan law intended liability under the state statute to "be limited to claims for damages by the identified abused child about whom no report was made." *Id.* at 537 (quoting *Murdock v. Higgins*, 559 N.W.2d 639, 646 (Mich. 1997)).

In the meantime, Wayne County DHS and the individual State Defendants had moved for reconsideration of the November 15, 2012 order. They argued that Wayne County DHS is an arm of the State, and therefore all claims against Wayne County DHS and the individual State Defendants in their official capacities should be dismissed. R. 164 (Mot. for Reconsideration at 2) (Page ID #4187). On February 4, 2013, the district court granted this motion and entered summary judgment in favor of Wayne County DHS and Wenk, Sampson, Lamar, McGehee, Trice, and Decormier-McFarland as to all claims brought against them in their official capacities. R. 171 (Order at 3-4) (Page ID #4225-26).

Children's Center had also moved the district court to reconsider its November 15, 2012 order, arguing

that the district court erred in allowing Brent's two-remaining claims against Children's Center—a state-law claim for gross negligence and a state-law claim for intentional infliction of emotional distress—to proceed. R. 165 (Mot. for Reconsideration 2) (Page ID #4195). Children's Center insisted that it was entitled to absolute immunity under state law from these two claims. *Id.* The district court ultimately agreed and entered summary judgment in Children's Center's favor on Brent's gross-negligence and IIED claims. R. 199 (Order at 17) (Page ID #4775).

On July 11, 2013, Robert Brent—who had turned eighteen years old on July 11, 2012—moved to join his father as a plaintiff, arguing that he ought to able to assert his own claims given that Brent lacked standing to vindicate the injuries suffered by Robert. R. 182 (Mot. to Join at 1-2) (Page ID #4612-13). Because Robert failed to elucidate what claims he intended to raise, the district court denied Robert's motion "as presently written," but instructed Brent to file a motion for leave to file a second amended complaint along with a proposed amended complaint that names Robert as a plaintiff and includes his additional claims. R. 199 (Order at 16-17) (Page ID #4774-75). Brent filed the motion for leave to amend the complaint along with a proposed second amended complaint, but the district court denied the motion because the proposed second amended complaint restated claims by Brent against parties who had already been dismissed from the suit. R. 210 (Order at 15) (Page ID #4983). As is relevant for this appeal, the district court instructed Brent to refile his motion for leave to file an amended complaint, but to exclude from the proposed amended complaint any claims—by either

Robert or Brent—against the Judicial Defendants, Wayne County DHS or its employees in their official capacities, or Children's Center. *Id.* at 16-18 (Page ID #4984-86). The district court further denied leave for Brent to file any federal-law claims against Methodist Children's Home, though it held that Robert could potentially allege a plausible claim against Methodist for gross negligence. *Id.* at 17-18 (Page ID #4985-86).

On December 9, 2015, Brent refiled a motion for leave to file a proposed second amended complaint and attached a new proposed amended complaint. R. 211 (Motion for Leave to File Second Am. Compl.) (Page ID #4988-5051). On March 4, 2016, the district court granted in part and denied in part Brent's motion.[1] First, the district court held that Robert could join the case as a plaintiff, thereby rejecting Methodist's argument that the statute of limitations barred Robert's request for joinder. R. 221 (Order at 22-23) (Page ID #5149-50). Second, the district court reversed its earlier suggestion that Robert could assert a gross-negligence claim against Methodist, holding instead that "concerns for 'finality of judgments and expeditious termination of litigation'" counseled against allowing "amendments asserting anew claims against Methodist." *Id.* at 24 (Page ID #5151). Third, the district court noted that all claims against the City of Detroit and its police officers ("the City Defendants") had been stayed pending the City's bankruptcy proceedings. *Id.* at 25 (Page ID #5152). Because the stay had been lifted in February 2016, the district court held that Brent's claims against the officers could now proceed

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[1] On October 3, 2014, this case was reassigned from Judge Julian Abele Cook to Judge Judith Levy.

via the second amended complaint. *Id.* Fourth, the district court rejected Brent's efforts to assert new claims under the Michigan Constitution against Wenk, Sampson, and Trice or to resurrect § 1983 claims against any of the individual State Defendants, even to the extent those claims were now being asserted on behalf of Robert rather than Brent. *Id.* at 27-34 (Page ID #5154-61). The district court allowed, however, plaintiffs to proceed with their preexisting IIED claims against various individual State Defendants, to proceed with Robert's failure-to-report-medical-neglect claim against Trice, and to add new state-law eavesdropping claims against Wenk, Sampson, and Decormier-McFarland. *Id.* at 35-36 (Page ID #5162-63). Fifth, the district court sua sponte struck all of plaintiffs' gross-negligence claims from the proposed second amended complaint, reasoning that Michigan law does not recognize "gross negligence" as an independent cause of action when "allegations of an intentional tort have been made." *Id.* at 26-27, 38-39 (Page ID #5153-54, 5166-67). Brent, with Robert now added as a plaintiff, then filed the second amended complaint.

The City Defendants moved for judgment on the pleadings, which the district court granted on November 9, 2016. R. 250 (Order at 10) (Page ID #5531). The individual State Defendants also moved for judgment on the pleadings on the three state-law claims remaining against these defendants (IIED, eavesdropping, and failure to report medical neglect). R. 230 (Mot. for J. on the Pleadings) (Page ID #5302). The district court determined that the individual State Defendants are entitled to absolute immunity under state law from plaintiffs' IIED and eavesdropping claims, but held that Trice is not entitled to immunity under the

Governmental Tort Liability Act from Robert's failure-to-report-medical-neglect claim. R. 249 (Order at 3-10) (Page ID #5513-20). Plaintiffs moved for reconsideration, arguing that the district court erred in dismissing all claims against the City Defendants and erred in granting state-law immunity on the IIED claims against the State Defendants. *See* R. 253 (Mot. for Reconsideration at 1) (Page ID #5543); 257 (Mot. for Reconsideration at 1-2) (Page ID #5589-90). As to their IIED claims against the State Defendants, plaintiffs insisted that the Sixth Circuit had already held in its 2014 decision that the individual State Defendants were not entitled to immunity from plaintiffs' IIED claims. R. 257 (Mot. for Reconsideration at 1-2) (Page ID #5589-90). The State Defendants, in turn, moved for reconsideration on the district court's decision not to grant statutory immunity to Trice from plaintiffs' claim of failure to report medical neglect. R. 255 (Mot. for Reconsideration at 2-5) (Page ID #5577-80).

On March 17, 2017, the district court affirmed its decision as to the City Defendants but reversed its earlier order as to the State Defendants, holding that (1) Trice was, in fact, entitled to statutory immunity from plaintiffs' claim of failure to report medical neglect, and (2) the Sixth Circuit had already denied the individual State Defendants "state-law immunity" as to plaintiffs' IIED claims. R. 261 (Order at 3-4, 6-8) (Page ID #5650-51, 5653-55). Although plaintiffs' eavesdropping claims were not before the Sixth Circuit when it denied the State Defendants qualified immunity on the IIED claims, the district court nevertheless reinstated plaintiffs' eavesdropping claims so that "all of plaintiffs' claims [would be] treated uniformly

and fairly throughout this case." *Id.* at 5 (Page ID #5652).

Plaintiffs then moved to alter or amend the district court's latest order to treat its ruling "as a final order as to all claims and Defendants previously dismissed or rejected by this Court or its predecessor." R. 262 (Mot. to Alter or Amend) (Page ID #5658-59). The State Defendants filed a statement explaining that they "have no objection to the Court directing that the March 17, 2017 order be a final order for the purpose of an immediate appeal." R. 263 (Statement at 2) (Page ID #5666). On April 11, 2017, the district court granted the motion and "certifie[d] for appeal the decision to grant qualified and statutory immunity to the City Defendants, and the decision to grant State Defendant Shevonne Trice statutory immunity." R. 264 (Order at 6) (Page ID #5673).

The individual State Defendants quickly filed a notice of appeal from the March 17, 2017 order insofar as it denied them state-law immunity from plaintiffs' state-law claims. R. 265 (Notice of Appeal at 2) (Page ID #5676). A few days later, plaintiffs filed a motion asking the district court to amend its April 11, 2017 order to allow plaintiffs to appeal the district court's orders as to "all claims and defendants that have been dismissed from this suit," and not just plaintiffs' Fourth Amendment claims against the City Defendants and the granting of statutory immunity to Trice. R. 267 (Mot. to Alter or Amend at 2) (Page ID #5680). Plaintiffs argued that the district court's April 11, 2017 order, as it currently stood, would create a "piecemeal appeal that should be avoided." *Id.*

In response, the State Defendants moved the district court to reconsider its denial of state-law

immunity to the individual State Defendants, as set forth in the district court's March 17, 2017 order. R. 268 (Mot. for Reconsideration at 1-2) (Page ID #5696-97). Although they had already filed a notice of appeal from the district court's March 17, 2017 order, the individual State Defendants argued that, if the district court opted instead to reconsider that order, "all of the claims [would] be final orders under 28 U.S.C. § 1291 and may proceed to appeal." *Id.* at 2 (Page ID #5697). The district court determined that it had jurisdiction to reconsider its March 17, 2017 order, notwithstanding the State Defendants' pending appeal, and held that the individual State Defendants were in fact entitled to absolute immunity against plaintiffs' IIED and eavesdropping claims. R. 270 (Order at 6) (Page ID #5725). As that decision resolved all claims, the district court entered final judgment and dismissed plaintiffs' complaint with prejudice. R. 271 (Judgment) (Page ID #5727). Plaintiffs filed a timely notice of appeal, R. 281 (Notice of Appeal) (Page ID #5844), and plaintiffs' appeal was subsequently consolidated with the individual State Defendants' appeal from the district court's earlier denial of state-law immunity as to plaintiffs' IIED and eavesdropping claims.

II. Discussion

As the above background section makes abundantly clear, this case involves a wide variety of claims, defendants, and procedural postures. To the extent possible, we address plaintiffs' claims against defendants in the order in which they were dismissed by the district court.

A. Judge Leslie Smith

Plaintiffs argue that the district court erred in dismissing the claims Brent levied against Judge Smith in his initial complaint. In particular, plaintiffs argue that Judge Smith violated their Fourth Amendment right to be free from unlawful searches and seizures by "institut[ing] a policy that allowed probation officers to rubber stamp Judge Smith's 'signature' on orders to remove children." Appellant Br. at 18. Though this precise allegation did not appear in Brent's initial complaint, Brent asked the district court for leave to amend his complaint to raise this claim. *See* R. 115 (Pl. Mot. for Reconsideration at 3-4) (Page ID #2376-77). The district court denied Brent's request, reasoning that any such amendment would be futile. *See* R. 163 (Order at 16) (Page ID #4127). We review de novo a district court's determination that proposed amendments to a complaint could not survive a motion to dismiss. *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986). Because the district court would have been required to dismiss Brent's amended complaint for lack of jurisdiction, we now AFFIRM.

The *Rooker-Feldman* doctrine precludes federal district courts from hearing "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The *Rooker-Feldman* doctrine occupies "narrow ground," *id.*, barring only claims where "the source of the injury is the state court decision," *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006). If there

is instead "some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *Id.* In short, where a plaintiff does not seek "redress for an injury allegedly caused by the state court decision itself," but instead "seeks redress for an injury allegedly caused by the defendant's actions," *Rooker-Feldman* does not apply. *Id.* at 393 (quoting *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 717 (4th Cir. 2006)).

Here, Brent claims that he is challenging Judge Smith's actions—i.e., her institution of the rubber-stamping policy—and not the child-removal order itself. Where, however, an allegedly unlawful policy is inextricably intertwined with a state-court order, we have previously differentiated between claims challenging the policy going forward and claims challenging the policy as applied in the past. Our decision in *Shafizadeh v. Bowles*, 476 F. App'x 71 (6th Cir. 2012), provides an apt analogy. There, a federal plaintiff alleged that the state court's practice of allowing law clerks to issue Emergency Protective Orders was unconstitutional. *Id.* at 72. In pursuing this claim, the *Shafizadeh* plaintiff asserted that a fresh-out-of-law-school law clerk had granted a request by the plaintiff's then-wife for an Emergency Protective Order that required the plaintiff to surrender his guns. *Id.* We held that the *Rooker-Feldman* doctrine did not bar the plaintiff's claim, notwithstanding his complaint's focus on "past injuries suffered as a result of . . . the issuance of the Emergency Protective Order," because the complaint was not "focused solely on those past injuries." *Id.* at 72-73 (emphasis added). Because the *Rooker-Feldman* doctrine does not bar "forward-looking, general challenges to state-court

practices," we held that the doctrine "was not a basis for dismissing [the plaintiff's] entire complaint." *Id.* at 73. In other words, while the *Rooker-Feldman* doctrine does not bar a plaintiff from attempting to "clear away" an allegedly unconstitutional state-law policy going forward, it does prevent a plaintiff from seeking "relief against the discipline imposed upon him" by application of an allegedly unlawful policy in the past. *Evans v. Cordray*, 424 F. App'x 537, 540 (6th Cir. 2011) (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993)).

We see plain parallels between *Shafizadeh* and this case. Like the plaintiff in *Shafizadeh*, Brent alleges that he was harmed by a policy that purportedly enabled unqualified persons to enter legal orders. Here, however, Brent does not wish merely to "clear away" Judge Smith's allegedly unlawful policy for future cases, but instead wants this court to hold that Judge Smith's application of her policy to the child-removal order entered against him was unconstitutional. This is precisely the sort of "specific grievance over specific decisions" that "the *Rooker-Feldman* doctrine intended to bar in the lower federal courts." *Lawrence v. Welch*, 531 F.3d 364, 371 (6th Cir. 2008) (quoting *Loriz v. Connaughton*, 233 F. App'x 469, 475 (6th Cir. 2007)). Thus, the district court lacked jurisdiction to consider Brent's claim that Judge Smith's policy violated the Fourth Amendment as applied to the removal order issued in this case.

Based on his first amended complaint (in which Brent reasserted and expanded on his claims against Judge Smith, notwithstanding the district court's instructions to the contrary), Brent seemingly also desires a declaration that Judge Smith's policy is un-

constitutional on a forward-going basis. *See* R. 114 (First Am. Compl. at 81) (Page ID #2363). Though the *Rooker-Feldman* doctrine would not preclude such a claim, *Shafizadeh*, 476 F. App'x at 72-73, Brent has not adequately alleged standing to pursue such a facial challenge. "[A]llegations of past injury alone are not sufficient to confer standing" in declaratory-judgment actions. *Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006). Rather, a plaintiff must "demonstrate actual present harm or a significant possibility of future harm" resulting from the state court's continued reliance on Judge Smith's policy. *Id.* (quoting *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998)). Having failed to include allegations of likely future harm in his complaint or amended complaint, Brent has not established standing to bring a facial challenge against Judge Smith's alleged rubber-stamping rule. Thus, the district court lacked jurisdiction over the entirety of Brent's complaint against Judge Smith and properly dismissed those claims.

B. Methodist Children's Home Society and the Children's Center

1. Claims Brought Against Methodist and Children's Center under 42 U.S.C. § 1983

The district court entered judgment in defendants' favor on all claims brought under 42 U.S.C. § 1983 against Methodist and the Children's Center because Brent—the only plaintiff in the case at that time—had failed to establish that either entity was a "state actor." R. 163 (Order at 29) (Page ID #4140). The district court announced that it was entering summary judgment as to these claims, but it is clear from the district court's reasoning that it applied the motion-

to-dismiss standard in reaching its decision. *See* R. 163 (Order at 21-27) (Page ID #4132-38). When ruling on the issue, the district court never once mentioned any of the materials that the parties had submitted in their motions or responses. *Id.* Rather, the district court examined Brent's "relevant arguments" and rejected each as a matter of law. *Id.* at 23 (Page ID #4134). In such circumstances, we feel compelled to accept the Children's Center's interpretation that "the District Court did not consider evidence beyond the pleadings" when assessing whether the Children's Center or Methodist were state actors. Children's Center Appellee Br. at 14 n.2. As "we are not bound to adhere to the label attached to the trial court's disposition of the case," *United Bhd. of Carpenters, Dresden Local No. 267 v. Ohio Carpenters Health & Welfare Fund*, 926 F.2d 550, 558 (6th Cir. 1991), we conclude that the district court dismissed Brent's claims under the standard set forth in Federal Rule of Civil Procedure 12(b) and review the decision accordingly.

We review de novo a dismissal under Rule 12(b)(6), and we will affirm the district court only if the complaint lacks "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Marie v. Am. Red Cross*, 771 F.3d 344, 361 (6th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In reviewing the district court's judgment, we construe the complaint "in the light most favorable to [Brent]," accept all allegations in the complaint as true, and draw all reasonable inferences in Brent's favor. *Gavitt v. Born*, 835 F.3d 623, 639-40 (6th Cir. 2016). Additionally, we liberally construe pro se filings—like Brent's—and hold such com-

plaints "to less stringent standards." *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). Viewing Brent's first amended complaint and plaintiffs' second amended complaint in this way, plaintiffs have alleged enough facts to plausibly state that Methodist and the Children's Center are state actors. We therefore REVERSE the district court's resolution of plaintiffs' § 1983 claims against Methodist and Children's Center and REMAND for further proceedings consistent with this opinion.

To initiate claims against Methodist and the Children's Center under 42 U.S.C. § 1983, plaintiffs must demonstrate that these entities are state actors. *Reguli v. Guffee*, 371 F. App'x 590, 600 (6th Cir. 2010). Though we have developed three separate tests for assessing whether a private entity is a state actor (the so-called "public functions test," the "state compulsion test," and the "nexus test," *id.*), the Supreme Court has made clear that all of our various "criteria" boil down to a core question: whether "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). (quoting *Jackson v. Met. Edison Co.*, 419 U.S. 345, 351 (1974)). Through its cases, the Court has "identified a host of facts that can bear on the fairness of such an attribution," *id.* at 296, including whether "a nominally private entity . . . is controlled by an 'agency of the State,'" *id.* (quoting *Com. of Pa. v. Bd. of Directors*, 353 U.S. 230, 231 (1957)), whether the private entity "has been delegated a public function by the State," *id.* (citing *West v. Atkins*, 487 U.S.

42, 56 (1988)), and whether the "government is 'entwined in [the private organization's] management or control,'" *id.* (quoting *Evans v. Newton*, 382 U.S. 296, 301 (1966)).

In assessing whether a "close nexus" exists "between the State and the challenged action," *Brentwood*, 531 U.S. at 295, we are guided by the Supreme Court's analysis in *West*, in which the Court held that a physician employed by North Carolina to provide medical services to state prison inmates acted under the color of state law for the purposes of 42 U.S.C. § 1983 when he treated a prisoner's injuries. 487 U.S. at 54. As the Court explained, North Carolina has constitutional obligations to provide adequate medical care to inmates, and it contracted with private physicians "to fulfill this obligation." *Id.* at 54-55. When the physician-defendant in *West* treated inmates pursuant to the state regulations and contractual agreements that "authorized and obliged" his care, he did so "clothed with the authority of state law." *Id.* (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The Court's reasoning in *West* governs our case. Michigan is constitutionally required to protect children who are wards of the state from "the infliction of unnecessary harm," *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994) (quoting *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990)), and to protect "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006) ("[T]he parent-child relation gives rise to a liberty interest that a parent may not

be deprived of absent due process of law."). Here, Michigan assumed these constitutional obligations when it removed the Brent children from their home, and Michigan subsequently contracted with Children's Center and Methodist to fulfill its duties. Children's Home, in particular, was tasked with supervising foster placements and with making recommendations to the court regarding the children's care and custody, R. 114 (Am. Compl. at 49, 78-79) (Page ID #2331, 2360-61), and both Methodist and Children's Center played active roles in overseeing family visits, developing service plans, and providing counseling services to the children, *id.* at 50, 66 (Page ID #2332, 2348). Plaintiffs have therefore plausibly alleged that, "in fulfilling its affirmative obligation[s], DHS enlisted the service of [Methodist and Children's Home] and the [three] entities worked together" to manage the children's custody and care. *Lethbridge*, 2007 WL 2713733, at *4; *see also Hall v. Smith*, 497 F. App'x 366, 375 n.13 (5th Cir. 2012) (leaving open whether "a private child placement agency could be considered a state actor with respect to the foster child placement decisions it makes pursuant to a contractual relationship with a state").

If anything, Children's Center and Methodist may be even more closely entangled with the state than the physician in *West*, given the extent to which Michigan regulates and dictates the organizations' behavior vis-à-vis the children in their care. *See, e.g.*, Mich. Comp. Laws § 400.14(q), *id.* §§ 722.111 *et seq.* Of course, "[s]tate regulation of a private entity, even if it is extensive and detailed, is not enough to support a finding of state action." *Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992). But where, as here,

there exists a close nexus "between the challenged action[s] and the regulatory scheme alleged to be the impetus behind the private action[s]," the state action requirement has been satisfied. *Id.* Given that a number of plaintiffs' allegations concern conduct the child-care organizations and DHS employees undertook together, plaintiffs have pleaded sufficiently that Methodist and the Children's Center are state actors to survive a motion to dismiss.

Because the district court declined to consider Methodist's and Children's Center's other arguments regarding plaintiffs' § 1983 claims, we leave it to the district court to resolve these issues in the first instance. *See Stanek v. Greco*, 323 F.3d 476, 480 (6th Cir. 2003). That said, we note that plaintiffs' ability to survive a motion to dismiss with respect to the state-actor question does not necessarily mean that they could survive summary judgment on their § 1983 claims. On remand, plaintiffs must point to record evidence creating a genuine issue of material fact that Methodist and the Children's Center are state actors. *See Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). In addition, the district court must determine whether plaintiffs have raised cognizable claims under § 1983. The district court did not address this argument below, Methodist only cursorily briefed the issue on appeal, and the Children's Center did not press the issue at all. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (alteration in original) (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 294 (1st Cir. 1995)). So this is

not the time to decide whether plaintiffs have stated a claim under § 1983. Nothing in our opinion today should be read to hold that they have. Accordingly, the district court can consider both the state actor and § 1983 issues at summary judgment.

2. Robert's State-Law Claims Against Methodist[2]

Because the district court had already dismissed Methodist from the case before considering whether to grant Robert's request to add claims as a new plaintiff, the district court prohibited Robert from bringing any new claims against Methodist. R. 221 (Order at 24) (Page ID #5151). The district court also determined that Robert's assertions of an IIED claim against Methodist would be "futil[e]," as his allegations did not "come close" to showing that Methodist's actions "would cause 'distress so severe that no reasonable man could be expected to endure it.'" R. 210 (Order at 17) (Page ID #4985) (quoting R. 163 (Order at 64) (Page ID #4175)). Plaintiffs now appeal the district court's denial with respect to Robert's IIED claim and negligence claim against Methodist. Appellant Br. at 41-42.

We review de novo the district court's determination that Robert's proposed IIED claim could not survive a motion to dismiss, *Associated Truck Lines*, 801 F.2d at 248, and we now AFFIRM. To set forth a claim for IIED under Michigan law, a plaintiff must show extreme and outrageous conduct, intent or recklessness, causation, and severe emotional distress.

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[2] Plaintiffs have not appealed the district court's denial of Brent's state-law claims against Methodist; those claims are therefore now waived.

Jones v. Muskegon Cty., 625 F.3d 935, 948 (6th Cir. 2010). "Such conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Id.* (quoting *Graham v. Ford*, 604 N.W.2d 713, 716 (Mich. Ct. App. 1999)).

The allegations set forth in plaintiffs' first proposed second amended complaint, R. 201 (First Proposed Second Am. Compl. at 73-80 (Page ID #4861-68), second proposed amended complaint, R. 211 (Second Proposed Second Am. Compl. at 56-60) (Page ID #5045-49), and second amended complaint, R. 222 (Second Am. Compl. at 56-60) (Page ID #5226-5230), fail to set forth a plausible IIED claim against Methodist. To start, "the complaint is devoid of allegations that" Methodist gave Robert expired medication or denied him access to a physician "for the purposes of inflicting severe emotional distress." *Cebulski v. City of Belleville*, 401 N.W.2d 616, 618-19 (Mich. Ct. App. 1986). Nor do Robert's allegations indicate that he actually suffered severe emotional distress. Finally, and perhaps most importantly, Methodist's alleged conduct here simply does not amount to "extreme and outrageous conduct" under Michigan law. In *Jones*, we considered whether a deceased prison inmate (through his personal representative) could survive summary judgment on an IIED claim against nurses who had denied him access to a physician for months, even though the inmate was "visibly ill and not eating meals" and had lost forty-six pounds in a six-month period. *Jones*, 625 F.3d at 938-39. We concluded that even if the nurses' decision to ignore the decedent's request for

medical assistance "for several months . . . could reasonably be construed as deliberately indifferent to Jones's serious medical needs, it does not establish that they acted intentionally or in a manner that is sufficiently extreme or serious to satisfy [an IIED] claim" under Michigan law. *Id.* at 948. If the behavior at issue in *Jones* was insufficient to establish an IIED claim as a matter of law, then so too is the alleged misconduct here. The district court therefore properly barred Robert's IIED claim on the ground that allowing such an amendment would be futile.

The district court barred Robert from asserting negligence and gross-negligence claims against Methodist on the ground that Methodist had already been fully dismissed from the litigation. R. 221 (Order at 24) (Page ID #5151). Because we now hold that the district court erred in dismissing Brent's federal-law claims against Methodist based on his purported failure to establish that Methodist was a state actor, we REMAND this case to the district court to decide in the first instance whether Robert's negligence and gross-negligence claims against Methodist should proceed. We agree, however, with the district court's rejection of Methodist's statute of limitations argument. Robert filed a motion to join as plaintiff on July 11, 2013, R. 182 (Mot. to Join as Pl.) (Page ID #4612-13)—the last day that he could bring tort claims against Methodist under Michigan law. *See* Mich. Comp. Laws §§ 600.5805(2); 600.5851(1). Though the motion failed to satisfy the requirements for initiating a complaint, the Supreme Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin v. Dep't of Veterans*

Affairs, 498 U.S. 89, 96 (1990). The district court therefore did not abuse its discretion in allowing equitable tolling in this case. *See Truitt v. Cty. of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

3. Plaintiffs' State-Law Claims Against the Children's Center

In his first amended complaint, Brent asserted two state-law claims against the Children's Center. First, Brent alleged that the Children's Center intentionally inflicted emotional distress on him (1) by telling him and his wife, in front of their children, that they would accept the plea deal they had been offered in Family Court if they loved their children, and (2) by cutting off phone contact between the Brents and their children in an effort to convince the parents to take the plea deal. R. 114 (Am. Compl. at 81) (Page ID #2363). Second, the Children's Center was allegedly "grossly negligent in their affirmative duty to help reunify the family." *Id.* The district court ultimately determined that the Children's Center was entitled to immunity under *Martin v. Children's Aid Soc.*, 544 N.W.2d 651 (Mich. 1996). We AFFIRM.

Martin shields social workers from liability for "initiating and monitoring child placement proceedings and placements." 544 N.W.2d at 654. Unlike absolute immunity under federal law, absolute immunity under *Martin* is "not limited to 'quasi-prosecutorial or quasi-judicial' actions." *Braverman v. Hall*, No. 253619, 2005 WL 1123889, at *1 (Mich. Ct. App. May 12, 2005). The Michigan courts have justified *Martin*'s broad grant of immunity by reasoning that state courts "regularly review[] the placement recommendations" made by social workers, *Martin*, 544 N.W.2d at 656, and there-

fore parents distressed by social workers' actions "may avail themselves of the safeguards built into the adjudication process," *McCarthy v. Scofield*, No. 284129, 2009 WL 3235639, at *6 (Mich. Ct. App. Oct. 8, 2009).

Plaintiffs argue, first, that the district court erred in granting the Children's Center immunity under *Martin* because the Children's Center failed to plead this affirmative defense in its initial responsive pleading. Federal law governs whether a defense has been waived in federal court, but state law governs which defenses must be pleaded affirmatively to avoid waiver. *See Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 901 (6th Cir. 2002). Here, both parties seem to agree that absolute immunity under *Martin* is an affirmative defense that can be waived if not properly pleaded, and we agree. As the Supreme Court of Michigan has reasoned that governmental immunity to individuals is an affirmative defense that individual officials bear the burden of raising and proving, we conclude that the same logic applies to absolute immunity under *Martin*. *See Odom v. Wayne Cty.*, 760 N.W.2d 217, 226-28 (Mich. 2008). The question therefore becomes whether, under federal law, the Children's Center waived its state-law immunity defense.

Federal Rule of Civil Procedure 8(c) requires defendants to raise affirmative defenses in their first responsive pleadings; the failure to do so may result in waiver of the defense. *Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004); *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986) ("Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense."). "It is well established, however, that failure to raise an affirmative defense by responsive pleading does not

always result in waiver." *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993), *as amended on denial of reh'g* (Aug. 31, 1993). "[T]he purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it." *Id.* "Thus, if a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice." *Id.* (quoting *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989)).

Here, the Children's Center did not raise *Martin* immunity in its answer to Brent's initial complaint, *see* R. 41 (Answer at 21-22) (Page ID #265-66), but it did raise the defense in its first filing with the district court following Brent's filing of his amended complaint, *see* R. 118 (Mot. to Dismiss at 7-10) (Page ID #2567-70). Given that the Children's Center promptly raised the defense as soon as Brent filed a superseding complaint, we cannot conclude that plaintiffs were prejudiced in any way by the Children's Center's failure to raise the defense earlier. This is not a case where a defendant raised an immunity defense for the first time "days before the trial was scheduled to commence," *Yates v. City of Cleveland*, 941 F.2d 444, 449 (6th Cir. 1991), or after the close of discovery, when a plaintiff's opportunity to gather relevant evidence in rebuttal would be harmed, *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 751 (6th Cir. 2015). Under the circumstances of this case, we conclude the Children's Center did not waive its defense under *Martin*.[3]

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[3] Because we hold that the Children's Center did not waive its immunity under *Martin*, we need not decide whether plaintiffs waived their waiver argument by failing to raise it earlier.

Plaintiffs nevertheless argue that the Children's Center is not entitled to *Martin* immunity on the merits. Here, again, we disagree. Plaintiffs' argument, essentially, is that the Children's Center had no authority to attempt to coerce plaintiffs into taking a deal, and therefore they cannot be immunized for this conduct. Appellant Br. at 43-44. We are aware of no support in Michigan law for this claim. Indeed, the *Martin* court specifically granted immunity to defendants who had been accused of "bad faith," which would appear to cover plaintiffs' allegations in this case. *See* 544 N.W.2d at 654. At bottom, *Martin* immunity does not arise out of Michigan's governmental immunity statute, *id.* at 655 n.5, and thus, unlike that statute, its protections are not limited to behavior that an officer "reasonably believes . . . [to be] within the scope of his or her authority," Mich. Comp. Laws § 691.1407 (2)(a). The district court therefore properly granted the Children's Center absolute immunity from plaintiffs' state-law claims.

C. Wayne County DHS and the Individual State Defendants in Their Official Capacities

The Eleventh Amendment bars suits against a state or its agencies in federal court unless the state consents to suit or Congress abrogated states' immunity with respect to certain claims. *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997). Municipalities and municipal agencies "generally do not receive Eleventh Amendment immunity." *Denton v. Bedinghaus*, 40 F. App'x 974, 978 (6th Cir. 2002). "However, when acting on a particular issue or in a particular area, a local government official or entity may serve as an alter ego or arm of the state and, in

that capacity, it may receive Eleventh Amendment protection." *Id.*

Here, the district court initially determined that Wayne County DHS and its employees were not entitled to sovereign immunity. *See* R. 163 (Order at 31-32) (Page ID #4142-43). Upon reconsideration, however, the district court held that Wayne County DHS served as an "arm of the state" in its dealings with the Brent family, and therefore both the agency and its employees were entitled to immunity from claims brought against them in their official capacities. R. 171 (Order at 3-4) (Page ID #4225-26). We review de novo the district court's grant of summary judgment in defendants' favor, and we make all reasonable inferences in plaintiffs' favor. *Timmer*, 104 F.3d at 842. Summary judgment is appropriate if a movant shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the district court properly granted summary judgment to defendants on these claims, we AFFIRM.

Wayne County DHS, as the entity asserting entitlement to sovereign immunity, bears the burden of showing that it is in fact an arm of the state. *Lowe v. Hamilton Cty. Dep't of Job & Family Servs.*, 610 F.3d 321, 324 (6th Cir. 2010). Whether Wayne County DHS is an "arm of the state" turns on four factors: (1) the State of Michigan's "potential legal liability for a judgment against" Wayne County DHS; (2) "the language employed by state courts and state statutes to describe" Wayne County DHS, "as well as the degree of control and veto power which the state has over" Wayne County DHS; (3) "whether state or local entities appoint [Wayne County DHS] board members"; and (4) "whether [Wayne County DHS's] functions fall under

the traditional purview of state or local government." *Id.* at 325.

"The state's potential legal liability for a judgment against the defendant 'is the foremost factor' to consider in our sovereign immunity analysis." *Id.* (quoting *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005)). Here, state law strongly suggests, although perhaps does not conclusively establish, that the State of Michigan would be responsible for judgments entered against Wayne County DHS. To start, the Michigan legislature abolished county departments of social services in 1975 and replaced them with a single statewide Department of Human Services (formerly called the Family Independence Agency). *See* Mich. Comp. Laws §§ 401.1 *et seq.* Numerous district courts have thereby concluded that county-level "child protective services offices are therefore not county agencies, but are merely local offices of the state DHS." *See, e.g., Bradford v. Child Protective Servs. of Mich. Genesee Cty.*, No. 12-CV-13718, 2013 WL 4084756, at *4 (E.D. Mich. Aug. 13, 2013). Given that county DHS offices are merely local subdivisions of the state DHS, and given that state agencies are required to pay for court judgments, it follows that the State of Michigan—and not Wayne County—is liable for judgments against Wayne County DHS. *See* Mich. Comp. Laws § 18.1396.

The second and third factors also point strongly in favor of treating Wayne County DHS as an arm of the state. Once the "county department of social services . . . [was] made structurally a part of the state department of social services," all employees of the county departments became employees of the state and became members of the state employees retirement system. Mich. Att'y Gen. Op. 4973 (Apr. 16, 1976). The

state allocates and distributes funding for county DHS offices, Mich. Comp. Laws §§ 400.14, 400.18, and Michigan DHS appoints the director, employees, and assistants of each county DHS office, *id.* § 400.45. Moreover, the state director of social services appoints one of the three members of each county's board, *id.* § 400.46, and the state department director may organize up to three counties into a single administrative unit "for purposes of administrative efficiency." *Id.* § 400.48. Finally, although county DHS departments are responsible for investigating "matters pertaining to dependent, neglected, and delinquent children," *id.* § 400.55(h), the boards of the county DHS offices must "cooperate" with Michigan DHS "in handling the welfare and relief problems and needs of the people of its county." *Id.* § 400.53.

As to the fourth factor, we conclude that Wayne County DHS's "functions cannot be characterized neatly as completely within the traditional purview of either local or state government." *Lowe*, 610 F.3d at 331-32. However, "because the other three relevant factors decidedly weigh" in favor of treating Wayne County DHS as an arm of the state, we hold that the district court's holding to this effect was proper. *See id.* at 332.

Seeking to bypass this conclusion, plaintiffs argue that Wayne County DHS waived its immunity defense by failing to brief the issue sufficiently in its initial motion for summary judgment. Appellant Br. at 29-30. Although a state agency may waive its sovereign immunity and consent to suit by voluntarily appearing and defending against the merits of a case in federal court, we have not required an agency to make a full-throated assertion of its immunity in its initial dealings with the court to avoid waiver. *See Boler v. Earley*,

865 F.3d 391, 410-11 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1281 (2018), *and cert. denied*, 138 S. Ct. 1285 (2018), *and cert. denied*, 138 S. Ct. 1294 (2018). In *Boler*, for instance, we held that the State of Michigan and various agencies had not waived their sovereign immunity when they argued against the merits of plaintiffs' motion for a preliminary injunction and submitted a joint statement of resolved and unresolved issues without mentioning sovereign immunity, and they did not invoke their sovereign immunity until after the district court prompted them to submit a supplemental brief of their jurisdictional arguments. *Id.* Given that Wayne County DHS undeniably invoked its sovereign immunity in its initial motion for summary judgment, and failed only to support adequately this invocation with sufficient argument or evidence, *see* R. 50 (Mot. for Summary J. at 20-21 (Page ID #309-10), we do not believe that Wayne County DHS waived the defense or consented to suit.

Finally, plaintiffs argue that the Eleventh Amendment does not apply to suits brought by a citizen against his own state for violations of the Fourteenth Amendment because (1) the Eleventh Amendment only bars suits by citizens of another state or a foreign county; and (2) plaintiffs could sue directly under the Due Process Clause of the Fourteenth Amendment, which "limits a state's sovereignty" with regard to due-process violations. Appellant Br. at 32. This argument is wrong on both fronts. First, as the Supreme Court has long recognized, the Eleventh Amendment protects states from suits by their own citizens. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 140-41 (1984). Second, the Fourteenth Amendment does not create a private right of action; instead, "§ 1983 provides

a cause of action for all citizens injured by an abridgement of th[e] protections" set forth in "the Equal Protection and Due Process Clauses of the Fourteenth Amendment." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 611 (2008) (Stevens, J., dissenting) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 119-20 (1992)). As "[§] 1983 does not abrogate Eleventh Amendment immunity," *Boler*, 865 F.3d at 410, sovereign immunity bars plaintiffs' claims against Wayne County DHS in this case.

D. Mia Wenk, Shevonne Trice, Heather Decormier-McFarland, Monica Sampson, Charlotte McGehee, and Joyce Lamar ("State Defendants")

Several issues remain on appeal with respect to the individual State Defendants in their personal capacities. We address first plaintiffs' federal-law claims and then address plaintiffs' state-law claims against the various State Defendants.

1. Plaintiffs' Fourth Amendment Claims Against Wenk, Sampson, and Lamar Concerning the Preparation, Submission, and Execution of the Removal Order

In reviewing Brent's first amended complaint, the district court held that the individual State Defendants are entitled to absolute immunity from plaintiffs' claims under 42 U.S.C. § 1983 concerning "the preparation and submission of the removal petition to the Family Court . . . , the execution of the resulting order, and the giving of recommendations and testimony." R. 163 (Order at 35) (Page ID #4146). "Whether a defendant is entitled to absolute or qualified immunity from liability under 42 U.S.C. § 1983 is a

legal question that this Court reviews *de novo*." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009).

Social workers are entitled to absolute immunity, "akin to the scope of absolute prosecutorial immunity," for conduct "intimately associated with the judicial phase of the criminal process." *Pittman v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 640 F.3d 716, 724 (6th Cir. 2011) (second quote quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Put differently, "social workers are absolutely immune only when they are acting in their capacity as *legal advocates*—initiating court actions or testifying under oath—not when they are performing administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc). The doctrine of absolute immunity applies even if social workers make knowingly false statements in the petition for a removal order and while advocating before the court. *Pittman*, 640 F.3d at 725-26.

Plaintiffs raise four objections to the district court's granting of absolute immunity to Wenk, Sampson, and Lamar. First, plaintiffs argue that these three defendants are not entitled to absolute immunity for their respective roles in petitioning for the removal order because the State Defendants failed to provide Brent with an impartial hearing before filing the petition. Appellant Br. at 20. Plaintiffs do not explain, however, how the alleged lack of a pre-petition hearing countermands the defendants' well-established right to immunity. We have previously rejected efforts to "circumvent" a social worker's absolute immunity for filing a petition "by stating a claim based on '[the social worker's] underlying action in failing to properly inves-

tigate'" the case. *Pittman*, 640 F.3d at 726 (citation omitted). To the extent that plaintiffs' argument hinges on such a claim, we reject it again here.

Next, plaintiffs insist that the State Defendants are not entitled to immunity for filing the petition because they submitted the petition to a probation officer, who allegedly rubber-stamped the order with a judge's signature, rather than to a judge or referee. Appellant Br. at 20. We understand this argument to be a misplaced effort to hold the State Defendants responsible for the Family Court's allegedly faulty procedures for reviewing and granting orders. As we have already held, plaintiffs cannot hold the social workers liable for decisions over which "the family court—not the State Defendants—bore the ultimate responsibility." *Brent*, 555 F. App'x at 529 (quotation marks omitted). Plaintiffs' second argument therefore also fails.

Third, plaintiffs contend that Wenk should not be immunized for her role as the "complaining witness" in support of the removal order. Appellant Br. at 20. Plaintiffs note that in the Fourth Amendment context, prosecutors who "vouch[] for the truth of the contents of [a] criminal complaint in front of a judicial officer" are entitled to qualified immunity, rather than absolute immunity, because they are acting more like a police officer seeking a warrant than a prosecutor presenting an indictment. *See Ireland v. Tunis*, 113 F.3d 1435, 1448 (6th Cir. 1997). Because Wenk not only presented the petition for removal, but also vouched for the truthfulness of its contents, plaintiffs argue that the doctrine of qualified immunity governs her conduct. Appellant Br. at 20. Moreover, because Wenk allegedly submitted false information in the petition, plaintiffs

contend that she must be denied qualified immunity. *Id.* (citing *Yancey v. Carroll Cty.*, 876 F.2d 1238, 1243 (6th Cir. 1989)).

True, we once held that a social worker could not receive absolute immunity for "the act of personally vouching for the truth of the facts that provide the evidentiary support for [the family court's] finding of probable cause." *Young v. Vega*, 574 F. App'x 684, 689 (6th Cir. 2014). *Young*, however, is unpublished and non-binding, and our later published precedent overrides *Young*'s holding. In *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015), for instance, we held that a social worker is entitled to absolute immunity against allegations that he "included false and misleading statements of fact in the protective-custody petition." *Id.* at 844. As we explained then, the social worker "offered his factual assessment in his capacity as a legal advocate initiating a child-custody proceeding in family court." *Id.* Because a petition for a removal order triggers a subsequent hearing in court, *see* Mich. Ct. R. 3.963(B)(1)(b), 3.965, a social worker's actions as a complaining witness are "more analogous to a prosecutor's decision to prosecute than a police officer's testifying by affidavit in support of probable cause." *Bauch v. Richland Cty. Children Servs.*, No. 17-3435, 733 F. App'x 292, 2018 WL 2338906, at *4 (6th Cir. May 23, 2018). The district court therefore did not err in granting absolute immunity to Wenk for serving as the "complaining witness" in support of the removal order.

Finally, plaintiffs argue that Wenk is not entitled to absolute immunity for her role in executing the removal order on February 18, 2017. Appellant Br. at 21-22. On this point we agree. Social workers are

entitled only to qualified immunity when removing children from a home because, in such circumstances, the social workers are "acting in a police capacity rather than as legal advocates." *Kovacic v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 724 F.3d 687, 694 (6th Cir. 2013). Thus, if Wenk violated plaintiffs' clearly established constitutional rights when executing the removal order, she would not be entitled to qualified immunity from plaintiffs' claims. *See id.* at 695.

Plaintiffs first argue that Wenk violated clearly established law by executing a removal order that she knew to contain falsehoods, in contravention of the well-established Fourth Amendment principle that an officer "cannot rely on a judicial determination of probable cause" to justify executing a warrant "if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant." *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003) (quoting *Yancey*, 876 F.2d at 1243). Though we entirely agree—and now directly hold—that a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the order, this principle was not clearly established at the time Wenk executed the order in this case. Indeed, we held as recently as 2015 that "general assertions that 'the Fourth Amendment was violated as to [a child] when he was seized pursuant to [an] order' that he claims 'was based on false statements and otherwise lacked probable cause' invoke no clearly established right." *Barber*, 809 F.3d at 848. As *Barber* concerned conduct that occurred after the allegedly

unlawful actions in this case, *see id.* at 842, we must grant Wenk qualified immunity here.

Plaintiffs next argue that Wenk violated clearly established law by executing a facially invalid warrant. However, plaintiffs did not include allegations of facial invalidity in the then-operative first amended complaint, and therefore the district court properly declined to consider the allegation when it was raised for the first time in a motion for reconsideration. *See* R. 199 (Order at 16) (Page ID #4774). In any event, as we explain further below, the warrant did not contain such "glaring deficienc[ies]" such that no reasonable social worker could have reasonably executed it. *Groh v. Ramirez*, 540 U.S. 551, 564 (2004). Wenk is therefore entitled to qualified immunity under this theory of liability, as well.

2. Robert's Fourth Amendment Claims Against Wenk, Sampson, and Decormier-McFarland Concerning the January 20, 2010 and January 21, 2010 Home Visits

In his initial complaint, Brent alleged that Wenk, Sampson, and Decormier-McFarland violated his Fourth Amendment rights when they interrogated his children and took photographs of his home without his consent. *See Brent*, 555 F. App'x at 524. The district court initially denied the social workers qualified immunity as to these allegations, but we reversed on appeal. *Id.* at 524-27. We held that the social workers had not violated clearly established law "by exceeding the limited consent to search that [Brent] had given them," and we thereby held that the social workers were entitled to qualified immunity. *Id.* When the district court subsequently allowed Robert to join the

case as plaintiff, it barred Robert from bringing Fourth Amendment claims against Wenk, Sampson, and Decormier-McFarland concerning their alleged "warrantless seizure[s]" and "custodial interrogations" of Robert on January 20 and 21, 2010. R. 221 (Order at 32-33) (Page ID #5159-60). According to the district court, "no controlling precedent [holds] . . . that a social worker's questioning of Robert Brent without parental consent violated his clearly established rights." *Id.* at 33 (Page ID #5160). Accordingly, the district court held that allowing Robert to assert his Fourth Amendment claims in the second amended complaint would be "futil[e]" because "there would still be qualified immunity on these issues." *Id.* As noted above, we review de novo a district court's conclusions on grounds of futility that proposed amendments to a complaint could not survive a motion to dismiss. *Associated Truck Lines*, 801 F.2d at 248. We now AFFIRM.

Robert's allegations against the individual State Defendants are as follows: On January 20, 2010, Brent gave Wenk limited consent to talk to Robert in the Brents' living room to make sure he was all right after having been outside in the middle of winter wearing only shorts. R. 222 (Second Am. Compl. at 6) (Page ID #5175). Once Wenk started asking Robert questions that "went beyond the consent given," Wenk demanded that she be allowed to talk to Robert alone in his bedroom and told the Brents that they could not object "because the law authorized her actions." *Id.* After "concluding her interrogation[]," Wenk "ordered" Robert to show her the rest of the house, including areas where he was not allowed to go, such as the basement and his brother's room. *Id.* at 7 (Page ID #5176). The next day, Wenk, Sampson, and Decor-

mier-McFarland returned to the home to ask Robert "a couple of questions." *Id.* at 8. Sampson "demanded" that Robert escort the three social workers upstairs. *Id.* at 26 (Page ID #5196). Plaintiffs make no further allegations about defendants' interactions with Robert on January 21, 2010.

These allegations, taken as true, do not amount to a violation of clearly established Fourth Amendment law. Undeniably, clearly established law prohibits the unreasonable seizure of a minor by state social workers. *See Kovacic*, 724 F.3d at 699. It is not at all clear, however, that Robert was seized during the January 20 or the January 21 home visits. "To determine whether a person has been seized within the meaning of the Fourth Amendment, the inquiry is whether, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Myers v. Potter*, 422 F.3d 347, 356 (6th Cir. 2005) (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984)). In *Myers*, the principal case upon which plaintiffs rely, we held that a fourteen-year-old boy was seized under the Fourth Amendment when he was removed from his mother's home, taken to a district attorney's office an hour away after his mother was falsely told he would be taken only a few miles away, and interrogated for over four hours (even though the officers had told his mother that he would be back home within the hour). *Id.* at 350, 355-57. In such circumstances, we concluded that the boy could not have reasonably believed that he could leave, particularly since he was questioned in an office with "the doors were locked behind him" and his repeated requests to be taken home were "expressly declined." *Id.* at 355.

The alleged facts of this case are palpably different. For one thing, the social workers never removed Robert from his home, rendering it far less likely that Robert felt unable to "leave" their presence. *Cf. United States v. Panak*, 552 F.3d 462, 466 (6th Cir. 2009) (holding, in the *Miranda* context, that "in-home encounter[s] between the police and a citizen generally will be non-custodial"). In addition, plaintiffs never allege that Robert declined to speak with the social workers or asked not to be interviewed. Even assuming Wenk told the parents they could not object to the questioning, as plaintiffs allege, there is no indication that Wenk told Robert he was required to speak with her. *See id.* at 467 (holding defendant was not in custody when she was never told "that she could not ask the investigators to leave or that she was required to answer their questions"). Indeed, plaintiffs' sole effort to show that the "encounters [were] involuntary" is to argue that "after attempts to end the interrogation were denied, Robert became very emotional"—a factual assertion that appears nowhere in plaintiffs' twice-amended complaint. *See* Appellant Br. at 28. Taken all together, we cannot conclude from plaintiffs' operative complaint that Robert was seized—let alone that he was seized in violation of clearly established law. We therefore affirm the district court's refusal to allow Robert to assert § 1983 claims based on purported Fourth Amendment violations against Wenk, Sampson, or Decormier-McFarland in plaintiffs' second amended complaint.

3. Plaintiffs' State Constitutional Claims Against Wenk and Sampson

In their proposed second amended complaint, plaintiffs also attempted to bring claims arising from

the Michigan Constitution against Wenk and Sampson.[4] In particular, plaintiffs alleged that the social workers violated plaintiffs' rights under Article I §§ 2, 6, 9, 11, 17, and 23 of the Michigan Constitution. R. 211 (Proposed Second Am. Compl. at 22, 31-32) (Page ID #5011, 5020-21). The district court properly barred plaintiffs from asserting these claims. *See* R. 221 (Order at 27-29) (Page ID #5154-56). Under Michigan law, plaintiffs may not bring suits for damages against individual government employees for alleged violations of the Michigan Constitution. *Jones v. Powell*, 612 N.W.2d 423, 426 (Mich. 2000). Plaintiffs resist his rule, arguing that they are not alleging claims directly under the Michigan Constitution, but are instead suing for violations of Michigan's Child Protection statute, which requires "[a]ll department employees involved in investigating child abuse or child neglect cases [to] be trained in the legal duties to protect the state and federal constitutional and statutory rights of children and families from the initial contact of an investigation through the time services are provided." Mich. Comp. Laws § 722.628(17). Michigan courts have never interpreted this provision of the Child Protection laws, let alone decided that the provision creates a private right of action. As plaintiffs offer no argument or case law in support of inferring a private right of action, we decline to do so. *See Hertel v. Mortg. Elec. Registration Sys., Inc.*, No. 1:12-CV-174, 2013 WL

[4] The district court believed that plaintiffs were also bringing claims under the Michigan Constitution against Trice, but we do not *see* any such claims in either the proposed second amended complaint or the second amended complaint. In any event, our holding here applies equally to plaintiffs' potential claims under the Michigan Constitution against Trice.

1874718, at *5 (W.D. Mich. May 3, 2013) ("[F]ederal courts are justifiably reluctant to find implied causes of action in state statutes due to federalism concerns."). We therefore AFFIRM.

4. Robert's State-Law Failure-to-Report Claim Against Trice

Robert brought a medical-neglect claim against Trice in plaintiffs' second amended complaint. In particular, Robert alleged that he was given expired medication while he was under the care of Methodist. R. 222 (Second Am. Compl. at 41) (Page ID #5211). Robert's parents learned about this incident during a family visit on April 14, 2010 and immediately reported it to Trice, who was present at the time. *Id.* Trice, however, "ignored her affirmative duty to report this medical neglect." *Id.* Two days later, Robert began coughing up blood and asked Methodist to *see* a doctor. *Id.* at 57 (Page ID #5227). After his requests to *see* a physician were repeatedly denied, Robert left Methodist and went to a hospital, where he was diagnosed with acute bronchitis and acute pharyngitis. *Id.* A Foster Care Review hearing was subsequently held on April 26, 2010, during which time "it was determined . . . that the medical neglect of R. Brent must be reported and investigated." *Id.* at 42 (Page ID #5212). Nevertheless, Trice, who was present at the meeting, "still refused to report" the allegedly ongoing "medical neglect of R. Brent." *Id.* Robert sued Trice for failing to report his medical neglect and sought damages, "including but not limited to medical expenses and emotional distress." *Id.* at 46 (Page ID #5216).

Trice responded to Robert's allegations by claiming immunity under the Governmental Tort Liability Act

("GTLA"), Michigan Compiled Laws § 691.1407. *See* R. 230 (Mot. for J. on the Pleadings at 10-12) (Page ID #5318-20). In Michigan, "[g]overnmental employees bear the burden of raising and proving their entitlement to immunity as an affirmative defense." *Gohl v. Turbiak*, No. 335389, 2018 WL 2067796, at *5 (Mich. Ct. App. May 3, 2018). The GTLA immunizes officers and employees of governmental agencies from tort liability for injuries arising out of negligence if:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Mich. Comp. Laws § 691.1407(2). The GTLA does not immunize officials from intentional-tort claims, *id.* § 691.1407(3), although common-law immunity precludes suits against government officials for intentional torts under certain circumstances. *Odom*, 760 N.W.2d at 228. Thus, by asserting immunity under the GTLA, Trice necessarily interpreted plaintiffs' failure-to-report claim as sounding in negligence.

Although the district court initially rejected Trice's GTLA defense, *see* R. 249 (Order at 7-10) (Page ID #5517-20), it ultimately held that Trice was entitled to governmental immunity because her failure to report medical neglect was not the proximate cause of Robert's injuries, *see* R. 261 (Order at 6-7) (Page ID #5653-

54). In so holding, the district court reasoned that Robert's injuries were caused "most immediately by other factors"—i.e., either "the illness itself or perhaps the expired medication." *Id.* at 7 (Page ID #5654). The district court therefore entered judgment on the pleadings in favor of Trice on Robert's failure-to-report claim—a determination that we now review de novo. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). In so doing, we treat "all well-pleaded material allegations of the pleadings of the opposing party" as true, and we will affirm the granting of a Rule 12(c) motion "only if the moving party is nevertheless clearly entitled to judgment." *Id.* (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)).

On appeal, plaintiffs do not challenge the district court's proximate-cause determination. Instead plaintiffs argue that Trice is not entitled to immunity because she has not established that she was acting within the scope of her authority, as required to secure immunity under the GTLA. *See* Appellant Br. at 25. Alternatively, plaintiffs argue that Trice's failure to report may have been intentional instead of negligent, and that she was not entitled to immunity under the standard set forth in *Odom*. We address each argument in turn.

We reject plaintiffs' first argument. Michigan courts define the "scope of authority" as "[t]he reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." *Backus v. Kauffman*, 605 N.W.2d 690, 694 (Mich. Ct. App. 1999) (quoting Black's Law Dictionary (7th ed.) at 1348). As a social worker, Trice is required under Michigan law to report child abuse

or child neglect when she "has reasonable cause to suspect" such abuse or neglect. Mich. Comp. Laws § 722.623. Trice therefore acts within the scope of her authority when she reports reasonable suspicions of abuse and neglect, as well as when she declines to report cases where there is "no reasonable cause" to suspect abuse or neglect. Accordingly, Trice necessarily acted within the scope of her authority when she decided—either rightly or wrongly—not to report the alleged medical neglect here. This conclusion is all the more apparent here given that Trice learned about Methodist's alleged misconduct while acting as a social worker (*i.e.*, attending a family visit and participating in a Foster Care Review hearing). *See* State Defendants Br. at 31. We therefore affirm the district court's grant of immunity.

We also reject plaintiffs' attempt to assert for the first time that Trice may have intentionally, rather than negligently, failed to report Methodist's medical neglect. It is entirely unclear from plaintiffs' second amended complaint whether Robert's failure-to-report claim alleges an intentional tort or negligence. *See* R. 222 (Second Am. Compl. at 46) (Page ID #5216) ("Ms. Trice is liable to Plaintiff R. Brent under MCL 722.633(1) for the damages caused from her failure to report the medical and educational neglect of Plaintiff R. Brent, including but not limited to medical expenses and emotional distress caused by her failure."). In response to the State Defendants' motion for judgment on the pleadings, however, plaintiffs stressed that Trice's conduct had been "grossly negligen[t]" and made no mention of a potential intentional tort. *See* R. 235 (Pls. Response to State Defs.' Mot. for J. on the Pleadings at 12) (Page ID #5372). Plaintiffs may

not now reinterpret their complaint for the first time on appeal to raise a claim that they never before asserted. *Cf. Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995) (holding that we generally "decline to review a claim that is presented for the first time on appeal").

We therefore AFFIRM the district court's grant of judgment on the pleadings in favor of Trice with respect to Robert's failure-to-report claim.

5. Plaintiffs' State-Law Claims (IIED and Eavesdropping) Against the State Defendants

The procedural history of plaintiffs' state-law claims against the State Defendants, as recounted on pages 9-11, supra, is complicated. In short, the district court initially determined that the State Defendants were absolutely immune under state law from plaintiffs' IIED and eavesdropping claims under *Martin v. Children's Aid Soc.*, 544 N.W.2d 651 (Mich. 1996), R. 249 (Order at 3-10) (Page ID #5513-20), then reversed itself following plaintiffs' motion for reconsideration, R. 261 (Order at 3-8) (Page ID #5650-55), and then reversed itself again, R. 270 (Order at 6) (Page ID #5725). In the meantime, the individual State Defendants had appealed the district court's prior holding that defendants were not entitled to absolute immunity. R. 265 (Notice of Appeal at 2) (Page ID #5676). Thus, we now have before us the State Defendants' appeal from the district court's denial of absolute immunity, as well as plaintiffs' appeal from the district court's subsequent granting of such immunity.

We conclude that the district court's denial of the State Defendants' absolute-immunity defense was immediately appealable, such that we have jurisdiction

over the appeal docketed in 17-1428. As a result, the district court lacked jurisdiction subsequently to reverse its order denying immunity after the State Defendants had filed a notice of appeal. Nevertheless, we agree with the district court's ultimate conclusion that the State Defendants are entitled to absolute immunity from plaintiffs' state law claims under *Martin*, and we therefore REVERSE the district court's decision denying immunity and REMAND with instructions to (re-enter) judgment in defendants' favor.

a. Jurisdiction

We have jurisdiction to consider the State Defendants' interlocutory appeal of the district court's denial of absolute immunity under *Martin*, though not for the reason the State Defendants suggest. The State Defendants rely on *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397 (6th Cir. 2007), to support their claim that "[t]he denial of state-law immunity is immediately appealable." 17, 1428, D.E. 9 (Defs.' Response to Mot. to Dismiss for Lack of Jurisdiction at 7). *Livermore*, however, concerns the appealability of orders denying immunity under Michigan's governmental immunity statute, Michigan Compiled Laws § 691.1407. *See* 476 F.3d at 407-08. As the Michigan courts have held, and as the State Defendants have repeatedly stressed in this case, *Martin* immunity "does not arise from this kind of statute." 544 N.W.2d at 655 n.5. Our decision in *Livermore* therefore does not control this case.

"[W]e must look to state immunity law to determine if a denial of immunity based on state law is appealable." *Walton v. City of Southfield*, 995 F.2d 1331, 1343 (6th Cir. 1993), *superseded by statute on other grounds as recognized in Livermore*, 476 F.3d 397. As we have long recognized,

> the right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to the defendant official to be free from the burdens of litigation arising from acts taken in the course of his duties.

Marrical v. Detroit News, Inc., 805 F.2d 169, 172 (6th Cir. 1986), *superseded by statute on other grounds as recognized in Bradley v. City of Ferndale*, 148 F. App'x 499, 512 (6th Cir. 2005). We have thus distinguished between state-immunity laws that provide only immunity from liability, rather than immunity from suit. *Id.* at 172-74. Where a state is focused solely on protecting officials from "the risk of ultimate liability in damages," we have concluded that the officials have no "entitlement not to stand trial" and therefore no right to an interlocutory appeal. *Id.* at 172, 174. Where, however, a state is not concerned only with liability for money damages, but also "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," we will conclude that the state intended to immunize its officials from suit and therefore intended to authorize interlocutory appeals from the denial of such immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)); *see also Marrical*, 805 F.2d at 172-74.

When the Michigan Court of Appeals held in *Martin* that social workers must receive absolute immunity for their role in "initiating and monitoring child placement proceedings and placements," it was

focused on far more than just immunity from money damages. In justifying its decision, the Michigan Court of Appeals explained that "social workers must be allowed to act without fear of intimidating or harassing lawsuits by dissatisfied or angry parents." *Martin*, 544 N.W.2d at 655. The court further explained that "absolute immunity is necessary to assure that our important child protection system can continue to function effectively" and to "[]serve the broader public interest in having participants [in contested child protection cases] . . . perform their respective functions without fear of having to defend their actions in a civil lawsuit." *Id.* at 655-56 (second quote quoting *Babcock v. Tyler*, 884 F.2d 497, 502 (9th Cir. 1989)) (alteration and omission in original). And the court deemed "persuasive" the *Martin* defendants argument that "[t]he threat of a suit . . . could make any social worker back off from making discretionary decisions that he or she would otherwise believe to be in the child's best interests." *Id.* at 656 (quotation marks and citation omitted). These rationales mirror the concerns the Supreme Court highlighted in *Forsyth* as evidence that qualified immunity under federal law is "immunity from suit." *See* 472 U.S. at 526-27. We therefore conclude, like the Court in *Forsyth*, that the entitlement under *Martin* "is an immunity from suit rather than a mere defense to liability." *Id.* at 526. Accordingly, the denial of absolute immunity under *Martin* is immediately appealable as a collateral order.

Plaintiffs resist this holding, arguing that the list of "final order[s]" subject to appeal of right in the Michigan Court Rules includes orders denying governmental immunity, but does not include orders denying immunity under *Martin*. *See* Mich. Ct. R.

7.203(A), 7.202(6)(a)(v). The trouble for plaintiffs, however, is that the Michigan Court Rules also authorize appeal of right from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule," Mich. Ct. R. 7.203(A)(2), and we determine whether appealability "has been established by [state] law" by applying the analysis set forth in *Marrical* and *Walton*. Sometimes, of course, our determination must change in light of intervening state law. In *Walton*, for instance, we held that orders denying governmental immunity are not immediately appealable under Michigan law, a decision we later reversed when Michigan amended its Court Rules in 2002 to identify expressly orders denying governmental immunity as "final orders" available for appeal of right. *See Livermore*, 476 F.3d at 408. But this does not mean that the process for "determining whether we may hear an appeal based on state-law immunity" has changed. *See Schack v. City of Taylor*, 177 F. App'x 469, 473 (6th Cir. 2006) (holding that we have jurisdiction to hear interlocutory appeals of orders denying governmental immunity given Michigan's amendments to its Court Rules, but recognizing that, in general, we still determine whether we can hear interlocutory appeals based on state-law immunity by asking whether "the state has extended an underlying substantive right to the defendant official to be free from the burdens of litigation" (quoting *Marrical*, 805 F.2d at 172)). Though the Michigan courts have not decided this issue, we conclude based on our precedent that orders denying *Martin* immunity are immediately appealable under state law.

Because the district court's denial of *Martin* immunity to the State Defendants was immediately appealable, the district court lost jurisdiction over the plaintiffs' state-law claims against the State Defendants once the State Defendants filed their notice of appeal. *See Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993). The district court concluded otherwise, reasoning that this court had already affirmed the district court's predecessor's decision to deny the State Defendants absolute immunity. *See* R. 264 (Order at 4 n.1) (Page ID #5671). While true that "the district court retains jurisdiction over an action when an 'appeal is untimely, is an appeal from a non-appealable non-final order, or raises only issues that were previously ruled upon in that case by the appellate court,'" *Lewis*, 987 F.2d at 394-95 (quoting *Rucker v. U.S. Dep't of Labor*, 798 F.2d 891, 892 (6th Cir. 1986)), the district court erred in holding that this court had already decided that the State Defendants were not entitled to immunity under *Martin*. We previously held that the State Defendants were not entitled to governmental immunity under the GTLA or *Odom*. Brent, 555 F. App'x at 535. We never considered, however, whether the State Defendants were entitled to absolute immunity under *Martin*. The district court therefore had no power to revisit the claims that were pending before this court on appeal.[5]

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[5] Plaintiffs insist that we lack jurisdiction because the State Defendants' appeal is untimely, in that the district court had purportedly decided that the State Defendants were not entitled to *Martin* immunity on November 15, 2012, and the State Defendants never appealed that order. *See* 17-1428 Appellee Br. at 15. Plaintiffs are wrong. By November 2012 order, the State Defendants had not yet raised immunity under *Martin*—only the Children's Center had. Moreover, although the district court

b. Waiver

Plaintiffs argue that even if we have jurisdiction to hear the State Defendants' appeal, we should hold that the State Defendants have waived their immunity defense under *Martin* by failing to raise this defense in a timely fashion. We decline plaintiffs' invitation.

As noted above, absolute immunity under *Martin* is an affirmative defense under Michigan law, and it can be waived in federal court if it is not asserted in defendants' first responsive pleading. *See* section II.B.3, *supra*. Here, the State Defendants did raise state-law absolute immunity in their first responsive pleading. *See* R. 200 (Answer at 6) (Page ID #4782); *see also* R. 225 (Answer at 5) (Page ID #5276). They did not, however, raise state-law absolute immunity in their pre-answer motion to dismiss. As we have previously held 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, *see English v. Dyke*, 23 F.3d 1086, 1091 (6th Cir. 1994), plaintiffs must believe that *English* does not decide this case. We disagree.

In *English*, we held that Federal Rule of Civil Procedure 12(g) does not require defendants to assert federal qualified immunity in their pre-answer motions to dismiss because qualified-immunity defenses essentially state that the plaintiff has failed to state a

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held that the Children's Center was not entitled to state-law immunity in its November 15, 2012 order, it subsequently revisited its decision and held that the Children's Center was entitled to *Martin* immunity, *see* R. 199 (Order at 10-13) (Page ID #4768-71). We therefore reject plaintiffs' arguments on this point.

claim, and a defense based on failure to state a claim need not be brought in a defendant's first motion, but instead "may be brought in a subsequent pleading, motion for judgment on the pleadings, or at trial on the merits." *Id.* Plaintiffs here argue that the Michigan court rules operate differently and require defendants to argue immunity defenses in their first dispositive motion or else waive the defense. *See* 17-1428, Appellee Br. at 27. We read Michigan's rules differently. *See* Mich. Ct. R. § 2.116(C)(7), (D)(2). In any event, federal law governs questions of federal procedure, and our holding in *English* therefore governs this case. *See Roskam*, 288 F.3d at 901.

Plaintiffs seemingly also argue that the State Defendants waived their defense under *Martin* by filing their answer to plaintiffs' first amended complaint tardily and by filing repeated motions for extensions. *See* 17-1428, Appellee Br. at 17-18. We review for abuse of discretion a district court's determination that an untimely assertion of an affirmative defense was permissible because it "did not result in surprise or unfair prejudice" to plaintiffs. *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997). We *see* no "clear error of judgment" here and therefore affirm. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

c. Merits

Plaintiffs recognize that *Martin* immunity is broad but nonetheless raise several arguments for its inapplicability here. First, plaintiffs insist that *Martin* immunity does not apply to activities taken before a petition for child removal is filed, as those activities take place without judicial oversight. 17-1428, Appellee Br. at 20-21. As Michigan courts have held other-

wise, we reject this argument. *See McCarthy*, 2009 WL 3235639, at *7 (holding that *Martin* immunity "appl[ies] with equal force to the pre-adjudication investigatory stages of a child protective proceeding," as "this might well be the most volatile stage of the proceeding").

Second, plaintiffs contend that Decormier-McFarland is not entitled to immunity under *Martin* because she was an intern with Wayne County DHS, rather than a paid employee. Plaintiffs offer no case law in support of their position, and we decline to limit Michigan law without some sort of evidence that the Michigan courts intended such a limitation to apply. *Cf. Rehm v. Interstate Motor Freight Sys.*, 133 F.2d 154, 157 (6th Cir. 1943) ("[When dealing with issues of state law,] the duty of United States courts . . . is to ascertain, construe and apply static state law: not to limit, modify or repeal state doctrine.").

Third, plaintiffs argue that the GTLA forecloses *Martin* immunity for governmental employees. As Michigan courts have granted immunity under *Martin* to governmental employees, we *see* no basis for adopting plaintiffs' interpretation. *See McCarthy*, 2009 WL 3235639, *4-6 (granting both governmental immunity and *Martin* immunity to a Children's Protective Services employee).

Finally, plaintiffs argue that Trice is not entitled to *Martin* immunity for drafting a document naming Michael and Noel Chinavare temporary guardians of Brent's male children without first obtaining a court order authorizing the guardianship. *See* R. 222 (Second Am. Compl. at 36) (Page ID #5206). As there was no "court oversight" over this decision, plaintiffs reason that *Martin* immunity cannot apply. *See* 17-

1428, Appellee Br. at 24-25. This argument misunderstands the breadth and the purpose of *Martin* immunity. If the Brents were displeased with Trice's allegedly wrongful behavior, they could have "avail[ed] themselves of the safeguards built into the adjudication process." *McCarthy*, 2009 WL 3235639, at *6. *Martin* immunity does not stop applying simply because the court did not pre-approve or "oversee every discrete act of the social worker." *Beauford v. Lewis*, 711 N.W.2d 783, 785 (Mich. Ct. App. 2005).

Thus, we conclude that the district court erred in denying the State Defendants absolute immunity under *Martin* from plaintiffs' IIED and eavesdropping claims (though we recognize, of course, that the district court subsequently reached the same resolution as we now do). We therefore grant the State Defendants absolute immunity as to these claims.

E. City of Detroit, Emina Biogradlija, and Michael Bridson ("The City Defendants")

In their second amended complaint, plaintiffs alleged that the City of Detroit, Detroit Police Officers Emina Biogradlija and Michael Bridson, and two other unknown Officers violated plaintiffs' Fourth and Fourteenth Amendment rights when they entered plaintiffs' home without a valid warrant and removed plaintiffs' children, in violation of 42 U.S.C. § 1983. R. 222 (Second Am. Compl. at 55) (Page ID #5225). Plaintiffs also claimed that the City Defendants intentionally caused plaintiffs emotional distress by forcibly entering plaintiffs' home, using excessive force to remove plaintiffs' children, and physically assaulting Brent. *Id.* Finally, plaintiffs insisted that the Detroit Police Department was grossly negligent

in its training and supervision of its police officers. *Id.* at 55-56 (Page ID #5225-26). The City Defendants moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), and the district court granted judgment in the City Defendants' favor as to all claims. R. 250 (Order) (Page ID #5522-33). We now AFFIRM.[6]

1. Jurisdiction and Standard of Review

As a preliminary matter, the City Defendants argue that this court lacks jurisdiction over plaintiffs' appeal because the district court entered final judgment in this case on May 1, 2017, R. 271 (Judgment) (Page ID #5727-28), and plaintiffs did not file a notice of appeal until July 7, 2017, R. 281 (Notice of Appeal) (Page ID #5844). Although plaintiffs typically must file a notice of appeal in a civil case within 30 days after entry of the final judgment, Federal Rule of Appellate Procedure 4(a)(4) provides that if a motion is filed within twenty-eight days of entry of judgment under Rule 59 or Rule 60 by "a party," then "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(1)(A), (a)(4) (emphasis added). Here, plaintiffs moved to vacate the entry of judgment as to the State Defendants under Federal Rules of Civil Procedure 59 and 60 and Local Rule 7.1 on May 4,

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[6] Plaintiffs also alleged that the City Defendants conspired to violate Plaintiffs' Fourth and Fourteenth Amendment rights with the Wayne County Department of Health Services and social worker Mia Wenk, in violation of 42 U.S.C. § 1985. R. 222 (Second Am. Compl. at 55) (Page ID #5225). The district court entered judgment on the pleadings in favor of defendants on this claim, and plaintiffs have not appealed this decision.

2017. R. 272 (Pls.' Mot. to Vacate Void Orders) (Page ID #5730). This motion was denied on June 9, 2017. R. 280 (Order at 4) (Page ID #5842). Plaintiffs' July 7, 2017 notice of appeal is therefore timely as to all parties, and this court has jurisdiction to hear plaintiffs' appeal vis-à-vis the City Defendants.

As noted above, we review de novo a judgment on the pleadings under Rule 12(c). *Fritz*, 592 F.3d at 722. Where, as here, defendants have attached exhibits to their motion for judgment on the pleadings, we may consider those exhibits "so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

2. Section 1983

The district court properly entered judgment on plaintiffs' claims under 42 U.S.C. § 1983. Government officials cannot be held liable under § 1983 unless they violate a plaintiff's clearly established constitutional rights. *Kovacic*, 724 F.3d at 695. In other words, an officer is immune from suit for constitutional violations unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Groh*, 540 U.S. at 563 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

Under clearly established Fourth-Amendment law, "government officials must obtain a warrant to conduct a search or seizure on private property, absent exigent circumstances or another recognized exception." *Kovacic*, 724 F.3d at 698.[7] Here, the City Defendants

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[7] Though plaintiffs' complaint alleges violations of the Fourth and Fourteenth Amendments, the district court assumed that

entered plaintiffs' home and removed Brent's children pursuant to an "Order to Take Children into Protective Custody" signed by a state family-court judge. R. 231-2 (Order) (Page ID #2427-28). Plaintiffs correctly assume that this removal order was equivalent to a judicially authorized warrant. *See* R. 222 (Second Am. Compl. at 54) (Page ID #5224); *see also Young*, 574 F. App'x at 692 (describing an ex parte order authorizing the Tennessee Department of Children's Services to take emergency temporary custody of children as "a judicially secured arrest warrant"); *J.B. v. Washington Cty.*, 127 F.3d 919, 930 (10th Cir. 1997) (holding that a judge's "order to take [a child] to a shelter home was tantamount to an arrest warrant issued by a magistrate"). Plaintiffs argue, however, that the City Defendants were not entitled to rely on the removal order because it was "so facially deficient . . . that the executing officers [could] not reasonably presume it to be valid." *Groh*, 540 U.S. at 565 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)); *see also* Appellant Br. at 34-35. In particular, plaintiffs allege that the order (1) did not have a court seal; (2) did not have a judge's name on the first page; (3) was signed with a "rubber stamp"; (4) "had the wrong description for all of Plaintiff's children; (5) included "contradictory statement[s] regarding 'reasonable efforts'"; (6) "did not specify who was authorized to execute it"; (7) had "no date of entry of order" and "no hearing date set," and (8) "gave blanket permission to

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plaintiffs intended to raise claims only under the Fourth Amendment, as incorporated against the states through the Fourteenth Amendment. R. 250 (Order at 3-4) (Page ID #5524-25). As plaintiffs have not challenged this assumption on appeal, we will assume that the district court correctly interpreted plaintiffs' complaint.

enter premises anywhere in the United States." R. 222 (Second Am. Compl. at 54) (Page ID #5224).

Some of plaintiffs' allegations fail on the facts. For instance, plaintiffs do not specify what is "wrong" about the order's description of the children, and we *see* no obvious error. *See* R. 231-2 (Order to Take Children into Protective Custody at 1) (Page ID #5351) (identifying each child by his or her name and birthday).[8] Other allegations are legally insignificant. The order is not deficient, for example, simply because it authorizes entry into plaintiffs' home or wherever the children are "reasonably believed to be found." *Id.* at 2 (Page ID #5352). Though the final catch-all phrase was overbroad, "an 'infirmity due to overbreadth does not doom the entire warrant.'" *United States v. Castro*, 881 F.3d 961, 965 (6th Cir. 2018) (quoting *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001)). Where a warrant contains "sufficiently particularized" portions that are "distinguishable from the invalid portions" and that "make up the greater part of the warrant," the proper portions of the warrant "remain[] valid." *Id.* at 966 (quoting *United States v. Sells*, 463 F.3d 1148, 1151 (10th Cir. 2006)). Nor are we aware of any constitutional requirement that warrants (or child removal orders) must include court seals, the name of the issuing judge on the first page, a prelim-

[8] We may review the removal order, which the City Defendants attached to their Rule 12(c) motion, because the contents of the order are central to plaintiffs' claims. *See Bassett*, 528 F.3d at 430.

inary hearing date,[9] or a handwritten as opposed to a stamped signature.

Moreover, even if the removal order contained some irregularities, plaintiffs have failed to establish that these flaws rendered the officers' reliance on the warrant objectively unreasonable. For instance, the field where the judge or referee was supposed to fill in the "[d]ate of entry of order" was left blank, but the order was stamped with a "Filed" date of February 18, 2010, and the order included an expiration date of March 18, 2010. *See* R. 231-2 (Removal Order at 1-2) (Page ID #2427-28). In addition, though the checkmark box indicating that reasonable efforts were not made to avoid removal was ticked, it was plain from the face of the warrant that this tick mark was a typographical error, as the checkmark box indicating that reasonable efforts *were* made to avoid removal was also ticked, and the order included a short narrative detailing those efforts. *Id.* Finally, though the order failed to identify the executing officers, this is "precisely the kind of technical error[s] in an otherwise valid warrant which fails to raise any substantive fourth amendment concerns." *United States v. Palmer*, 770 F.2d 167, 1985 WL 13528, at *5 (6th Cir. 1985); *see also People v. Godboldo*, No. 323261, 2016 WL 299707, at *5 (Mich. Ct. App. Jan. 21, 2016), *appeal denied*, 878 N.W.2d 856 (Mich. 2016), *reconsideration denied*, 882 N.W.2d 155 (Mich. 2016) (holding removal order did not violate Fourth Amendment or state law when it "did not specify who was authorized to take the child into protective custody" because "the court rule

[9] Under Michigan law, a preliminary hearing must be held within 24 hours after a child has been taken into protective custody. Mich. Ct. R. § 3.965(A)(1).

permitted the officers who entered the home to take the child into protective custody"). At bottom, plaintiffs have not identified the sort of "glaring deficiency that any reasonable officer would have known was constitutionally fatal." *Groh*, 540 U.S. at 564.

We also reject plaintiffs' argument that the manner in which the City Defendants entered plaintiffs' home violated the Fourth Amendment. *See* Appellant Br. at 34. Plaintiffs complain that Officer Bridson "pushed his way past" Brent to effectuate the child removal order and refused to produce the order until "five minutes" after entering the home. R. 222 (Second Am. Compl. at 53) (Page ID #5223). The Fourth Amendment bars the use of excessive force in effectuating a warrant, *see, e.g.*, *Binay v. Bettendorf*, 601 F.3d 640, 647 (6th Cir. 2010); *Miller v. Sanilac Cty.*, 606 F.3d 240, 251 (6th Cir. 2010), but "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). Here, Brent concedes that he refused to allow the officers to enter his home after being told that they had a warrant to remove Brent's children. R. 222 (Second Am. Compl. at 53) (Page ID #5223). In such circumstances, Officer Bridson's pushing of Brent—which was not alleged to be unduly violent or forceful—was not unreasonable. *See Stricker v. Twp. of Cambridge*, 710 F.3d 350, 364 (6th Cir. 2013) (holding officers did not violate Fourth Amendment where members of household "repeatedly disobeyed lawful officer commands" and officers' use of force was not "gratuitously violent"). And, in any event, such limited contact did not violate clearly established

law. *See Marcilis v. Twp. of Redford*, 693 F.3d 589, 598 (6th Cir. 2012) (officers pushing homeowner "'violently' to the floor despite the fact that he was visibly bandaged" did not violate clearly established Fourth Amendment law under the circumstances presented). The alleged five-minute delay between entry and allowing Brent to view the warrant is also constitutionally acceptable. *See Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433, 442-47 (6th Cir. 2006) (concluding that the Warrant Clause of the Fourth Amendment does not "require[] officers to produce a copy of the warrant (and any affidavit) at the outset of the search"). Plaintiffs have therefore failed to raise any viable § 1983 claims against the Detroit Police Officers.[10]

3. *Monell* Claim

Plaintiffs' failure-to-train and failure-to-supervise claims against the City of Detroit also fail. "A plaintiff may seek damages against a municipality where the municipality has a custom, policy, or practice that resulted in deprivation of the plaintiff's constitutional rights." *Gonzalez v. Kovacs*, 687 F. App'x 466, 470 (6th Cir. 2017) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)). Here, as in *Gonzalez*, plaintiffs' complaint failed to allege "a single fact that suggests, plausibly or otherwise," that the Detroit Police Officers'

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[10] To the extent that plaintiffs mean to argue that the officers were unnecessarily rough in "ripp[ing] [the youngest child] from his mother and push[ing] him out the door," R. 222 (Second Am. Compl. at 53) (Page ID #5223), plaintiffs lack standing to assert those claims. *See Jezowski v. Thompson*, No. 1:16-CV-13242, 2018 WL 3060250, at *5 (E.D. Mich. May 18, 2018), *report and recommendation adopted*, No. 16-CV-13242, 2018 WL 3048500 (E.D. Mich. June 20, 2018).

purported Fourth Amendment violations were "the result of a custom, policy, or practice of [the City of Detroit]. The district court therefore properly dismissed this count of [plaintiffs'] complaint." *Id.*

In their response to the City Defendants' Rule 12(c) motion and in their opening brief before this court—but not in their complaint—plaintiffs asserted that "the Detroit Police Department was under a consent order to cure the very Fourth Amendment violations that occurred here" and was therefore "well aware that constitutional violations were occurring on a regular bas[i]s" but nevertheless "took no steps whatsoever to attempt to cure these issues." Plaintiffs failed to reference or discuss this consent order in their complaint and never attached the consent order to its briefings before the district court, such that the district court would have been required to expressly exclude the additional material or convert the City Defendants' motion to a motion for summary judgment. *See Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 503 (6th Cir. 2006). As a result, the district court was not required to consider these vague, outside-the-pleadings allegations in assessing the City Defendants' motion under Rule 12(c), and neither are we. *Cf. Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) ("When considering a motion for judgment on the pleadings (or a motion to dismiss under Fed. R. Civ. P. 12(b)(6)), the court generally must ignore materials outside the pleadings . . . .").

Finally, plaintiffs insist that the City ought to be held liable for failing to enforce its alleged policy barring Detroit Police Officers from serving civil orders. *See* R. 222 (Second Am. Compl. at 54) (Page ID #5224). We fail to *see* how serving civil orders in

violation of this purported internal policy amounts to a constitutional violation, and thus the City's failure to enforce this policy adequately (assuming it exists) does not create liability under *Monell*. *See Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) ("There can be no liability under *Monell* without an underlying constitutional violation.").

4. Intentional Infliction of Emotional Distress

The district court properly held that statutory immunity precluded plaintiffs' IIED claim against the City Defendants. Michigan law immunizes government officials from liability for intentional torts if

> (a) [t]he acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority, (b) the acts were undertaken in good faith, or were not undertaken with malice, and (c) the acts were discretionary, as opposed to ministerial.

Odom, 760 N.W.2d at 228. The district court determined that the individual defendants had adequately pleaded the elements for statutory immunity in their answer to plaintiffs' complaint, and plaintiffs had failed to plead facts suggesting that the defendants' conduct was unreasonable, not taken in good faith, or undertaken with malice. R. 250 (Order at 9-10) (Page ID #5530-31). As a result, the district court entered judgment in defendants' favor on plaintiffs' IIED claim. *Id.* Plaintiffs then moved for reconsideration and attached to their motion an internal Detroit Police Department policy purportedly showing that Detroit police officers should not execute civil orders. *See* R.

253 (Pls. Mot. for Reconsideration at 8-9, Ex. 1) (Page ID #5550-51, 5555-56). In their motion, plaintiffs argued that the individual officers could not claim that they acted within the scope of their authority, acted in good faith, or performed "discretionary" acts when they executed the civil order in violation of the police department's internal policy. *Id.* at 8-9 (Page ID #5550-51). The district court denied plaintiffs' motion for reconsideration, reasoning that "[n]othing about [the plaintiffs' exhibit] suggests the officers acted unreasonably under the circumstances when they executed the order to remove Brent's children from the home." R. 261 (Order at 8) (Page ID #5655). We agree.

We note at the outset that the district court was free to consider the attachment plaintiffs enclosed with their motion for reconsideration, as plaintiffs referred to the Detroit Police Department's purported policy regarding civil orders in their complaint, and that document is "central to the claims contained therein." *See Bassett*, 528 F.3d at 430. In reviewing that document, we agree with the district court that the document lends no support to plaintiffs' repeated assertion that "the Detroit Police has a policy strictly prohibiting the Detroit Police from executing civil orders." Appellant Br. at 38. Rather, the document states only that "[w]arrants and writs issued by competent judicial authority emanating from civil cases are generally the responsibility of the county sheriff, court appointed bailiffs, or court officers of the 36th District Court," and "[g]enerally, officers will not be dispatched to requests for assistance by bailiffs, court officers, or city officials, unless a breach of the peace is imminent." R. 253 (Pls. Mot. for Reconsideration, Exhibit 1) (Page ID #5555). The document therefore does not

show that the officers acted in bad faith, with a lack of authority, or with a lack of discretion.

Moreover, plaintiffs' complaint, read against the backdrop of Michigan law, compels the conclusion that the officers are entitled to statutory immunity. Defendants plainly acted within the scope of their authority when they executed the removal order, as Michigan Court Rule 3.963 specifically contemplates that "a child protective services worker, an officer, or [an]other person deemed suitable by the court" may take children into protective custody pursuant to a removal order. *See* Mich. Ct. R. 3.963(B)(1) (emphasis added); *see also Godboldo*, 2016 WL 299707, at *5 (holding that Michigan law authorized police officers to execute removal order and take children into protective custody). And the district court correctly determined that plaintiffs had not averred facts allowing the inference that defendants had acted with malice. *See Stoll v. Luce Mackinac Alger Schoolcraft Dist. Health Dep't Bd. of Health*, No. 316287, 2014 WL 5364085, at *3 (Mich. Ct. App. Oct. 21, 2014) (holding defendant entitled to governmental immunity where the plaintiff's complaint had "concluded that [the defendant] acted with malice, but [the plaintiff] offered no facts to support his conclusions"). Finally, all conduct attributed to the officers in this case was discretionary as a matter of law. *See Norris v. Lincoln Park Police Officers*, 808 N.W.2d 578, 582 (Mich. Ct. App. 2011) ("A police officer's decisions regarding how to respond to a citizen, how to safely defuse a situation, and how to effectuate the lawful arrest of a citizen who resists are . . . clearly discretionary."). The district

court therefore properly entered judgment in the City Defendants' favor on plaintiffs' IIED claims.[11]

F. Gross Negligence Claims Against City and State Defendants

In their final argument regarding the City and State Defendants, plaintiffs contend that the district court erred in sua sponte striking plaintiffs' claim for "gross negligence" from the second amended complaint. In dismissing these claims, the district court reasoned that "Michigan law does not allow an independent cause of action, defined as 'gross negligence,' to lie where allegations of an intentional tort have been made." R. 221 (Order at 26-27) (Page ID #5153-54). Plaintiffs now argue that the district court erred because (1) the defendants were required to raise this defense affirmatively, and (2) the Federal Rules of Civil Procedure allow plaintiffs to raise alternative theories of liability. *See* Appellant Br. at 36-37. We review de novo the district court's dismissal of plaintiffs' gross-

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[11] The district court entered judgment on behalf of all City Defendants on plaintiffs' IIED claim, even though the district court's analysis focused exclusively on whether the individual defendants were entitled to governmental immunity. *See* R. 250 (Order at 8-10) (Page ID #5529-31). As plaintiffs have not argued that the district court erred in entering judgment in favor of the City of Detroit as to plaintiffs' IIED claim, we need not consider the issue. Nonetheless, for the sake of completeness, we note that under Michigan law, "the City of Detroit could only be held liable for the intentional misconduct of an employee acting within the scope of his or her employment, and that absent such a finding of liability on the part of any individual defendant police officer, a verdict must be entered on behalf of the City of Detroit and against Plaintiffs in this case." *Holloway v. McIntyre*, 838 F.2d 471, 1988 WL 7961, at *2 (6th Cir. 1988).

negligence claim. *See Meros v. Kilbane*, 107 F.3d 12, 1997 WL 48984, at *2 (6th Cir. 1997).

1. City Defendants

A district court generally may not dismiss a complaint sua sponte without first giving notice to the plaintiff. *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 558 (6th Cir. 2012). Here, however, plaintiffs have not complained about insufficient notice, and any potential prematurity in the district court's dismissal of plaintiffs' gross-negligence claims against the City Defendants was harmless because "no amendment would have allowed [plaintiffs] to obtain relief from the defendants." *Tidik v. Kaufman*, 156 F.3d 1232, 1998 WL 466571, at *1 (6th Cir. 1998).

Michigan's governmental immunity statute protects government officers from tort liability unless their "conduct . . . amount[s] to gross negligence that is the proximate cause of the injury or damage." Mich. Comp. Laws § 691.1407(2)(c). Thus, "establishing that a governmental official's conduct amounted to 'gross negligence' is a prerequisite to avoiding that official's statutory governmental immunity." *Bletz v. Gribble*, 641 F.3d 743, 756 (6th Cir. 2011). Michigan's immunity statute does not, however, provide an independent cause of action for "gross negligence," and plaintiffs may not bypass the immunity statute by "transforming intentional excessive force or battery claims into negligence claims." *Jackson v. Lubelan*, 657 F. App'x 497, 502 (6th Cir. 2016). As plaintiffs here are seemingly attempting to reframe Officer Bridson's alleged "assault" of Brent as a claim for gross negligence, *see* Appellant Br. at 38, the district court correctly dismissed plaintiffs' gross-negligence claim against the

City Defendants. Asserting that plaintiffs have failed to state a claim under Michigan law is not an affirmative defense, and thus the district court did not err in dismissing the claim sua sponte. *See* Mich. Comp. Laws § 2.111(F)(3) (defining affirmative defenses).

Plaintiffs, however, insist that their gross-negligence claim is premised not only on the officers' alleged "forced entry and assault," but also on the officers' failure to abide by the Detroit Police Department's alleged policy against executing civil orders. Appellant Br. at 38. According to plaintiffs, "[w]hether the officers intentionally ignored this mandate or w[ere] neglectful in their duties is at this point a material issue of fact to be determined by the jury." *Id.* Plaintiffs are correct to suggest that they may bring common-law negligence claims based on allegations that could also undergird intentional-tort claims, in that they may allege that "even if intentional conduct did not cause [their] injuries, 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results' did." *Jackson*, 657 F. App'x at 503 (citation omitted). But a plaintiff seeking to raise a common-law negligence claim must show that the defendant owed him a duty of care, and, here, plaintiffs have identified no statute, contractual relationship, or common-law principle that imposes a duty running from Detroit police officers to private citizens requiring the officers to abide by internal departmental polices regarding the execution of child removal orders. *See Cummins v. Robinson Twp.*, 770 N.W.2d 421, 434 (Mich. Ct. App. 2009). Thus, even assuming the Detroit Police Department has a policy against executing such orders, the district court properly struck plaintiffs' gross-negligence claim against the City Defendants from the second amended complaint.

2. State Defendants

The district court's striking of plaintiffs' gross-negligence claims against the State Defendants was erroneous. As noted above, plaintiffs are barred from bringing gross-negligence claims only if those claims are "fully premised" on alleged intentional torts. *VanVorous v. Burmeister*, 687 N.W.2d 132, 143 (Mich. Ct. App. 2004), *overruled on other grounds by Odom*, 760 N.W. 2d 217. Here, however, plaintiffs allege that various State Defendants were grossly negligent in failing to follow certain procedures and statutory obligations. *See, e.g.*, R. 211 (Proposed Second Am. Compl. at 19) (Page ID #5008) (alleging that Wenk amended the removal petition to assert that one of Brent's children had "high lead sometime in the past" without conducting an investigation, as allegedly required "by written policy"). We have previously entertained gross-negligence claims premised on similar allegations that social workers failed to follow the procedures set forth in the Michigan Child Protection Law. *See Jasinski v. Tyler*, 729 F.3d 531, 536-37, 544-45 (6th Cir. 2013). The district court therefore erred in striking plaintiffs' gross-negligence claims on the ground that they were not cognizable under Michigan law. While it is possible that the claims should be dismissed for other reasons, we leave it to the district court to make such determinations in the first instance. *See Stanek*, 323 F.3d at 480. We therefore REVERSE the district court's striking of plaintiffs' gross-negligence claims against the State Defendants and REMAND for further proceedings consistent with this opinion.

G. Remand to a Different District Court Judge

Plaintiffs have asked this court to reassign this case to a different district court judge on remand. "This Court possesses the power, under appropriate circumstances, to order the reassignment of a case on remand pursuant to 28 U.S.C. § 2106." *Lavin v. Husted*, 764 F.3d 646, 651-52 (6th Cir. 2014) (quoting *Rorrer v. City of Stow*, 743 F.3d 1025, 1049 (6th Cir. 2014)). In assessing whether to reassign a case, we consider:

> (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously expressed views or findings;
>
> (2) whether reassignment is advisable to preserve the appearance of justice; and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. at 652 (quoting *Rorrer*, 743 F.3d at 1049). Reassignment is an "extraordinary power" that should "rarely be invoked." *Id.* (second quote quoting *Rorrer*, 743 F.3d at 1049).

We have reviewed the record of this case, along with the allegations levied by plaintiffs against the district court in their appellate briefing and in their motion for disqualification before the district court. *See* R. 273 (Mot. to Disqualify) (Page ID #5744-67). We agree with the district court that "no reasonable person could conclude that the Court's decisions in favor of [defendants] in this case are the product of deep-seated favoritism and antagonism." R. 279 (Order

at 6) (Page ID #5836). We also find no reason to believe that the district court would have "substantial difficulty in putting out of his or her mind previously expressed views or findings." *Lavin*, 764 F.3d at 652 (quoting *Rorrer*, 743 F.3d at 1049). We do, however, have grave concerns, given the procedural complexity and duration of this case, that reassignment would result in "waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.* We therefore decline to exercise our power of reassignment here.

III. Conclusion

This case has been long, complicated, and procedurally messy. We sympathize with the plaintiffs' efforts to remedy perceived wrongs, defendants' efforts to defend against this longstanding suit, and the district court's efforts to resolve each claim properly. We now AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion.

OPINION OF THE SIXTH CIRCUIT
(FEBRUARY 6, 2014)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATHANIEL BRENT,

Plaintiffs-Appellee,

v.

MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND; MONICIA SAMPSON; CHARLOTTE MCGEHEE and JOYCE LAMAR,

Defendants-Appellants.

No. 12-2669

On Appeal from the United States District Court
for the Eastern District of Michigan

Before: COLE, GILMAN, and DONALD, Circuit Judges

RONALD LEE GILMAN, Circuit Judge.

Mia Wenk, Shevonne Trice, Heather Decormier-McFarland, Monica Sampson, Charlotte McGehee, and Joyce Lamar appeal the district court's decision denying them absolute and qualified immunity under federal law and governmental immunity under Michigan law. Nathaniel Brent claims that these defendants, all of whom are social workers, violated his constitutional

rights when they searched his home without a warrant and temporarily removed his minor children from his custody. For the reasons set forth below, we AFFIRM IN PART AND REVERSE IN PART the decision of the district court and REMAND the case for further proceedings consistent with this opinion.

I. Background

A. Factual Background

The incident that sparked this lawsuit took place on January 17, 2010 when Brent's then 15-year-old son, RAB, arrived at a Detroit police station barefoot and wearing only a pair of shorts. Detroit Police Officer Donald Coleman reported the incident to the Wayne County Department of Human Services (DHS). At the same time RAB's mother, Sherrie Brent, who is not a party to this action, contacted DHS about filing incorrigibility charges against RAB. These events prompted Wenk, a DHS employee, to visit Brent's home on January 20 and 21, 2010.

Brent claims that Officer Coleman failed to file the required paperwork to initiate the DHS investigation, and that Coleman subsequently withdrew his report. According to Brent, Coleman determined that the incident resulted from "poor decision making on the part of the youth." The defendants neither acknowledge nor dispute this assertion, nor does Brent cite the record to support his claim.

In any event, Brent allowed Wenk to enter his living room during the January 20, 2010 visit and permitted her to speak with RAB. He claims that the questioning became leading and suggestive, with Wenk eventually demanding to speak to RAB alone over

Brent's objection. Wenk then proceeded to interview his other four children without his knowledge or consent. Finally, she demanded that RAB show her the basement of the house where he slept, again without Brent's consent. Brent alleges that this visit allayed Wenk's concerns and that she decided with her supervisor, Sampson, to investigate the family for alternative bases for child neglect—not those related to the original referral from Officer Coleman.

Wenk contacted Brent the next day, January 21, 2010, to arrange for another visit. Brent did not agree to the visit, but Wenk arrived at his home anyway, along with Sampson and Decormier-McFarland. While Wenk spoke with Brent and his wife, Sampson and Decormier-McFarland walked around the entirety of the house, taking photographs without Brent's consent. Brent makes additional allegations regarding the period from January 21, 2010 to February 18, 2010, but because the district court did not rely on these facts in deciding to deny qualified immunity, we need not address them here.

On February 18, 2010, Wenk filed a neglect petition with the Family Division of the Third Judicial Circuit Court for Wayne County (the Family Court) seeking removal of Brent's five minor children, three of whom are boys and two of whom are girls. The Family Court ordered them removed that same day. Detroit police officers took the children from Brent's custody and placed them in emergency shelters that very evening. The Family Court appointed guardians ad litem the following day. On March 3, 2010, the children were placed with foster families. But on March 26, 2010, the children were removed from those placements and returned to the emergency shelters.

The male children were eventually placed in separate foster care centers.

A jury trial regarding the underlying allegations took place in the Family Court on May 11 to 13, 2010. On June 2, 2010, the Family Court ordered the children released to their parents with a directive that DHS continue to supervise the children. The Family Court terminated this supervision on September 10, 2010, finding that the Brents had improved the conditions in their home and the children's needs were being met.

B. Procedural Background

Brent filed this lawsuit in February 2010, claiming a multitude of constitutional and state-law violations on the part of the various actors involved with this case. As relevant here, Brent alleged that Wenk, Trice, Decormier-McFarland, and Sampson violated his constitutional rights under the Fourth and Fourteenth Amendments during the January 20 and 21, 2010 visits to his home when they exceeded the scope of Brent's consent to search, misrepresented the purpose of their visit, and photographed the home's interior. He also contends that Wenk, Trice, Decormier-McFarland, Sampson, McGehee, and Lamar denied him various parental rights to make decisions regarding his children in violation of the Fourteenth Amendment's Due Process Clause. Brent further alleges that many of these actions were extreme and outrageous conduct, constituting intentional infliction of emotional distress (IIED) and gross negligence under Michigan law. Finally, he claims that defendant Trice violated MCL § 722.633(1) by failing to report suspected child neglect of RAB while RAB was in the state's custody.

Following discovery, the defendants moved for summary judgment. The district court rejected their claims of qualified and absolute immunity regarding the federal charges and denied state-law immunity on the IIED, gross negligence, and MCL § 722.633(1) claims. This appeal followed.

II. Legal Standard—Federal Immunity

A. Standard of Review

"Whether a defendant is entitled to absolute or qualified immunity from liability under 42 U.S.C. § 1983 is a legal question that this Court reviews *de novo*." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009). The denial of qualified immunity premised on a factual dispute is not immediately appealable. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995). "To the extent that a district court's denial of a claim of qualified immunity turns on an issue of law, however, the Supreme Court has held that the denial constitutes a final, appealable decision within the meaning of 28 U.S.C. § 1291." *Sheets v. Mullins*, 287 F.3d 581, 585 (6th Cir. 2002).

B. Absolute Immunity

"[S]ocial workers are absolutely immune only when they are acting in their capacity as *legal advocates*—initiating court actions or testifying under oath—not when they are performing administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc) (emphasis in original). "The official seeking absolute immunity bears the burden of showing that immunity is justified in light of the function she was performing." *Id.* at 774. "When

applied, [t]he defense of absolute immunity provides a shield from liability for acts performed erroneously, even if alleged to have been done maliciously or corruptly." *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 694 (6th Cir. 2013) (alteration in original) (internal quotation marks omitted).

C. Qualified Immunity

As set forth in *Andrews v. Hickman County*, 700 F.3d 845 (6th Cir. 2012), we review district court decisions on qualified immunity as follows:

> First, we determine whether based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Id. at 853 (internal quotation marks omitted). We may review the denial of qualified immunity only "to the extent that the appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law." *Dorsey v. Barber*, 517 F.3d 389, 394 (6th Cir. 2008) (internal quotation marks omitted).

"The inquiry into whether a right was clearly established must be conducted in light of the specific context of the case. [It must be] sufficiently clear that

a reasonable official would understand that what he is doing violates that right . . . [and] in the light of preexisting law the unlawfulness must be apparent." *Andrews*, 700 F.3d at 853 (second alteration in original) (internal quotation marks omitted). "The plaintiff has the burden of establishing that the law was clearly established at the time of the challenged conduct." *Id.*

III. Fourth Amendment Claims

A. Introduction

The district court denied qualified immunity on four of Brent's Fourth Amendment claims. Specifically, the court found that Brent raised triable issues as to whether:

> (1) Mia Wenk went beyond the scope of the limited consent that had been given to her to enter the living room area of [Brent's] home and question RAB to ensure that he had no medical problems arising from his exposure to the cold weather (January 20th visit); (2) Wenk demanded to be permitted to question RAB outside the presence of either parent (January 20th visit); (3) Wenk, Heather Decormier-McFarland, and Monica Sampson gained entry to his home by misrepresenting the purpose and intent of their visit (January 21st visit); (4) while Wenk kept the Brent parents preoccupied, and despite Brent's expressed objections, Sampson and Decormier-McFarland went throughout the home and photographed the interior of his home (January 21st visit).

In essence, Brent argues that Wenk, Decormier-McFarland, and Sampson violated his Fourth Amendment rights by exceeding the limited consent to search that he had given them.

The social workers do not appear to contest that Brent has raised a triable issue as to whether he suffered a violation of his Fourth Amendment rights. They instead contend that this court had not clearly established as of January 2010 that Brent had a right to be free from unreasonable searches and seizures performed by social workers. In support, they cite *Andrews*, 700 F.3d at 859, which held that the Fourth Amendment's prohibition on unreasonable searches does apply to social workers, but that such law was not clearly established as of 2008 when the relevant events in *Andrews* took place.

B. Legal Standard

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972). "[A] warrantless search or seizure inside a home by a law enforcement officer violates the Fourth Amendment unless an exception to the warrant requirement applies." *Andrews*, 700 F.3d at 854.

C. Analysis

Wenk, Sampson, and Decormier-McFarland raise a close question as to whether the Fourth Amendment applied to their conduct in January 2010. As the social

workers argue, *Andrews* and *Jordan v. Murphy*, 145 F. App'x 513 (6th Cir. 2005), on which *Andrews* relied, suggest that until *Andrews*, this court had not yet clearly established that the Fourth Amendment applies to the activities of social workers. On the other hand, since *Andrews*, this court has held that the clearly established law in this circuit determined as early as 2002 that the Fourth Amendment applies to the seizure of children by social workers. *See Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 699 (6th Cir. 2013) (holding that this circuit had clearly established in 2002 that the warrantless seizure of children by social workers violates the Fourth Amendment). And in doing so, this court reasoned that, presumptively, the Fourth Amendment applies to all searches and seizures performed under color of law. *See id.* We must now decide whether *Andrews* or *Kovacic* governs the search of a home in 2010. Because Brent's Fourth Amendment allegations relate to the search of his home, and not to the seizure of his children, we hold that *Andrews* controls.

Andrews concerned the search of the plaintiff's home following a complaint to a state agency responsible for the welfare of children. The plaintiff in *Andrews* claimed that police officers arrived at his home with employees of the State Department of Children's Services in tow. Andrews testified that when he walked into his home, he "was immediately followed into [his] house by an officer, closely followed by the three [Department of Children's Services] employees, and then another officer, creating a 'whoosh of presence' and 'flooding' into the home." *Andrews*, 700 F.3d at 850. He also claimed that he was coerced into consenting to the interview of his children outside

his presence and acquiescing in a walk-through of his home, both performed by the Children's Services employees. *Id.* at 851.

Andrews sued, alleging, among other things, that the state employees violated his Fourth Amendment rights by entering his home without a warrant or his consent, interviewing his children without his consent, and walking through his home without his consent. The social workers claimed absolute and qualified immunity, but the district court held that they were not entitled to immunity. On appeal, this court reversed. The court first explained that,

> [i]f their implication is that social workers are not state actors for the purposes of the Fourth Amendment, the Supreme Court has established that the Fourth Amendment's restrictions on unreasonable searches and seizures extend well beyond the police:
>
> > [T]he Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities . . . . Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," it would be anomalous to say that the individual and his private property are fully protected by the Fourth

> Amendment only when the individual is suspected of criminal behavior.
>
> *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (internal citations omitted). Thus, the presumption appears to be that any state officer should operate with the default understanding that the Fourth Amendment applies to her actions, unless a specific exception to the requirements of the Fourth Amendment has been found to apply.

Id. at 858-59. The *Andrews* court concluded, based on this presumption, that the Fourth Amendment applied to the Children's Services employees. *Id.* at 859.

Nonetheless, the *Andrews* court noted that this circuit had no clearly established law indicating that social workers were subject to the restrictions of the Fourth Amendment in the performance of their duties; that is, it determined that, as of 2008, this court had not yet clearly established that social-worker activities are subject to the Fourth Amendment. The court explained that this court's unpublished decision in *Jordan*, 145 F. App'x 513, "is the only case from our court that bears on the issue of whether the reasonable social worker, facing the situation in the instant case, would have known that her conduct violated clearly established law. Yet, *Jordan* fails to give clear guidance to the social worker faced with the decision to enter the Andrews home." *Andrews*, 700 F.3d at 861. Thus, although the court concluded that "social workers in entering a home are governed by the Fourth Amendment, and . . . that no social worker exception applies in such situations," it said that clearly established law did not compel such a conclusion in 2008 when the search occurred. *Id.* at 863.

In *Kovacic v. Cuyahoga County Department of Children and Family Services*, 724 F.3d 687, 699 (6th Cir. 2013), this court also considered whether a warrantless search and seizure by child welfare officials violated the Fourth Amendment. As in *Andrews*, *Kovacic* relied on the premise that state actors are presumptively subject to the Fourth Amendment. *Id.* at 698 (citing *Camara v. Municipal Ct.*, 387 U.S. 523, 530-31 (1967)). But contrary to *Andrews*, *Kovacic* reached the following conclusion:

> In sum, there is an absence of pre-2002 case law specifically mentioning social workers, which under our binding precedent is insufficient to upset the presumption that all government searches and seizures are subject to the strictures of the Fourth Amendment. We thus agree with the district court that at the time of the social workers' actions, it was clearly established that Fourth Amendment warrant requirements, including the exigent-circumstances exception, apply to the removal of children from their homes by social workers.

Kovacic, 724 F.3d at 699. The *Kovacic* court drew this conclusion after considering *Andrews*.

Collectively, *Andrews* and *Kovacic* indicate that before this court decided *Andrews* in 2012, a social worker entering a home without a warrant did not violate clearly established law, but a social worker removing a child without a warrant did. Brent does not allege that his children were removed in violation of the Fourth Amendment; he instead challenges the warrantless entry into his home. *Andrews* therefore controls this case, meaning that the social workers

are entitled to qualified immunity on Brent's Fourth Amendment claim.

Brent does not challenge this interpretation of *Andrews*, but instead argues that *Andrews* was wrongly decided. He relies on decisions of district courts within this circuit and the decisions of other circuits to establish that there has never been a social-worker exemption to the Fourth Amendment.

Brent's argument is without merit. First, *Andrews* belies Brent's argument by holding that there was no clearly established law regarding a social worker exemption in 2008, when the events in *Andrews* took place. And Brent cites no case that would indicate a change in this circuit's law between 2008 and 2010, when the events of this case took place. Second, and relatedly, "[w]hen determining whether a constitutional right is clearly established, we look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal." *Andrews*, 700 F.3d at 853. Brent's reliance on district court cases within this circuit and on the law of other circuits is therefore unavailing. Because our circuit in *Andrews* held that there was no clearly established law regarding the Fourth Amendment's applicability to social workers in 2008, that determination controls this case. We therefore reverse the judgment of the district court and grant the social workers qualified immunity on Brent's Fourth Amendment claims.

IV. Fourteenth Amendment Claims

A. Background

The district court also denied qualified immunity to the defendants on several of Brent's Fourteenth Amendment claims. It interpreted Brent's claims as violations of both his "procedural due process interest in parenting" and his "substantive fundamental right to raise [his] child[ren]." *Quoting Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000). Analyzing both bases for Brent's claims, the district court determined that "[t]o the extent that Brent's claim is based upon the removal of the children from his home, the State Defendants are correct that they cannot be held liable for any such deprivation because the family court—not the State Defendants—bore the ultimate responsibility for this decision." Nonetheless, the district court determined that Brent did raise triable issues regarding whether the social workers made decisions regarding the removed children's care without consulting him. The court specifically identified the following five actions:

> (1) various examinations and interventions that were conducted without his knowledge or consent and in the absence of any court order; (2) the refusal of several Defendants to seek or permit his input in decisions regarding his children's medical, educational, residential, and other needs; (3) the failure to advise him of decisions that had been made with respect to his children; (4) certain Defendants' insistence that—notwithstanding their conclusion that the home conditions were adequate and safe—they would recom-

> mend the children's return only if he would waive his right to a jury trial and give up all post-return decision-making authority with respect to their education, medical care, and extracurricular activities; and (5) the creation of a document that purported to appoint the Chinavares as the temporary guardians of the male children without parental consent or a court order.

(internal citation omitted).

On appeal, the defendants contend that both absolute and qualified immunity shield them from these claims. They first argue that they are entitled to absolute immunity for all of their actions leading up to the Family Court's removal order because the Family Court mandated the only constitutionally cognizable deprivation that Brent suffered—the removal of his children from his custody. Second, the defendants contend that Brent retained no protected liberty interest in the parenting of his children after the Family Court placed them in foster care. They accordingly argue that their failure to consult Brent regarding his children did not violate his due process rights under the Fourteenth Amendment.

B. Legal Standard

The Fourteenth Amendment's Due Process Clause guarantees that no "State [shall] deprive any person of life, liberty, or property, without due process of law." Supreme Court precedent holds that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child

to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A state may extinguish parental rights only by proving that "clear and convincing evidence" so warrants. *Id.* at 769. Yet beyond a liberty interest in the future custody of one's child, the Supreme Court has not delineated the rights of parents temporarily deprived of the custody of their children. And neither party points us to any precedents from this circuit that illuminate the meaning of the right to raise one's child.

We particularly note that

> not every disregard of its regulations by a public agency . . . gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

Bates v. Sponberg, 547 F.2d 325, 329-30 (6th Cir. 1976). Brent must therefore show not only that the state violated its own procedures, but that such violation resulted in a procedure that violated constitutional due process. That is, he must show that the resulting procedure contravenes clearly established federal law.

C. Analysis

The social workers first argue that the district court misinterpreted this court's decision in *Pittman v. Cuyahoga County Department of Children and Family Services*, 640 F.3d 716, 722 (6th Cir. 2011), and that properly understood, the case indicates that

absolute immunity shields them from all of Brent's claims. In *Pittman*, the plaintiff claimed that an agent of the county's child welfare agency

> unconstitutionally deprived him of his fundamental liberty interest in maintaining a parental relationship with [his child] by regularly, repeatedly and on an ongoing basis misrepresenting his status, his whereabouts and his attitude towards parenting [his child] to the Juvenile Court; by misrepresenting his status [and] his attitude toward parenting when participating in agency decisions regarding the placement and custody of [his child]; and by completely cut[ting] him out of the [placement and custody] process.

Id. at 723-24 (third, fifth, and sixth alterations in original) (internal quotation marks omitted). Pittman also claimed that the defendants misled him to believe that he would be next in line for custody of his child if they determined the child's mother to be an unfit parent. *Id.* at 724.

The *Pittman* court first held that absolute social-worker immunity protects against liability for the filing of a complaint and affidavit in support of removal of a child. *Id.* Specifically, the court noted that "[w]hether [the social worker] made intentional misrepresentations to the juvenile court in the complaint and affidavits does not affect the conclusion that she is entitled to absolute immunity." *Id.* at 725. The *Pittman* court drew on *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc), which analogized social-worker immunity in such contexts to prosecutorial immunity.

In the present case, the district court properly applied *Pittman*. It held that "[t]o the extent that Brent's claim is based upon the removal of the children from his home, the State Defendants are correct that they cannot be held liable for any such deprivation because the family court—not the State Defendants—bore the ultimate responsibility for this decision." The district court found triable issues only with regard to whether the social workers failed to properly consult with Brent after the children's removal. Accordingly, *Pittman*, standing alone, does not contradict the district court's analysis.

The social workers nonetheless argue that Brent's remaining claims should be dismissed based on absolute immunity under *Holloway* because they were acting in their capacity as legal advocates. Alternatively, they contend that the rights that the district court identified were not clearly established and, therefore, qualified immunity shields them. On a claim of absolute immunity, "[t]he official seeking absolute immunity bears the burden of showing that immunity is justified in light of the function she was performing." *Holloway*, 220 F.3d at 774. But on a claim of qualified immunity, "[t]he plaintiff has the burden of establishing that the law was clearly established at the time of the challenged conduct." *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012). We will now consider each of Brent's Fourteenth Amendment claims in turn.

1. Social Worker Action 1: Interrogation of Brent's Children Without His Consent

Brent alleges that Wenk, Sampson, and Decormier-McFarland interrogated his children in violation of his constitutional rights. In particular, he asserts

that Wenk interviewed all of his children without his consent when she visited his home on January 20, 2010. He also claims that Sampson and Decormier-McFarland seized RAB by forcing him to show them around Brent's residence on January 21, 2010.

Brent cites two cases to suggest that the actions of Wenk, Sampson, and Decormier-McFarland were a violation of his clearly established Fourteenth Amendment rights, but neither is persuasive. First, he cites *Myers v. Potter*, 422 F.3d 347 (6th Cir. 2005), which held that police officers violated Myers's Fourth Amendment rights when they interrogated Myers, who was then a child, for three hours beyond the one hour to which his mother had consented. Brent's claim differs in two critical respects. First, Brent asserts his claim under the Fourteenth Amendment, but *Myers* clearly established the law only under the Fourth Amendment.

The second critical difference between this case and *Myers* is that Brent asserts the claim on his own behalf, not on behalf of his children. *Myers* reaffirmed the unremarkable proposition that a party interrogated without valid consent suffers a constitutional violation. It provides no authority to suggest that a father personally suffers a constitutional violation when social workers interrogate his children without his consent. Accordingly, *Myers* provides no authority regarding Brent's Fourteenth Amendment rights.

The other case that Brent cites, the Seventh Circuit decision in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), is also distinguishable. *Doe* held that

> because the defendants had no evidence giving rise to a reasonable suspicion that the plaintiff parents were abusing their children, or

> that they were complicit in any such abuse, the defendants violated the plaintiffs' right to familial relations by conducting a custodial interview of John Doe Jr. without notifying or obtaining the consent of his parents and by targeting the plaintiff parents as child abusers.

Id. at 524.

But *Doe* alone does not clearly establish the law in the Sixth Circuit. As this court clearly explained in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042-43 (6th Cir. 1992):

> [I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

This reasoning severely limits *Doe*'s import as an out-of-circuit case. Moreover, the holding in *Doe* does not point "unmistakably to the unconstitutionality of the conduct complained of here," *see id.* at 1043, because RAB's under-dressed mid-January arrival at

a police station in fact gave rise to a reasonable suspicion of child abuse. Finally, *Doe* actually granted qualified immunity to the caseworkers on the basis that they would have believed that state law gave them authority to conduct such an interview. Brent has therefore cited no authority supporting the conclusion that the interrogation of his children violated a constitutional right.

We also note that *Kovacic v. Cuyahoga County Department of Children and Family Services*, 724 F.3d 687 (2013), is not to the contrary. *Kovacic* determined that this circuit had "clearly established [as of 2002] that Fourth Amendment warrant requirements, including the exigent-circumstances exception, apply to the removal of children from their homes by social workers." *Id.* at 699. The case held that a parent may sue social workers for such constitutional violations. But *Kovacic* did not address whether a temporary seizure within the home (*i.e.*, to interrogate the children) violated the Fourth Amendment. Neither do the parties' submissions to this court. Absent any further discussion on this point, Brent has failed to carry his burden of showing that the actions of Wenk, Sampson, and Decormier-McFarland violated clearly established law. Qualified immunity is therefore appropriate on these claims.

2. Social Worker Actions 2 and 3: Failure to Seek Brent's Input in Decisions Regarding the Children and Failure to Advise Brent of the Decisions

Brent fails to carry his burden of showing that any of these alleged actions violated clearly established law. His principal contention is that *Santosky*

guaranteed him the right to be consulted regarding his children's care while they were not in his custody. But *Santosky*'s holding is considerably more limited. *Santosky* considered the interest parents retain in the permanent custody of their children when the state temporarily removes the children from their parents' care. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). It did not consider the parents' right to participate in other decisions concerning the children's welfare while they are temporarily in the state's custody. Accordingly, Brent has not identified any clearly established law that the defendants allegedly violated.

Brent next argues that MCL §§ 712A.13a(10)(c) and 722.124a gave him certain rights, and that the state's failure to honor its state-law obligations itself violates due process. Michigan Compiled Law § 712A.13a(10) provides that "[i]f the court orders placement of the juvenile outside the juvenile's home, the court shall inform the parties . . . [t]hat participation in an initial services plan is voluntary without a court order." And MCL § 722.124a gives social workers the right to consent to routine medical treatment for children in their care. Brent cites three cases in support of his claim that the defendants' purported violations of MCL §§ 712A.13a(10) and 722.124a constitute a federal due process violation: *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Goss v. Lopez*, 419 U.S. 565 (1975); and *Perry v. Sniderman*, 408 U.S. 593 (1972).

We find none of these cases on point. In *Wolff*, the Supreme Court confronted "important questions concerning the administration of a state prison," namely whether "disciplinary proceedings did not comply with the Due Process Clause." 418 U.S. at 542-43. The case before us, in contrast, concerns child-neglect

proceedings, and Brent does not challenge the adequacy of the proceedings, but only the social workers' alleged failure to comply with state law.

Goss is similarly not on point. That case concerned a class of high-school students' suspensions from school. The Supreme Court held that the Due process Clause "requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581. Brent is not asserting that his children were suspended from school, so *Goss* is of no relevance to the present circumstances.

Finally, Brent cites *Perry*. The Supreme Court in *Perry* held that the government cannot deny a governmental benefit to a recipient because of the recipient's exercise of a constitutional right. *See* 408 U.S. at 597-98. Although *Perry* might bear on Brent's retaliation claim, discussed in the next subsection, it has no relevance to the provisions at issue in this subsection.

All three cases cited by Brent are therefore distinguishable. On the other hand, this court's recent decision in *Jasinski v. Tyler*, 729 F.3d 531 (6th Cir. 2013), although cited by neither side, is directly on point. The key holding in *Jasinski*, a case involving a different provision of Michigan's child-protection laws, is as follows:

> To establish a procedural due process claim, a plaintiff must show "(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of

> this interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the . . . interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). A liberty interest may be created by state law when a state places "substantive limitations on official discretion." *Tony L. and Joey L. v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). A state may create such limitations by "establishing 'substantive predicates' to govern official decision-making . . . and further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989)). The state statute "must use 'explicitly mandatory language' requiring a particular outcome if the articulated substantive predicates are present." *Id.* (citing *Thompson*, 490 U.S. at 463).

Id. at 541. Michigan Compiled Laws § 712a.13a(10)(c) appears to qualify as such a substantive limitation on official discretion because the statute specifies that "[i]f the court orders placement of the juvenile outside the juvenile's home, the court *shall* inform the parties . . . [t]hat participation in an initial services plan is voluntary without a court order." (emphasis added).

But Brent does not rely on *Jasinski*, and we are therefore loathe to address the constitutional dimensions of MCL § 712a.13a(10)(c) here. This is particularly so because we have discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the cir-

cumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In the present case, we have concluded that Brent has not carried his burden of showing that the law applicable to his case was clearly established. *Jasinski* supports this reasoning because *Jasinksi* itself held that "we cannot say that a reasonable [Child Protective Services] official would understand that the failure to file a petition under § 722.638 would constitute a denial of procedural due process. No decision has yet found a procedural due process right in a similar context." *Jasinksi*, 729 F.3d at 544. Likewise, the parties here have pointed us to no case suggesting a constitutional dimension to MCL § 712a.13a(10)(c). The social workers are therefore entitled to qualified immunity on these procedural due process claims.

3. Social Worker Action 4: Alleged Insistence that Brent Waive His Right to a Jury Trial in Order to Obtain the Social Workers' Approval of the Children's Return to his Custody

The district court also denied qualified immunity on Brent's claim that certain defendants insisted that—notwithstanding their conclusion that the home conditions were adequate and safe—they would recommend the children's return only if he would waive his right to a jury trial and give up all post-return decision-making authority with respect to their education, medical care, and extracurricular activities. On appeal, the social workers argue that this conduct was intimately connected to their role as advocates and, in any event, only the Family Court could have ordered the children's return. We agree.

Under this court's decision in *Pittman v. Cuyahoga County Department of Children and Family Services*, 640 F.3d 716, 725 (6th Cir. 2011), the removal of the children from parental custody was one entrusted to the Family Court. Accordingly, the Family Court affected the deprivation, not the social workers, whatever their conduct in so advocating. The decision to return the children, and the advocacy associated therewith, is entitled to the same immunity. Indeed this court has so held. Considering Tennessee's child welfare statute, this court explained that

> Tennessee law entrusts the decision whether to return a neglected child to the home from which he was removed to the Juvenile Court. The Department [of Children's Services] acts in an advisory role to the Juvenile Court in recommending that the child is ready to return home. In performing that role, social workers in the Department act in much the same fashion as probation officers who make sentencing recommendations to criminal courts for which they are entitled to absolute immunity. . . . Social workers involved in the investigation or recommendation are, therefore, entitled to absolute immunity with respect to claims arising from such recommendations and investigations.

Rippy ex rel. Rippy v. Hattaway, 270 F.3d 416, 422-23 (6th Cir. 2001) (internal citations omitted). The same logic applies here. Advocacy and decisions concerning the return of removed children are entitled to the same immunity as advocacy and decisions concerning their initial removal.

Moreover, *Perry v. Sniderman*, 408 U.S. 593 (1972), offers no help to Brent. A claim for retaliation under *Perry* must allege that the government denied the plaintiff a benefit because the plaintiff exercised a constitutional right. *See* 408 U.S. 597 ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . "). Here, Brent appears to claim that he had the right to have the social workers recommend the return of his children (the purported benefit), and that they denied him this benefit because he chose to exercise his right to a jury trial in the Family Court (the purported constitutional right).

Brent is wrong twice over. First, a recommendation from the social workers is not a benefit within the meaning of *Perry* but is, as we have just explained, an action committed to the absolute discretion of the social workers. Second, although Brent may have been entitled to a jury trial in the Family Court under Michigan law, Brent provides no authority holding that the Fourteenth Amendment requires such a procedure, so he cannot claim that he exercised a constitutional right at all. We therefore find *Perry* inapposite to the present case.

In sum, the defendants are entitled to absolute immunity on this claim. We therefore reverse the district court's judgment to the contrary.

4. Social Worker Action 5: Creation of a Document that Purported to Appoint the Chinavares Family as the Temporary Guardians of the Male Children

Finally, the district court determined that Brent raised triable issues regarding the creation of a docu-

ment that purported to appoint the Chinavares family as the temporary guardians of the male children without parental consent or a court order. The document, issued on the Department of Human Services' stationery states that "Noel and Michael Chinavare does [sic] have temporary guardianship of [AB, RB, and JB]."

As earlier discussed, the only case that Brent cites in support of his parental rights, *Santosky v. Kramer*, 455 U.S. 745 (1982), held that a state may "may sever completely and irrevocably the rights of parents" only by proving that "clear and convincing evidence" so warrants. *Id.* at 747-48 (emphasis added). Brent cites no authority supporting the proposition that the document declaring that the Chinavares had temporary guardianship of Brent's three boys violated his right to due process. Indeed this claim also fails under qualified immunity's first prong—that the defendants violated Brent's constitutional rights at all—because Brent has not alleged, much less proffered evidence, that the document actually deprived him of the custody of his children. Absent some authority suggesting that clearly established law prohibited the social workers' actions, Brent has failed to carry his burden of establishing that a reasonable juror could find to the contrary. Qualified immunity is therefore appropriate on this claim.

5. Alleged Discovery Violation

The social workers also appeal the district court's decision regarding "[i]mmunity as to the alleged failure to produce documents." In its opinion, the district court considered this claim "as falling within [Brent's] parental rights claim." Brent argues that MCL

§ 722.627(2)(f) gives him the right to access DHS records regarding his children.

The language of the statute reads as follows:

> Unless made public as specified information released under section 7d, a written report, document, or photograph filed with the department as provided in this act is a confidential record available only to 1 or more of the following . . .
>
> (f) A person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or neglect or a victim who is an adult at the time of the request, if the identity of the reporting person is protected as provided in section 5.

As we explained with regard to MCL § 712a.13a(10)(c), MCL § 722.627(2)(f) appears to "place[] substantive limitations on official discretion" that would render any violation of MCL § 722.627(2)(f) an additional violation of Brent's procedural due process rights. *See Jasinski v. Tyler*, 729 F.3d 531, 541 (6th Cir. 2013) (internal quotation marks omitted). Brent, however, does not so argue. Nor does he cite any authority suggesting that "a reasonable [Child Protective Services] official would understand that the failure to [comply with MCL § 722.627(2)(f)] would constitute a denial of procedural due process. No decision has yet found a procedural due process right in a similar context." *See Jasinksi*, 729 F.3d at 544. The burden on this issue is Brent's—a burden to show the violation of clearly established federal law. *See Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012) ("The plaintiff has the burden of establishing

that the law was clearly established at the time of the challenged conduct."). This is a burden that Brent has failed to meet.

We also note some difficulty in discerning the factual basis for Brent's claim. Brent appears to have requested the entire case file on his children. But Brent does not clarify in his briefing which of these documents he was allegedly denied. As the defendants point out, Brent's complaint acknowledges that the defendants did deliver some documents to Brent's attorney "during the hearing on March 30, 2010." The record does not reveal whether these March 30, 2010 documents are the entire basis for this claim or only some portion of it. And Brent has not established that this timing violated his due process rights. He has, therefore, failed to carry his burden against the defendants' assertions of qualified immunity with regard to the documents in question. For these reasons, we grant qualified immunity to the defendants on this claim.

V. State-Law Claims

A. Background

The district court also denied governmental immunity on several of Brent's state-law claims. Specifically, the district court denied state-law immunity on Brent's IIED and gross-negligence claims against Wenk, Sampson, Trice, McGehee, and Lamar, as well as his claim under MCL § 722.633(1) against Trice. We will consider each claim in turn.

B. Legal Standard

The Michigan Supreme Court has

[p]rovide[d] these steps to follow when a defendant raises the affirmative defense of individual governmental immunity. The court must do the following:

(1) Determine whether the individual is a judge, a legislator, or the highest-ranking appointed executive official at any level of government who is entitled to absolute immunity under MCL 691.1407(5).

(2) If the individual is a lower-ranking governmental employee or official, determine whether the plaintiff pleaded an intentional or a negligent tort.

(3) If the plaintiff pleaded a negligent tort, proceed under MCL 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

(a) the individual was acting or reasonably believed that he was acting within the scope of his authority,

(b) the governmental agency was engaged in the exercise or discharge of a governmental function, and

(c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

(4) If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental

immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

Odom v. Wayne Cnty., 760 N.W.2d 217, 228 (Mich. 2008). Contrary to who bears the burden of proof in the federal context, "the burden . . . fall[s] on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Id.* at 227-28.

C. Analysis

1. IIED Claims

Brent alleges that the social workers intentionally inflicted emotional distress upon him in myriad ways. The district court dismissed several of Brent's IIED claims, but identified many more as remaining for trial. As the district court explained,

> [t]he essence of these allegations is that the State Defendants, despite having no actual belief that the Brent children were exposed to any harm in the home, nevertheless undertook a campaign to discover—or even fabricate—damaging evidence so as to get the children removed, and then, having accomplished that purpose, used the return of the

children as collateral to coerce Brent to relinquish his parental authority. For example, Brent alleges that (1) Wenk, with Sampson's approval, continued her investigation of the Brent family, notwithstanding their conclusion that the initial complaint was unsubstantiated, (2) Wenk and Sampson conducted this investigation having already predetermined the outcome and falsified various reports to support this outcome; (3) Wenk, Trice, McGehee, Lamar, and Sampson refused to explain what services were being offered to the Brent family or what harm, if any, the children faced in the absence of those services; (4) Wenk, Trice, McGehee and Sampson withheld information from Brent and refused to permit him to have any input regarding what was best for the family; (5) Wenk abused her authority to force her will upon the parents upon threat of the children not returning or being removed again after their return; (6) Wenk, Sampson, and Lamar refused to advise Brent what he needed to do to facilitate the return of his children; (7) Wenk coerced Brent into turning over all post-return decision-making authority with respect to the children's education, medical care, and extracurricular activities by threatening that the children would otherwise not be permitted to return; (8) Sampson and Lamar refused to respond to or investigate Brent's claims regarding constitutional, statutory, and policy violations; (9) despite having determined that the home was suitable for the children's return, Trice, Lamar, and McGehee

> held the children hostage to coerce the Brents to forfeit their right to trial and falsified various documents to justify not returning the children; (10) Trice refused to provide services to reunify the family, notwithstanding the review board's conclusions that the medical and educational needs of the children were not being met during their removal and that they should be returned to the Brent home. Brent also alleges that these actions were taken with reckless disregard for their effect on him, and caused him extreme emotional distress.

The social workers argue on appeal that they had no reason to know that any of these purported actions were unlawful, and that because the Family Court jury determined that Brent had neglected his children, their investigation cannot have been conducted with malice. They further contend that if this court finds no federal constitutional violations, then they must have been acting within the scope of their authority. Brent responds that because Michigan law requires the state employees to be trained in their legal duties, they cannot plausibly claim that they were mistaken as to those duties. He also contends that the defendants have offered no evidence suggesting that they were acting in good faith.

We find Brent's arguments the more persuasive at this stage of the case. First, the defendants cite no cases, orders of the Family Court, or Michigan statutes authorizing the ten actions that the district court identified as remaining for trial. Second, the defendants cite no authority for the proposition that simply because their actions did not violate the U.S. Consti-

tution, they could reasonably believe that they were within the scope of their state-law authority. The defendants also fail to cite any compelling authority to support their claim that because the Family Court jury determined that Brent had neglected his children, none of their actions could have been taken with malice. Although they rely on the opinion of the Michigan Court of Appeals in *Latits v. Phillips*, 826 N.W.2d 190 (Mich. Ct. App. 2012), for the proposition that a finding of probable cause defeats a claim for false arrest, they offer no authority to suggest that Michigan law applies this holding to the actions of social workers in the context of child-neglect proceedings. Accordingly, we affirm the district court's decision that, at this stage, the defendants have failed to negate the absence of a genuine dispute regarding Brent's IIED claims, but we note that they may reassert their state-law immunity defense upon the completion of discovery.

2. Gross-Negligence Claims

For similar reasons, we deny the defendants' claims of governmental immunity on Brent's gross-negligence claims. The parties' briefing and the district court's opinion leaves some doubt as to what the factual bases are for these claims. Nonetheless, as with Brent's IIED claims, the burden is on the government official asserting immunity to prove that she or he is so entitled, *see Odom v. Wayne Cnty.*, 760 N.W.2d 217, 227-28 (Mich. 2008), which includes proving that he or she "was acting or reasonably believed that he was acting within the scope of his authority." *Id.* at 228. As with Brent's IIED claims, the defendants have failed to cite the authority that allegedly authorized their actions. Absent such authority, we cannot conclude as a matter of law that the defendants reasonably

believed that Michigan law authorized their actions. State-law immunity is therefore inappropriate at this stage of the case.

3. Michigan Compiled Laws § 722.633(1) Claim

Finally, we consider Brent's claim that "Trice is liable to Plaintiff under MCL 722.633(1) for the damages caused from her failure to report the medical neglect of Plaintiff's son, including but not limited to medical expenses and emotional distress suffered by Plaintiff as a result of her failure." Michigan Compiled Laws § 722.633(1) provides that "[a] person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure." The district court considered this claim and explained that "[a]lthough the State Defendants request a dismissal and/or a summary judgment with respect to Brent's entire amended complaint, Trice has not made any argument specifically regarding this claim. Therefore, and in the absence of any argument or briefing by the parties, this claim will proceed."

On appeal, Trice does not dispute that she failed to specifically address this claim before the district court, but instead argues that Brent lacks standing to bring this claim himself and that it should instead have been brought by RAB. She adds that even if RAB had brought this claim, the neglectful party rather than Trice herself would be the proximate cause of any injuries. Brent counters that both whether he was injured by the failure to report (and therefore has standing to bring this claim) as well as the proximate cause of any injury are factual issues that are not before us on appeal.

On this claim the law favors Trice. "Even if no party to this appeal has raised the issue of standing, this court can and must address the issue on its own motion." *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1092 (6th Cir. 1985). Here, the Michigan Supreme Court has explained that "the Legislature intended that liability under [MCL § 722.633(1)] be limited to claims for damages *by the identified abused child* about whom no report was made." *Murdock v. Higgins*, 559 N.W.2d 639, 646 (Mich. 1997) (emphasis added) (quoting *Marcelletti v. Bathani*, 500 N.W.2d 124, 127 (Mich. Ct. App. 1993)). Brent brings this claim in his own name, not RAB's. Accordingly, his claim must be dismissed for lack of standing.

VI. Conclusion

For all of the reasons set forth above, the judgment of the district court is AFFIRMED with regard to Brett's state-law claims of IIED and gross negligence. Its judgment with regard to the remainder of Brett's claims is REVERSED because the social workers are entitled to either absolute or qualified immunity. We REMAND the case to the district court for further proceedings consistent with this opinion.

OPINION AND ORDER DENYING MOTION FOR DISQUALIFICATION [273] (JUNE 9, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATHANIEL BRENT and ROBERT BRENT,

Plaintiffs,

v.

MIA WENK ET AL.,

Defendants.

Case No. 11-cv-10724

Before: Judith E. LEVY, United States District Judge,
Mona K. MAJZOUB, Mag. Judge.

Before the Court is plaintiffs' motion for disqualification. Plaintiffs argue the Court has demonstrated bias and should be disqualified. (Dkt. 273.)

For the reasons set forth below, plaintiffs' motion is denied.

I. Background

Plaintiffs argue that the Court has demonstrated personal and judicial bias against them. To support this claim, they argue that the Court had improper *ex parte* communications with counsel for the State Defendants when the Court allegedly contacted counsel

to see if other State attorneys would be appearing in a separate civil case filed by Nathaniel and Sherrie Brent, 17-cv-11302. (Dkt. 273 at 9.) Further, the Court "again contacted" counsel for the State so she could participate in the May 5, 2017 hearing on plaintiffs' motion to vacate a prior order (Dkt. 272), but did not give plaintiffs notice that the May 5 hearing scheduled for case no. 17-cv-11302 would also be a hearing for this case. (*Id.*)

Plaintiffs also claim that the Court showed bias during the May 5, 2017 hearing because (1) it erred in denying their motion for a preliminary injunction filed in case no. 17-cv-11302, and (2) when discussing the motion to vacate filed in this case, the Court "opposed Plaintiffs' motion more strongly than the Defendants did." (Dkt. 273 at 10.) Both of these actions, plaintiffs contend, demonstrate "this Court's personal aversion to admitting it did not have authority to enter the order in question." (*Id.*)

Finally, plaintiffs argue the Court has repeatedly acted improperly by "ignor[ing] both the law of the case and established case law when such would benefit the Defendants." (Dkt. 273 at 12.) For each of these reasons, plaintiffs believe the Court should grant the motion for disqualification.

II. Legal Standard

Pursuant to 28 U.S.C. § 144, when a party filed a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice . . . such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." In other words, if a timely and legally sufficient affidavit is filed, the district judge must

recuse herself. "However, the district judge of whom recusal is sought may initially determine the legal sufficiency of the affidavit." *United States v. Surapaneni*, 14 F. App'x 334, 336 (6th Cir. 2001) (citing *Easley v. Univ. of Mich. Bd. of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988)). An affidavit is legally sufficient only if the following three conditions are met: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable [person] that a bias exists; and (3) the facts must show the bias is personal as opposed to judicial in nature." *Henderson v. Dep't of Pub. Safety and Corr.*, 901 F.2d 1288, 1296 (6th Cir. 1990).

And under section 144, "recusal is mandated . . . only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* Further, under this section, the bias must be "a personal bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law." *Id.* (quoting *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983)).

Under section 455, a judge must disqualify herself "in any proceeding in which [her] impartiality might be questioned," or "[w]here [she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. §§ 455(a), (b)(1). "The statute is not based on the subjective view of a party . . . and rather imposes an objective standard: a judge must disqualify himself where a reasonable person with knowledge of all the [illegible] reasonably be questioned." *Burley v. Gagacki*, 834 F.3d 606, 615-16 (6th Cir. 2016) (internal quotations and

citations omitted). And "[t]he burden is on the moving party to justify disqualification." *Id.* at 616.

III. Analysis

In this case, the motion and supporting affidavit are not legally sufficient to justify recusal under either section 144 or 455. For the reasons set forth below, the facts in the affidavit and motion, taken as true, would not convince a reasonable person that personal or judicial bias exists.

First, even though the Court contacted counsel for the State Defendants prior to the May 5, 2017 hearing, the contact was, as plaintiffs acknowledge (see Dkt. 273 at 23), only to determine who would represent the State in case no. 11-cv-11302. This contact shows no more than the Court's attempt to resolve an administrative issue, and in no way demonstrates personal bias for the State Defendants or judicial bias against plaintiffs with respect to the Court's view of the law. Moreover, the contact could not demonstrate judicial bias because counsel for the State Defendants spoke only with Court staff, not the undersigned Judge, and no further communication of any kind occurred after this scheduling call. (Dkt. 275 at 2.)

Second, the Court did fail to provide plaintiffs with notice that the motion to vacate would be considered during the same hearing as for case no. 17-cv-11302. But this error does not show personal or judicial bias. This is evident by the fact that, once the Court was informed of the error during the May 5, 2017 hearing, the Court informed the parties that it would not rule on the motion to vacate during the hearing. Instead, the Court indicated it would decide the motion on the briefs after receiving additional briefing, assuming

the State desired to file a response to the motion. (See Dkt. 277 at 31-33.)

Finally, plaintiffs argue that the Court has repeatedly erred in ruling for the State Defendants. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The appropriate vehicle for addressing adverse rulings is typically appeal, not recusal. *Id.* And "opinions formed by the judge on the basis of facts introduced or events occurring in the court of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

Here, no reasonable person could conclude that the Court's decisions in favor of the State Defendants in this case are the product of deep-seated favoritism and antagonism. Instead, the record shows that the Court has addressed each of plaintiffs' arguments (*see, e.g.*, Dkt. 261), and the orders finding for the State Defendants resulted from the Court's attempts to correct errors in its understanding of the complicated procedural and substantive history of this case. These corrections are "normal and acceptable" judicial behavior rather than manifestations of bias or prejudice. *See Getsy v. Mitchell*, 495 F.3d 295, 311 (6th Cir. 2007) ("the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable") (quoting *Liteky*, 510 U.S. at 552). [redacted] the case, and not "upon knowledge that the [Court] ought not possess." *Burley*, 834 F.3d at 616. Finally,

whether the Court erred in denying the motion for a preliminary injunction in case no. 17-cv-11302 cannot itself demonstrate personal or judicial bias. Plaintiffs' remedy is to appeal the adverse ruling. In sum, plaintiffs have not fulfilled their burden to show bias requiring disqualification.

IV. Conclusion

For the reasons set forth above, plaintiffs' motion (Dkt. 273) is DENIED.

IT IS SO ORDERED.

/s/ Judith E. Levy
United States District Judge

Dated: June 9, 2017
Ann Arbor, Michigan

ORDER DENYING MOTION TO VACATE [272] (JUNE 9, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATHANIEL BRENT and ROBERT BRENT,

Plaintiffs,

v.

MIA WENK ET AL.,

Defendants.

Case No. 11-cv-10724

Before: Judith E. LEVY, United States District Judge.

Before the Court is plaintiffs' motion to vacate an order and judgment closing the case (Dkts. 270, 271), which plaintiffs allege are void. (Dkt. 272.) The State Defendants argue the orders are not void, but the best way to proceed is under Fed. R. Civ. P. 62.1. (Dkt. 274.)

The May 1, 2017 order (Dkt. 270) plaintiffs now seek to vacate granted the State Defendants' motion for reconsideration (Dkt. 268) and denied as moot plaintiffs' second motion to alter the judgment. (Dkt. 267.) In that order, the Court granted the State Defendants absolute immunity after realizing Judge Cook, who previously presided over this case, had done so in 2014. (*See* Dkt. 199.) Because plaintiffs argued the

Court improperly denied them permission to appeal an order denying the State Defendants absolute immunity, the Court held the second motion for relief was moot, as the May 1, 2017 order closed all remaining claims in the case. On May 1, 2017, a final judgment dismissing the complaint was also entered. (Dkt. 271.)

Plaintiffs first argue the Court lacked jurisdiction to enter the May 1, 2017 order. (Dkt. 272 at 8.) To the extent the Court was not clear in the May 1, 2017 order (Dkt. 270), the Court did not lose jurisdiction when the State Defendants filed an appeal. A district court loses jurisdiction on appeal unless the appeal is without foundation or is frivolous. *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993) (district court retains jurisdiction when appeal is . . . from a non-final, non-appealable order). But, as stated in the prior order, the Court expressly held that the issue appealed by the State Defendants was non-final and non-appealable. Thus, the appeal taken was without foundation, and the Court retained jurisdiction to grant the State Defendants' motion.[1]

Plaintiffs next argue that the Court violated the Sixth Circuit's authority by failing to adhere to the

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[1] Although the State argues that to proceed under Fed. R. Civ. P. 62.1 is a straightforward path to resolution, this avenue is unnecessary. It may be the most attractive option for the State Defendants due to their pending appeal of the now-vacated order denying them absolute immunity, but this is not how the Court makes its decisions. Further, denying plaintiffs' motion and adhering to the final order and judgment in place will not cause additional issues on appeal or add substantially to the procedural complexity of this case.

law of the case. (Dkt. 272 at 9.) Law of the case is a discretionary doctrine, and the Court can depart from it when "a decision is clearly erroneous and would work a manifest injustice." *Hanover Ins. Co. v. Amer. Eng'ring Co.*, 105 F.3d 306, 312 (6th Cir. 1997). Here, the Sixth Circuit previously upheld Judge Cook's order denying absolute immunity. *Brent v. Wenk*, 55 F. App'x 519, 537 (6th Cir. 2014). But after this ruling, Judge Cook granted the State Defendants absolute immunity, holding that his prior opinion had been based on an improper conflation of section 1983 immunity and absolute immunity. (*See* Dkt. 199.) In other words, Judge Cook's later order did not violate the law of the case doctrine because it was done to correct a clearly erroneous error. And this Court's decision to enter the May 1, 2017 order granting immunity was a correction to its own oversight with regard to the history of this case, as set forth in detail in that order. (*See* Dkt. 270 at 4.) Accordingly, the Court did not violate the Sixth Circuit's order.

Finally, plaintiffs argue that the State Defendants waived or defaulted the absolute immunity defense. But plaintiffs' argument that the State Defendants have failed to preserve the defense is unavailing. The State Defendants included it as a defense in their answer to plaintiffs' second amended complaint (Dkt. 225), and in their motion for judgment on the pleadings. (*See* Dkt. 274 at 8.) Moreover, as plaintiffs acknowledge, the issue of absolute immunity has been a part of this litigation for years—and they argue, in fact, that this Court cannot grant immunity because the Sixth

Circuit specifically denied it—and to argue the defense has been waived is frivolous.[2]

Accordingly, for the reasons set forth above, nothing about the May 1, 2017 order rendered it void.

Plaintiffs' motion to vacate (Dkt. 272) is DENIED.

IT IS SO ORDERED.

/s/ Judith E. Levy
United States District Judge

Dated: June 9, 2017
Ann Arbor, Michigan

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[2] Plaintiffs argue the defense was waived because the State Defendants admitted that they "did not raise *Martin* immunity prior to their motion for judgment on the pleadings." (Dkt. 278 at 8 (citing Dkt. 268 at 9).) Both parties are wrong. The State Defendants argued as far back as 2012 that they were entitled to social worker immunity, and even though they did not cite *Martin v. Children's Aid Society*, 215 Mich. App. 88 (1996), in their briefs, Judge Cook interpreted the claim as asserting entitlement to this immunity. (Dkt. 163 at 58.) This order was appealed to the Sixth Circuit, which did, in fact, address the issue of absolute immunity, but, as set forth above, Judge Cook later reversed the decision to deny absolute immunity on the grounds that the court had improperly conflated section 1983 and absolute immunity.

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AGAINST STATE DEFENDANTS [257], DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AGAINST CITY DEFENDANTS [253], AND GRANTING STATE DEFENDANTS' MOTION FOR RECONSIDERATION [255]
(MARCH 17, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATHANIEL BRENT and ROBERT BRENT,

Plaintiffs,

v.

WAYNE COUNTY DHS ET AL.,

Defendants.

Case No. 11-cv-10724

Before: Judith E. LEVY, United States District Judge,
Mona K. MAJZOUB Mag. Judge.

On November 9, 2016, this Court entered an order granting in part and denying in part the State Defendants' motion for judgment on the pleadings. (Dkt. 249.) The Court held that these defendants were entitled to [redacted] tion of emotional distress and eavesdropping claims, but not entitled to statutory immunity against plain-

tiff Robert Brent's failure to report medical neglect claim. (*Id.* at 10.) That same day, the Court entered an order granting the City of Detroit Defendants' motion for judgment on the pleadings, holding that they were entitled to qualified immunity against plaintiffs' Fourth Amendment claims, that plaintiffs failed to state a claim under 42 U.S.C. § 1985, and that defendants were entitled to statutory immunity against plaintiffs' intentional infliction of emotional distress claim. (Dkt. 250 at 10.)

Plaintiffs have filed motions for reconsideration on both of the Court's orders. (Dkts. 253, 257.) The State Defendants have also filed a motion for reconsideration on the Court's decision not to grant immunity to defendant Shevonne Trice. (Dkt. 255.)

For the reasons set forth below, plaintiffs' motion for reconsideration on the order granting absolute immunity to the State Defendants is granted. Plaintiffs' motion for reconsideration on the order dismissing the City Defendants is denied. The State Defendants' motion for reconsideration with respect to defendant Shevonne Trice is granted.

I. Legal Standard

A motion for reconsideration should be granted "if the movant demonstrates a palpable defect by which the court and the parties have been misled and that a different disposition of the case must result from a correction thereof." *In re Greektown Holdings, LLC*, 728 F.3d 567, 573-74 (6th Cir. 2013). "A palpable defect is one that is 'obvious, clear, unmistakable, manifest, or plain.'" *Majczyzak v. City of Wayne*, 836 F. Supp. 2d 586, 596 (E.D. Mich. 2011).

II. Analysis

A. Motions for Reconsideration of Order Regarding State Defendants

Plaintiffs argue the Court erred in concluding the law of the case doctrine did not apply as regards the State Defendants' claim that they were entitled to absolute immunity pursuant to *Martin v. Children's Aid Society*, 215 Mich. App. 88 (1996). (Dkt. 257 at 7-14.) The State Defendants argue the Court erred in failing to grant statutory immunity to defendant Trice with regard to plaintiff Robert Brent's failure to report medical neglect claim. (Dkt. 255 at 7-10.)

First, plaintiffs are correct. The law of the case established by the Sixth Circuit did address and deny the State Defendants absolute immunity with regards to plaintiffs' intentional infliction of emotional distress ("IIED") claim at this stage of the case. *Brent v. Wenk*, 555 F. App'x 519, 537 (6th Cir. 2014). The Honorable Julian Abele Cook, Jr., who previously presided over this case, concluded plaintiffs had stated a claim for IIED and declined to grant the State Defendants absolute immunity under *Martin*, but stating they could raise the issue of immunity again after discovery. (Dkt. 163 at 62-63.) The Sixth Circuit affirmed, holding the State Defendants were not entitled to "state-law immunity," which includes *Martin* immunity, at this stage of the case, but could reassert the defense after discovery was complete. *Brent*, 555 F. App'x at 537. This Court is "bound to proceed in accordance with the mandate and law of the case as established by the appellate court." *Hanover Ins. Co. v. Amer. Eng'ring Co.*, 105 F.3d 306, (6th Cir. 1997). Accordingly, the Court denies the State Defendants absolute

immunity without prejudice to reassert the defense upon completion of discovery.

The law of the case does not apply to the eavesdropping claim because, at the time the Sixth Circuit ruled on the state-law immunity issue, plaintiffs had not yet amended their complaint to include a claim for violations of Mich. Comp. Laws §§ 750.539d-750.539e. Although plaintiffs referenced the statutes in the complaint, they did not expressly include these statutes as independent bases of liability, and Judge Cook did not address them in the opinion that was appealed to the Sixth Circuit. (*See* Dkt. 163.) Thus, this Court is not bound by the law of the case with regards to the immunity defense. But to ensure all of plaintiffs' claims are treated uniformly and fairly throughout this case, the Court will adopt its predecessor's analysis of the *Martin* doctrine. (*See* Dkt. 163.) Accordingly, because the alleged improper photographing of plaintiffs' home at the time plaintiffs' minor children were removed from the home was not "related to the filing of petitions or reports, or the giving of testimony or recommendations" in family court, the Court will deny the State Defendants absolute immunity without prejudice to them reasserting the defense after discovery concludes.

Defendants argue plaintiffs have failed to state a claim for violation of these statutes because they did not "eavesdrop" within the meaning of the statute and there is no private cause of action for violations of these statutes. (Dkt. 260 at 8.) But the authority defendants cite is unpersuasive. First, plaintiffs are correct that they have pleaded an invasion of privacy in violation of Mich. Comp. Laws §§ 750.539d-750.539e, not just eavesdropping, by alleging certain defendants

illegally entered plaintiffs' home and photographed it and disseminated these photos without plaintiffs' consent. (*See* Dkt. 222 at 22, 28-30, 33-35.)

And Michigan state courts have previously held Mich. Comp. Laws § 750.539d "creates a criminal and civil cause of action for invasion of privacy." *Lewis v. LeGrow*, 258 Mich. App. 175, 183 (2003); *see also John Doe (1-3) v. Dearborn Pub. Schs.*, Case No. 06-cv-12369, 2008 WL 896066, at *10 (E.D. Mich. Mar. 31, 2008) (same) (Hood, J.). Mich. Comp. Laws § 750.539e is inextricably linked with § 750.539d because it provides that the dissemination of information obtained in violation of Mich. Comp. Laws § 750.539d is illegal, and because it has the same purpose as § 750.539d—to protect against invasions of privacy—the Court concludes this provision also provides for a civil cause of action. *See Lewis*, 258 Mich. App. at 190 (finding private cause of action under § 750.539d when interpreted in light of the scope of the common law right to privacy). Thus, plaintiffs have stated a claim and, as set forth above, the State Defendants are not entitled to immunity at this stage. Plaintiffs' motion for reconsideration as to the question of immunity on the IIED and invasion of privacy claims is granted without prejudice to the State Defendants reasserting the defense at the close of discovery.

With respect to the State Defendants' motion for reconsideration, the State Defendants have sufficiently demonstrated that any alleged failure to report medical neglect by defendant Shevonne Trice is not the proximate cause of plaintiff Robert Brent's injury. As the Michigan courts have made clear, the conduct complained of must be the most direct and immediate cause, not simply a contributing cause. *See, e.g., Beals v. Mich-*

igan, 497 Mich. 363, 365 (2015) (lifeguard immune from tort liability because child's drowning resulted most immediately from an "unidentified reason" that kept him submerged).

Here, Ms. Trice allegedly failed to report medical neglect and the use of expired medication, but plaintiff's worsening illness was caused most immediately by other factors. The State Defendants argue the proximate cause must be the illness itself or perhaps the expired medication. (Dkt. 255 at 9.) This claim is unproven at this time. But that the proximate cause is "unknown does not make that unidentified reason any less the proximate cause" of plaintiff's allegedly prolonged illness. *Beals*, 497 Mich. at 366. Thus, given the indirect connection between defendant Trice's alleged failure to report and plaintiff's injury, as a matter of law, her alleged conduct cannot be the proximate cause and Ms. Trice is entitled to immunity. Accordingly, the State Defendants' motion for reconsideration on this issue is granted.

B. Motion for Reconsideration of Order Regarding City Defendants

Plaintiffs argue the Court erred by granting immunity to the City Defendants with regard to the Fourth Amendment claim brought pursuant to 42 U.S.C. § 1983 and the IIED claim. (*See generally* Dkt. 253.)

First, with respect to the Fourth Amendment claim, plaintiffs raise essentially the same arguments as in their prior motion, but have now attached excerpts of the City of Detroit's policies and guidelines regarding searches and other stops. (Dkt. 253 at 19-22.) Nothing about this document suggests the officers acted un-

reasonably under the circumstances when they executed the order to remove plaintiff Nathanial Brent's children from the home. Further, although Nathanial Brent claims he told the police that the order was invalid when they arrived at his home (*id.* at 11), these statements alone do not demonstrate the City Defendants acted unreasonably in relying on and executing the warrant. Thus, there is no palpable error in the Court's prior order (Dkt. 250), and plaintiffs' motion for reconsideration on this claim is denied.

Second, with respect to the IIED claim, plaintiffs have raised new arguments regarding the Detroit police officers' conduct in the motion for reconsideration, and attached an excerpt of the guidelines for the Detroit Police Department and several police logs. (Dkt. 253 at 19-20, 24-29.) Despite these new facts, plaintiffs have not demonstrated the conduct of the officers was not undertaken in good faith, given the circumstances, or taken with malice, which is required to state an IIED claim. As set forth in the prior order (Dkt. 250), plaintiffs have not sufficiently pleaded facts suggesting the officers' conduct was reckless or intentionally misleading or otherwise unreasonable under the circumstances. Thus, the City Defendants are entitled to qualified immunity against plaintiffs' IIED claim, and plaintiffs' motion for reconsideration on this issue is denied.

III. Conclusion

For the reasons set forth above, plaintiffs' motion for reconsideration (Dkt. 257) on the order granting absolute immunity to the State Defendants is GRANTED without prejudice to the State Defendants reasserting the defense at the close of discovery.

The State Defendants' motion for reconsideration (Dkt. 255) on the order denying immunity to defendant Trice is GRANTED.

Plaintiffs' motion for reconsideration (Dkt. 253) on the order dismissing the City Defendants is DENIED.

IT IS SO ORDERED.

/s/ Judith E. Levy
United States District Judge

Dated: March 17, 2017
Ann Arbor, Michigan

ORDER TO TAKE CHILD(REN) INTO PROTECTIVE CUSTODY (CHILD PROTECTIVE PROCEEDINGS) (FEBRUARY 18, 2010)

STATE OF MICHIGAN JUDICIAL CIRCUIT-
FAMILY DIVISION WAYNE COUNTY

Case No. 10492704
Petition No. 10002937

In the matter of (name(s), alias(es), DOB) (see reverse side for other identifying information)

Aaron Brent (4/11/93), Robert Brent (7/11/94), Jaime Brent (7/20/95), Samantha Brent (11/2/97), James Brent (2/21/99)

Upon presentation of proofs as required by the court, IT APPEARS:

- There are reasonable grounds for this court to remove the child(ren) from the parent(s), guardian, or legal custodian in compliance with MCL 712A.2(b) and MCR 3.963(B) because conditions or surroundings of the child(ren) are such as to endanger the health, safety, or welfare of the child(ren), and it is contrary to the welfare of the child(ren) to remain in the home because:

  During the investigation, it was found that the home was unsafe and not suitable for the children. Referral was made to Families First on 2/16/10. When the workers arrived, Mr. Brent stated "I told you guys not to come here and we don't deal with liars!" and slammed the door. When the

worker later called, Ms. Brent refused the services. TDM was held on 2/18/10 and they were uncooperative.

- Reasonable efforts to prevent removal of the child(ren) from the home were not made.
- Reasonable efforts were, made to prevent removal of the child(ren) from the home. Those efforts include:

  Referral was made to Families First on 2/16/10. When the workers arrived, Mr. Brent stated "I told you guys not to come here and we don't deal with liars!" and slammed the door. When the worker later called, Ms. Brent refused the services. TDM was held on 2/18/10 and they were uncooperative.

IT IS ORDERED:

The child(ren) shall be taken into protective custody and placed with/returned to the Department of Human Services for care and supervision.

Placement shall continue until resumption of the next scheduled hearing.

- To effect his order you are authorized to enter the premises located at 538 S. Livernois, Detroit MI 48209 or where reasonably believed to be found
- The parent(s), guardian(s), or legal custodian(s) of the child(ren) shall be directed to appear for a preliminary hearing in this matter to be held on to be set at Third Circuit Court, 1025 E. Forest Det 48207 Wayne Cty Juvenile Detention Facility, 1326 St. Antoine, Detroit MI 48226.

This authorization to enter the premises and take the child(ren) into protective custody expires 3/1/2010.

/s/ Leslie Kim Smith
Judge

NOTE to parent, guardian, or legal custodian; If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you to fully participate in court proceedings, please contact the court immediately to make arrangements,

MCL 722.638—Aggravated Circumstances

(1) The Department shall submit a petition for authorization by the court under Section 2(b) of Chapter XIIA of 1939 PA 288, MCL 712A.2, If one or more of the following apply:

(a) The Department determines that a parent, guardian, or legal custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and abuse included one or more of the following:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuses.

(iv Loss or serious impairment of an organ or limb.

(v Life threatening injury.

(vi) Murder or attempted murder.

(b) The Department determines that there is risk of harm to the child and either of the following is true:

(i) The parent's rights to another child were terminated as a result of proceedings under Section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.

(ii) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under Section 2(b) of Chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the Department of Human Services shall include a request for termination of parental rights at the initial dispositional hearing as authorized under Section 19b of Chapter XIIA of 1939 PA 288, MCL 712A.19b.

STIPULATED ORDER OF DISMISSAL AS TO DEFENDANT THE CHILDREN'S CENTER, ONLY (NOVEMBER 8, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATHANIEL H. BRENT and ROBERT BRENT,

Plaintiffs,

v.

MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND, MONICIA SAMPSON; CHARLOTTE MCGEHEE; JOYCE LAMAR; EMINA BIOGRADLIJA; MICHAEL BRIDSON; DETROIT POLICE DEPARTMENT; TWO UNKNOWN DETROIT POLICE OFFICERS; WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES; METHODIST CHILDREN'S HOME; THE CHILDREN'S CENTER; LESLIE SMITH,

Defendants,

Case No. 2:11-CV-10724

Before: Hon. Judith E. LEVY, United States District Judge, Mag. Mona K. MAJZOUB

This matter having come before this Honorable Court by stipulation of parties and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that any and all claims against Defendant THE CHILDREN'S CENTER that were brought, could have been brought, or should have been brought in this lawsuit, are dismissed with prejudice and without costs, sanctions, or attorneys' fees as to Defendant THE CHILDREN'S CENTER, Only.

THIS ORDER DOES NOT RESOLVE THE LAST PENDING CLAIM IN THIS CASE AND DOES NOT CLOSE THIS CASE.

/s/ Judith E. Levy
United States District Judge

Dated: November 8, 2018

I hereby stipulate to entry of the above Order:

/s/ Nathaniel H. Brent
(w/permission 11/1/18)
Nathaniel H Brent, Plaintiff
6110 Carleton Rockwood Road
South Rockwood, MI 48179
734-236-4527
nathaniel_brent@msn.com

/s/ Robert Brent
(w/permission 11/1/18)
Robert Brent, Plaintiff
6110 Carleton Rockwood Road
South Rockwood, MI 48179
734-236-4527

/s/ David M. Saperstein (P49764)
Attorneys for Defendant
The Children's Center Maddin
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28400 Northwestern Hwy.
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248-827-1885
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SCHEDULING ORDER
(DECEMBER 4, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NATHANIEL H. BRENT and ROBERT BRENT,

Plaintiffs,

v.

WENK ET AL.,

Defendants,

Case No. 11-cv-10724

Before: Hon. Judith E. LEVY
United States District Judge

After conducting an in-person status conference, the following scheduling deadlines are ordered for the disposition of the remaining claims in this case:

1. Initial Motions under Fed. R. Civ. P. 12: January 25, 2019;
2. Responses to Rule 12 Motions: February 25, 2019;
3. Reply to Rule 12 Motions: March 4, 2019;
4. Initial Disclosures under Fed. R. Civ. P. 26(a)(1): January 4, 2019;

5. Remaining discovery will at a date to be set 120 days following the Court's ruling on all Rule 12 motions; and

6. Dispositive motions at a date to be set 30 days following the close of discovery—briefing must be filed in accordance with the local rules.

Further scheduling deadlines will be set at a future date after the close of discovery.

IT IS SO ORDERED.

/s/ Judith E. Levy
United States District Judge

Dated: December 4, 2018
Ann Arbor, Michigan

ORDER OF THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 11, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

17-1428

NATHANIEL BRENT; ROBERT BRENT,

Plaintiffs-Appellees,

v.

WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES ET AL.,

Defendants,

MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND; MONICIA SAMPSON; CHARLOTTE MCGEHEE; JOYCE LAMAR,

Defendants-Appellants.

17-1811

NATHANIEL BRENT; ROBERT BRENT,

Plaintiffs-Appellants,

v.

WAYNE COUNTY DEPARTMENT OF HUMAN SERVICES; MIA WENK; SHEVONNE TRICE; HEATHER DECORMIER-MCFARLAND; MONICIA SAMPSON; CHARLOTTE MCGEHEE; JOYCE LAMAR; EMINA BIOGRADLIJA; MICHAEL BRIDSON; DETROIT POLICE DEPARTMENT; TWO UNKNOWN DETROIT POLICE OFFICERS; METHODIST CHILDREN'S HOME SOCIETY; THE CHILDREN'S CENTER; LESLIE SMITH,

Defendants-Appellees.

Nos. 17-1428/1811

Before: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered by Order of the Court

/s/ Deborah S. Hunt
Clerk