FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK MANN; MELISSA MANN; N.G.P.M., a minor-by and through their Guardian Ad Litem, Bruce Paul; M.N.A.M., a minor-by and through their Guardian Ad Litem, Bruce Paul; N.E.H.M., a minor-by and through their Guardian Ad Litem, Bruce Paul; M.C.G.M., a minor-by and through their Guardian Ad Litem, Bruce Paul, *Plaintiffs-Appellees/ Cross-Appellants,* v. COUNTY OF SAN DIEGO; SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY; POLINSKY CHILDREN'S CENTER, *Defendants-Appellants/ Cross-Appellees*.	Nos. 16-56657 16-56740 D.C. No. 3:11-cv-00708-GPC-BGS OPINION

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted May 15, 2018
Pasadena, California

Filed October 31, 2018

Before: Kim McLane Wardlaw, Jacqueline H. Nguyen, and John B. Owens, Circuit Judges.

Opinion by Judge Wardlaw

COUNSEL

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OPINION

WARDLAW, Circuit Judge.

We have long recognized the potential conflict between the state's interest in protecting children from abusive or neglectful conditions and the right of the families it seeks to protect to be free of unconstitutional intrusion into the family unit, which can have its own potentially devastating and long lasting effects. Here, San Diego County (County) social workers removed four children under the age of six from their family home under a suspicion of child abuse, took them (as was routine) to Polinsky Children's Center (Polinsky) for temporary shelter, and subjected them to invasive medical examinations, without their parents' knowledge or consent and without a court order

authorizing the examinations. The family sued the County and others, alleging violations of the parents' Fourteenth Amendment and the children's Fourth Amendment rights. On cross-motions for summary judgment, the district court concluded that the County's custom and practice of performing the medical examinations without notifying parents and excluding parents from those examinations violates the parents' Fourteenth Amendment rights. The district court further concluded, however, that the Constitution did not require the County to obtain the parents' consent or a court order. The district court did not address whether the children's Fourth Amendment rights were violated by the invasive medical examination.

These cross-appeals require us to determine whether the County violates the Fourth and Fourteenth Amendments when, absent exigent circumstances or a reasonable concern that material physical evidence might dissipate, it subjects children to medical examinations without first notifying parents and obtaining parental consent or judicial authorization for the examinations.[1]

I.

Mark and Melissa Mann are the parents of four children: N.G.P.M., born in 2004, and N.E.H.M., M.C.G.M.,

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[1] Following the district court's determination of *Monell* liability, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the parties settled all but the *Monell* claim against the County. Consequently, we consider only the claims against the County.

and M.N.A.M., triplets born in 2006. Mark is the director of the Wesleyan Center for 21st Century Studies at Point Loma Nazarene University. Melissa is a nurse midwife at Scripps Hospital. In April 2010, two incidents led to the removal of the Manns' children, then ages 6 and 4 (the triplets), from their family home and their admission to Polinsky.

On Monday, April 6, 2010, N.E.H.M.'s preschool director called Mark Mann after observing a red mark on her lower back. Mark went to the preschool and explained that he had struck N.E.H.M. with a wooden spoon the night before in a misguided effort to calm her. The preschool director told Mark that as a mandatory reporter, she was required to report the incident to the San Diego County Health and Human Services Agency (HHSA). With Mark in the room, the director reported the incident on HHSA's child abuse hotline and indicated that Mark was cooperative. In the following days, HHSA social workers interviewed Mark, Melissa, and the children at their home. Mark and Melissa agreed to receive supportive services and each signed a voluntary safety plan, which, among other things, prohibited Mark from using physical discipline on the children and required the presence of a third party when help was needed to adequately care for the children.

During one of these visits, social workers noticed that M.N.A.M. had a bruise on his forehead. Melissa explained that M.N.A.M. had hit his head on a kitchen countertop. When the social workers asked to photograph the bruise, however, Melissa protested that it

felt "manipulative," but later that day she apologized to the social workers and volunteered to take N.E.H.M and M.N.A.M. to Rady Children's Hospital for a "Suspected Child Physical Abuse and Neglect Examination." The next day, the children's examining physician concluded that N.E.H.M.'s red mark was consistent with Mark's explanation, and that M.N.A.M.'s bruise was "most likely accidental."

Despite Mark and Melissa's cooperation, the social workers decided to prepare a dependency application in order to remove the Mann children from their home. The social workers omitted exculpatory evidence from the application[2]—evidence that the district court later concluded would have rendered the application insufficient to support a protective custody warrant. Relying on the flawed application, the juvenile court issued a warrant authorizing the removal of the children on April 12, 2010, and the County removed the Mann children from their home and took them to Polinsky later that day. Upon their admission to Polinsky, the children met with a nurse who performed a cursory examination, checking the children's vital signs and their

[2] The application excluded, for example, Mark and Melissa's agreement to take the children to Rady Children's Hospital, and Melissa's suggestion that the children be taken to a physician. It also said that Melissa had been "confrontational and hostile" and "had refused to cooperate" with the social workers.

heads for lice, as well as made sure they had no urgent medical needs.[3]

The next day, April 13, 2010, Mark and Melissa appeared at a detention hearing at the juvenile court, where the County asked them to sign a "Consent for Treatment—Parent" form. The standardized form authorized treatment only if the treatment was "recommended by a licensed physician. . . ." The form permitted the parents to indicate whether they preferred treatment by "Private Physician" or "Other Licensed Hospital/Medical Facility." Mark Mann signed the form and indicated that, if treatment was necessary, they preferred it to be provided by the children's private physician at Scripps Health.

Meanwhile at Polinsky, while the Manns were appearing in court, a doctor, Nancy Graff, performed a ten- to fifteen-minute medical examination of each of the Mann children that included a twenty-two point assessment of general appearance, behavior, mental status, and specific parts of the body (e.g., skin, head, and eyes). The examination also included a gynecological and rectal exam, which involved a visual and tactile inspection of the children. For the gynecological exam, Dr. Graff testified that she asked the girls to "kind of drop their legs into a frog leg situation," and "separate[d] the labia and look[ed] at the hymen. . . ." Staff also administered tuberculosis tests, requiring

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[3] The Manns do not challenge the constitutionality of this initial cursory examination, and this opinion addresses only the subsequent medical examinations of the children.

pricks of the children's skin, and the children gave blood and urine samples for drug screening. If staff observed signs of abuse, the County required them to photograph the abuse for the children's records. No one notified Mark and Melissa that their children were examined.

Since at least November 2003, the County routinely performed this medical examination on children admitted to Polinsky after a juvenile court order authorized it to "obtain a comprehensive health assessment as recommended by the American Academy of Pediatrics (AAP), including a mental status evaluation, for a child prior to the detention hearing. . . ."[4] The County, however, excluded from its examination practices verbal children re-admitted to Polinsky within a short period of time, reasoning that such children are able to tell County officials about any abuse they experienced between their last discharge and their readmission.

The day after the Mann children were subjected to this medical examination, they were released from Polinsky to the custody of their paternal grandmother, who resided in the family home until the dependency

[4] The 2007 order authorizing the examinations expired in January 2011, and the parties have not included an updated court order in the record. The Polinsky medical examination purported to follow the guidelines prescribed by the AAP for the "Health Care of Young Children in Foster Care." The AAP guidelines instruct that "whenever possible, confirmation should be obtained from the birth parents" and "birth parents should be encouraged to be present at health care visits and to participate in health care decisions." The County did not follow these guidelines.

proceedings were resolved. Months later, after a trial, the juvenile court dismissed the dependency petition, concluding that it was unsupported by sufficient evidence. Mark and Melissa were never notified that their children had been examined, and did not suspect that any medical examinations had taken place until N.G.P.M. told Melissa that "two ladies at the college [Polinsky] said they needed to touch me down there," and demonstrated what she was required to do for the gynecological and rectal exam.

The Mann family filed suit against the County in April 2011, alleging violations of the Fourth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 against the social workers and the County, as well as asserting state law claims. The Manns contended that the County violated their Fourteenth Amendment rights and the children's Fourth Amendment rights by: (1) performing the medical examinations in the absence of exigency, valid parental consent, or court order specific to the child examined, and (2) failing to notify the parents of the examinations so that they may be present.

While the Manns' case was pending before the district court, the County settled a second case with a different Southern California family, not party to this suit, who had also alleged that the County's practices of conducting the Polinsky medical examinations without parental notice and outside the presence of parents violated the Constitution. *See Swartwood v. Cty. of San*

Diego, 84 F. Supp. 3d 1093, 1098-104 (S.D. Cal. 2014).[5] To settle that lawsuit, the County proposed "modifying its consent forms, including to provide notification to parents and guardians of their right to be present at the exams;" "modifying the Polinsky Children's Center's facilities and procedures to allow for parental presence at examinations upon request;" and "modifying the Agency's requests to the Juvenile Court for child-specific orders authorizing exams and treatment of children, if parents refuse to consent to the examinations." *Swartwood v. Cty. of San Diego*, No. CV 12-1665 W (BGSx), Petition For Approval of Minors' Interest in Settlement of Action, Dkt. No. 98-1, at 6-7. The County did not appeal the judgment in the *Swartwood* case, and the district court's final order approving the minor's compromise omitted these remedial measures.[6] *Id.*, Dkt. Nos. 100, 101, 103.

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[5] The Manns' motion for judicial notice is **GRANTED**.

[6] Both the County and the Manns' attempts to use the *Swartwood* settlement as a procedural weapon fail. The Manns argue that the County should be collaterally estopped from re-litigating whether the Polinsky medical examinations violate parents' constitutional rights. We have "hesitate[d] to give preclusive effect to the previous litigation of a question of law by estoppel against a state party when no state law precedent compels that we do so," *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689 (9th Cir. 2004), and we decline to do so here. "Rather than risk that an important legal issue is inadequately considered" in a district court settlement, we decide the issue for the first time for our Circuit. *Id.* at 690.

Nor does the *Swartwood* settlement render this appeal moot, as the County argues. The County's decision to change its practice of conducting medical examinations without parental knowledge or consent falls under the "voluntary cessation" exception to the

Notwithstanding the *Swartwood* court-approved settlement, the County contested the Manns' claims. In November 2015, the district court granted in part the County's motion for summary judgment and granted in part the Manns' cross-motion for summary judgment. The district court determined that the County had a policy of barring parents from the Polinsky medical examinations.[7] And, although the district court concluded that the Fourteenth Amendment required the County to notify Mark and Melissa of the Polinsky medical examinations and to include them during the examinations, it also concluded that the County was not constitutionally obligated to obtain the parents' consent or a court order to conduct the examinations.

The Manns and the County then settled most of their claims and dismissed all claims against the social workers. This settlement did not include the *Monell* claim concerning the Polinsky medical examinations. The County timely appealed this claim, contending that the Fourth and Fourteenth Amendments did not require it to provide advance notice to the parents. The

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mootness doctrine. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The County has not demonstrated that it is legally bound to continue use of its new consent forms or its new practices, and the district court order approving the *Swartwood* minor's compromise does not mention the County's proposed remedial measures. Notably, the County has maintained throughout this litigation that it is not constitutionally bound to provide notice and consent. Even more importantly, the Manns seek monetary relief, for which they are eligible regardless of the County's current practices.

[7] The County no longer disputes this point as it did before the district court.

Manns cross-appealed, arguing that the Fourth and Fourteenth Amendments required not only advance notice to parents but also consent or a court order to conduct the examinations. Thus the issue before us is whether the County's practice of not notifying parents and not obtaining either parental consent or judicial authorization in advance of the Polinsky medical examinations violates the Fourth and Fourteenth Amendments.

II.

The Manns contend that the Polinsky medical examinations violate their privacy rights, which are protected as a matter of substantive due process under the Fourteenth Amendment. The Mann children, through guardian ad litem Bruce Paul, assert that the Polinsky medical examinations violate their constitutional right to be free from unreasonable searches under the Fourth Amendment.[8] We first address the parents' Fourteenth Amendment claims and then turn to the children's Fourth Amendment claims.[9]

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[8] Although the Mann children are also protected by the privacy guarantees of the Fourteenth Amendment, the Supreme Court has instructed that their claims are best analyzed under the Fourth Amendment, which provides an "explicit textual source of constitutional protection" for their claims that they were subjected to an unreasonable search. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

[9] We note that three district courts in the Southern District of California have already found certain of the County's practices concerning the Polinsky medical examinations unconstitutional. *See Parkes v. Cty. of San Diego*, 345 F. Supp. 2d 1071, 1091-95

A.

We conclude that the County violates parents' Fourteenth Amendment substantive due process rights when it performs the Polinsky medical examinations without notifying the parents about the examinations and without obtaining either the parents' consent or judicial authorization. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Id.* (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979), and *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999)). In our 2000 decision in *Wallis*, we agreed with the Second Circuit that the

> Constitution assures parents that, in the absence of parental consent, [physical examinations] of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration

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(S.D. Cal. 2004) (concluding that the County's policy of failing to notify or obtain consent from the children's parents to conduct the Polinsky medical examinations violated the Fourth and Fourteenth Amendments); *Reynolds v. Cty. of San Diego*, 224 F. Supp. 3d 1034, 1062-69 (S.D. Cal. 2016) (concluding that the County's policy of excluding parents from the Polinsky medical examinations was unconstitutional); *Swartwood*, 84 F. Supp. 3d at 1116-24.

> of the procedure is reasonable under all the circumstances.

Id. (quoting *van Emrik v. Chemung Cty. Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990)). We held that "[b]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate medical attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." *Id.*

The County counters by attempting to distinguish *Wallis* on the ground that its holding applies only to investigatory medical examinations. The County claims that the Polinsky medical examinations are not investigatory. Rather, it argues, the examinations are conducted to assess the child's "mental health" and are conducted in a "light, pleasant atmosphere." But, as the district court found, there is no dispute here that the Polinsky medical examinations are investigatory because the "physician is looking for signs of physical and sexual abuse." Dr. Graff, who examined the Mann children and was the co-medical director of Polinsky, testified that she and her staff "look closely for any evidence of physical abuse" and document any evidence they find. The Polinsky medical examinations are not routine pediatric exams. Notably, the County exempts verbal children from the Polinsky medical examinations under certain circumstances because they can adequately describe potential abuse, irrespective of their immediate medical needs. That these examinations

may serve dual purposes does not negate the investigatory character of the procedures.

The County's attempts to parse a purely non-investigatory purpose out of the Polinsky medical examinations are not persuasive, especially because medical examinations of young children are particularly likely to have dual purposes as the "investigation of [ ] abuse for child protection purposes may uncover evidence of a crime." *Greene v. Camreta*, 588 F.3d 1011, 1026-27, 1029 (9th Cir. 2009), *vacated in part as moot* 661 F.3d 1201 (9th Cir. 2011). As we observed in *Greene*, "'disentangling [the goal of protecting a child's welfare] from general law enforcement purposes' becomes particularly 'difficult,'" *id.* at 1026 (citation omitted), because California law requires mandatory reporters such as medical professionals to notify law enforcement agencies if they identify signs of child abuse. Cal. Penal Code § 11165.7; *see Greene*, 588 F.3d at 1028; *accord Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406-07 (5th Cir. 2002) (holding that social workers' investigations regarding alleged child abuse are not "divorced from the State's general interest in law enforcement" because they function "as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child"). Because of these legal obligations, a child's medical examination may turn investigatory even if the examination does not begin as such.

We conclude that the same rules apply to purely investigatory examinations as to dual-purpose examinations, where one of the purposes is investigatory.

Thus under *Wallis*, the County is required to notify the parents and obtain parental consent (or a court order) in advance of performing the Polinsky medical examinations, and permit parents to be present for these examinations because, while the examinations may have a health objective, they are also investigatory. Parental notice and consent is even more warranted when examinations have dual purposes than when the purpose is purely for health reasons. Ironically, the AAP guidelines that the County uses to justify its practices state that "[w]hen appropriate and as a part of the care plan of the child welfare agency, birth parents should be encouraged to be present at health care visits and to participate in health care decisions." Am. Academy of Pediatrics, *Health Care of Young Children in Foster Care*, 109 Pediatrics 536, 538 (2002). And we agree with the Tenth Circuit's observation that "parental consent is critical" in medical procedures involving children "because children rely on parents or other surrogates to provide informed permission for medical procedures that are essential for their care." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1207 (10th Cir. 2003) (citing Am. Academy of Pediatrics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 Pediatrics 314-17 (Feb. 1995)); *see also id.* ("It should go without saying that adequate consent is elemental to proper medical treatment.").

The district court erred by concluding that the Polinsky medical examinations were investigatory in nature but holding that parental consent was not required because the procedures were not as invasive as

those used in *Wallis*. *See Wallis*, 202 F.3d at 1135 (concerning medical procedures performed on children including internal body cavity examinations of the vagina and rectum). The court's analysis should have stopped with its determination that the medical examinations had an investigatory purpose. A parent's due process right to notice and consent is not dependent on the particular procedures involved in the examination, or the environment in which the examinations occur, or whether the procedure is invasive, or whether the child demonstrably protests the examinations. "Nothing in *Wallis* or *Greene* suggests that the Fourteenth Amendment liberty interest only applies when a magnifying scope is used." *Swartwood*, 84 F. Supp. 3d at 1118. The amount of trauma associated with a medical examination, particularly for young children, is difficult to quantify and depends upon the child's developmental level, previous trauma exposure, and available supportive resources, among other factors.[10] Given this reality, a parent's right to notice and consent is an essential protection for the child and the parent, no matter what procedures are used.

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[10] *See* 2008 Presidential Task Force on Posttraumatic Stress Disorder and Trauma in Children and Adolescents, *Children & Trauma*, AM. PSYCHOLOGICAL ASS'N, (2008), http://www.apa.org/pi/families/resources/children-trauma-update.aspx. *But see also Wallis*, 202 F.3d at 1142 n.13 (citing R. Lazebnik et al., *Preparing Sexually Abused Girls for Genital Evaluation*, 13 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 155 (1990) (concluding that vaginal examinations may be particularly traumatic for young girls when their parents are not present)).

Where parental notice and consent are not possible, the law admits of recognized exceptions to parental rights. In an emergency medical situation, the County may proceed with medically necessary procedures without parental notice or consent to protect the child's health. *See Mueller v. Auker*, 700 F.3d 1180, 1187 (9th Cir. 2012) ("[P]arents have a 'constitutionally protected right to the care and custody of their children' and cannot be 'summarily deprived of that custody without notice and a hearing,' except where 'the children are in imminent danger.'") (quoting *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997)). And when there is a "reasonable concern that material physical evidence might dissipate," notice and consent may not be required. *See Wallis*, 202 F.3d at 1141. But neither exception applies here. The County routinely performed the Polinsky medical examinations after a child's admission to the facility, irrespective of any medical emergency or need to preserve evidence. And here, the County had already photographed N.E.H.M.'s red mark and M.N.A.M.'s bruise before their admission to Polinsky, and identified no other evidence it needed to collect to support its stated basis for the dependency charge.

There is no indication that providing constitutionally adequate procedures poses an administrative inconvenience. Here, had the County wished to notify Mark and Melissa of the examinations and obtain their consent, it could have easily done so when they appeared in juvenile court and signed the form that provided parental consent to future, medically necessary

treatments.[11] And the County's consent form adopted in response to the *Swartwood* litigation provides parental notice, belying any suggestion that a notice process would be administratively infeasible. Should a parent refuse to consent, the County may obtain judicial authorization for the examination. Because judicial supervision is almost always required to take a child into protective custody, the County will invariably have a set time and place to request such judicial approval for the medical examination.

Nor is the requirement that the County provide parental notice and obtain consent inconsistent with the County's obligation to provide routine or emergency medical care to children in its custody, or with the 2003 juvenile court order that specifically authorized the medical examinations. *Accord Sangraal v. City & Cty. of San Francisco*, No. C 11-04884 LB, 2013 WL 3187384, at *14 (N.D. Cal. June 21, 2013). California law requires County social workers to "notify the parent, guardian, or person standing *in loco parentis* of the person, if any, of the care found to be needed before that care is provided" and permits the County to provide the care "only upon order of the court in the exercise of its discretion." Cal. Welf. & Inst. Code § 369(a). And in

[11] The County no longer argues that the "Consent for Treatment—Parent" form that Mark and Melissa signed supplies valid consent or notice, as it clearly does not. Because that form does not explain that Polinsky staff intended to perform (and had likely already performed) a medical examination of their children and instead asked for consent for "medical, developmental, dental, and medical health care *to be given*," the form did not adequately apprise Mark and Melissa of the contemplated procedure.

most circumstances, the County may notify the parents, obtain their consent, *and* perform the scheduled medical examinations without interference, as this case illustrates.

We reject the County's argument that we must also apply a "shocks the conscience" standard to Mark and Melissa's Fourteenth Amendment substantive due process claim under *Monell*. Neither *Wallis* nor *Greene* applied such a test, and the County cites no Ninth Circuit authority for the proposition that this test applies here. As the district court correctly concluded, Mark and Melissa have a "direct" *Monell* claim based on the County's undisputed policy or practice of failing to notify parents of the Polinsky medical examinations, for which they are only required to prove that the County acted with "the state of mind required to prove the underlying violation." *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1185-86 (9th Cir. 2002), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (distinguishing "direct" from "indirect" *Monell* claims, which allege that a municipality violated the constitution through its omissions and which require a showing of deliberate indifference). The County's deliberate adoption of its policy or practice "establishes that the municipality acted culpably." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404-5 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving the[] issues of fault and causation are straightforward."). Our inquiry ends there.

For all these reasons, the County's failure to provide parental notice or to obtain consent violated Mark and Melissa Mann's Fourteenth Amendment rights and the constitutional rights of other Southern California parents whose children were subjected to the Polinsky medical examinations without due process.

B.

The Mann children possess a Fourth Amendment right to "be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV; *see also Wallis*, 202 F.3d at 1137 n.8. Because we have concluded that the Polinsky medical examinations are at least partially investigatory, the examinations are well within the ambit of the Fourth Amendment. *See Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.9 (2001) ("[W]e have routinely treated urine screens taken by state agents as searches within the meaning of the Fourth Amendment even though the results were not reported to the police."); *see also United States v. Attson*, 900 F.2d 1427, 1429 (9th Cir. 1990) (recognizing that the Fourth Amendment includes searches that are "somehow designed to elicit a benefit for the government in an investigatory or, more broadly, an administrative capacity"), *cert. denied*, 498 U.S. 961 (1990); *accord Dubbs*, 336 F.3d at 1206 (collecting cases). Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment—subject only to a few "specifically established and

well-delineated exceptions." *See Katz v. United States*, 389 U.S. 347, 357 (1967).[12]

The County contends that the "special needs" exception to the warrant requirement applies because the Polinsky medical examinations have at least a secondary purpose of safeguarding the health of the child and other children at Polinsky. "Special needs" cases are cases in which "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). Where the special needs exception applies, we replace the warrant and probable cause requirement with a balancing test that looks to "the nature of the privacy interest," "the character of the intrusion," and "the nature and immediacy of the government's interest." *Id.* at 830-38.

We assume, without deciding, that the "special needs" doctrine applies to the Polinsky medical examinations,[13]

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[12] The Mann children's Fourth Amendment claims are not rendered moot because they are no longer in the custody and control of the County or Polinsky's staff. *See Camreta v. Greene*, 563 U.S. 692, 710-11 (2011), *vacating in part* 588 F.3d 1011 (9th Cir. 2009). Because the Mann children are still minors living in San Diego County, they remain subject to the possible jurisdiction of the County's child welfare system, and therefore it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968).

[13] In *Greene*, we concluded that the special needs exception does not apply to investigatory medical examinations of children removed from their parents' custody, *see* 588 F.3d at 1027, but the

but conclude that the searches are unconstitutional under the "special needs" balancing test if performed without the necessary notice and consent. To reach this conclusion, we balance the children's expectation of privacy against the government's interest in conducting the Polinsky medical examinations.

Children removed from their parents' custody have a legitimate expectation of privacy in not being subjected to medical examinations without their parents' notice and consent. *See, e.g.*, *Yin v. California*, 95 F.3d 864, 871 (9th Cir. 1996) (Persons have "a legitimate expectation of privacy in being free from an unwanted medical examination, whether or not that examination entails any particularly intrusive procedures."); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (concluding that the collection of a public school student's urine sample, as well as its subsequent analysis, are invasions of societally-sanctioned expectations of privacy, but ultimately concluding that the search was reasonable). While the County's custodial responsibility and authority over the children diminishes their privacy interests somewhat, *Parham*, 442 U.S. at 603, the children nonetheless maintain a legitimate expectation of privacy.

Importantly, the Polinsky medical examinations are significantly intrusive, as children are subjected to visual and tactile inspections of their external genitalia, hymen, and rectum, as well as potentially painful

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Supreme Court later vacated that portion of our opinion as moot, *see* 661 F.3d 1201 (9th Cir. 2011).

tuberculosis and blood tests. *See Dubbs*, 336 F.3d at 1207. Children are forced to undress and are inspected, by strangers, in their most intimate, private areas. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 604 (1989) (urination is "an excretory function traditionally shielded by great privacy."). N.G.P.M.'s description of the examination to Melissa indicates that even at six years old, she knew that the examination had exposed something private. The County's argument that the examinations are "minimally intrusive" because they are "adjusted to the children's comfort level," ignores that the County routinely subjects children to these objectively intimate and potentially upsetting procedures.[14] And while the County argues that the test results "were used only for health-related rather than law enforcement purposes," the dual purposes of the search necessarily mean that the examinations could result in the disclosure of information to law enforcement, which would further intrude on the children's privacy. *Cf. Earls*, 536 U.S. at 833 (reasoning that because test results were kept in confidential files released to school personnel only on a "need to know"

[14] The County's comparison of the Polinsky medical examination to the urinary testing in *Earls* is not persuasive. In *Earls*, high school students who had voluntarily joined non-athletic extracurricular activities were subjected to urinary testing, which involved the student giving a urinary sample in the privacy of a bathroom stall. *Earls*, 536 U.S. at 832. Here, children who have been involuntarily removed from their parents are subjected to visual and tactile inspections of their genitals and rectum, in addition to other potentially upsetting procedures. The Polinsky medical examinations, in context, are far more privacy-invasive than the testing in *Earls*.

basis, this diminished the potential privacy invasion); *Vernonia*, 515 U.S. at 658 (same).

While the County's concern for the health of children in its custody is important, it has not demonstrated that the "nature and immediacy" of its interest outweighs the children's privacy interests. *See Earls*, 536 U.S. at 834. When a child is examined, he or she has already been admitted to Polinsky and been examined for emergency medical needs and contagious diseases.[15] While the initial assessment clearly serves to treat children's immediate needs and address potential dangers to other children at Polinsky, it is less evident how the search at issue does so. *Cf. Mueller*, 700 F.3d at 1187. And the County provides no other interest beyond the health of the child that would make the need to conduct the search more immediate such that providing notice and obtaining consent would impede the provision of necessary medical services.

Nor has the County demonstrated that compliance with the Fourth Amendment, i.e., providing parental notice and obtaining consent or judicial authorization, would be "impracticable." *See Earls*, 536 U.S. at 829. To the contrary, the County's current policy is to obtain parental consent and provide advance notice to the parents so that they can be present at the examination. The County's involvement with the juvenile court system throughout the dependency process provides it

[15] Again, the Manns do not contest that the County may perform the initial medical assessments without parental notice or consent, as those assessments involve only a cursory observation for satisfactory vital signs and the absence of lice or fever.

with ready access to request a warrant from the juvenile court if necessary. And as recognized by the AAP, the Polinsky medical examination may even benefit from the involvement of the parents, who can identify vaccines, medications, allergies, and chronic diseases that the child may not be able to communicate on her own. There is no reason to think that parental notice and consent is "impracticable" in this context.

The Mann children's experience underscores our conclusion. Here, the County removed the children from the family home, and could have sought Mark and Melissa's consent at that time. When the children were subjected to the Polinsky medical examination the next day, Mark and Melissa were present in court, at which time the County also could have sought their consent. And there was no suspicion that the Mann children had been sexually abused or needed immediate medical attention such that performing the search was necessary prior to providing Mark and Melissa notice and obtaining their consent.

Should exigent circumstances, i.e., medical emergency or the fear of evidence dissipating, necessitate an earlier examination, the County may perform the examination without notifying the parent and obtaining consent. But in general, the County has provided us no compelling reason why it cannot wait to conduct the Polinsky medical examinations until it has at least attempted to notify the parents and obtain consent. *See Dubbs*, 336 F.3d at 1214-15 ("While it is certainly true that a properly conducted physical examination is 'an effective means of identifying physical and

developmental impediments in children,' this supplies no justification for proceeding without parental notice and consent." (citation omitted)).

Because the County's interest in protecting children's health does not outweigh the significant intrusion into the children's somewhat diminished expectation of privacy, the County's policy of subjecting children to the Polinsky medical examinations without parental notice and consent is unreasonable. Thus, we conclude that the County violated the Mann children's Fourth Amendment rights by failing to obtain a warrant or to provide these constitutional safeguards before subjecting the children to these invasive medical examinations.

III.

The County's continued failure to provide parental notice and obtain consent for the Polinsky medical examinations has harmed families in Southern California for too long. Here, the County subjected the Mann children to invasive medical examinations unbeknownst to their parents, who were meanwhile trying to cooperate with the County's investigation. The Manns were deprived of their right to raise their children without undue interference from the government, the right to make medical decisions for their children, and the right to privacy in their family life. The Mann children were subjected to invasive, potentially traumatizing procedures absent constitutionally required safeguards. Although we must balance these fundamental rights

against the state's interest, we conclude that the County is constitutionally required to provide parental notice and obtain parental consent or judicial authorization for the protection of parents' and children's rights alike.

AFFIRMED IN PART and REVERSED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK MANN et al., Plaintiffs, v. COUNTY OF SAN DIEGO et al., Defendants.	Case No. 3:11-cv-0708-GPC-BGS **ORDER:** **(1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** [ECF No. 194] **(2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** [ECF No. 197] (Filed Nov. 23, 2015)

In this civil rights case, Plaintiffs allege that Defendants violated their family's civil rights during a child abuse investigation that led to the removal of the minor children from the family's home. Compl., ECF No. 1. Before the Court are the parties' cross-motions for partial summary judgment. Defs. 2nd Mot. Summ. J. ("Defs. Mot."), ECF No. 194; Pls. 2nd Mot. Summ. J. ("Pls. Mot."), ECF No. 197. The motions have been fully briefed. Defs. Resp. to Pls. Mot. Summ. J. ("Defs. Resp."), ECF No. 201; Pls. Resp. to Defs. Mot. Summ. J. ("Pls. Resp."), ECF No. 202. A hearing on the motions

was held on October 16, 2015 and the matter was taken under submission. ECF No. 210.

Having considered the parties' submissions, oral argument and the applicable law, and for the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion and **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion.

BACKGROUND

The relevant facts in this case having been described in the Court's previous Order, the Court will not reiterate them in depth here. *See* 1st Summ. J. Order 2–12 ("Summ. J. Order"), ECF No. 102. In short, this is an action brought by Plaintiffs Mark and Melissa Mann and their four minor children N.E.H.M., M.C.G.M., N.G.P.M., and M.N.A.M ("Plaintiffs") challenging actions taken by the County of San Diego ("County"), the County's Health and Human Services Agency ("HHSA"), and the County's Polinsky Children's Center, a temporary emergency shelter for children who are separated from their families ("Polinsky") ("Defendants") during the course of a child abuse investigation that led to the removal of the minor children from the family's home. (*Id.*)

Plaintiffs initially filed a complaint against the County, HHSA, Andrea E. Hernandez (née Cisneros), Lisa J. Quadros, Gilbert Fierro, Kelly Monge, Susan Solis, and six other now dismissed defendants. Compl.; *see also* Orders Dismissing Defs., ECF Nos. 93, 142. Plaintiffs asserted eight causes of action for: (1)

assault; (2) battery; (3) false imprisonment; (4) violation of federal civil rights guaranteed by the First, Fourth, and Fourteenth Amendments under 42 U.S.C. § 1983; (5) *Monell* claims related to the County's policies; (6) intentional infliction of emotional distress ("IIED"); (7) violation of state civil rights under Cal. Civ. Code § 43; and (8) violation of state civil rights under Cal. Civ. Code § 52.1. Compl. at 30–33.[1] Every cause of action was pled against all the Defendants, with the exceptions of the fourth cause of action for the § 1983 claims, which was pled solely against the individual defendants, and the fifth cause of action for the *Monell* claims, which was pled solely against the County, HHSA, and Polinsky. *Id*.

Following parties' initial cross-motions for partial summary judgment, the Court found that Defendants were entitled to qualified immunity with respect to Plaintiffs' fourth cause of action for the § 1983 claims to the extent that such claims were based on Defendants': (1) interview with N.G.P.M. at school; (2) examination of the children at Polinsky; and (3) listing of Mr. Mann on California's Child Abuse Central Index ("CACI"), but not with respect to their actions in obtaining and executing the protective custody warrant. Summ. J. Order 16–29. Defendants were granted summary judgment on Plaintiffs' *Monell* cause of action with regards to the charge of inadequate training. *Id.* at 30–31; Scheduling Order 8, ECF No. 190.

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[1] All page numbers refer to the pagination generated by the CM/ECF system, not the parties' original page numbers.

Subsequently, the Court found good cause to direct additional briefing in order to determine whether the following issues can be decided on summary judgment: (1) Plaintiffs' *Monell* cause of action based on the Polinsky exams; (2) Defendants' qualified immunity defense to Plaintiffs' § 1983 First Amendment retaliation claim; (3) all claims against Defendants Fierro, Monge, and Solis; and (4) Plaintiffs' state law causes of action of assault, battery, false imprisonment, IIED, and violations of Cal. Civ. Code § 43 and § 52.1. Scheduling Order 9–10. Parties' motions and responses followed.

LEGAL STANDARD

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. *Id.* at 322–23. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

Once the moving party has satisfied this burden, the nonmoving party cannot rest on the mere allegations or denials of his pleading, but must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Id.* at 325. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In making this determination, the court must "view[] the evidence in the light most favorable to the nonmoving party." *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility determinations, weighing of evidence, or drawing of

legitimate inferences from the facts; these functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

Cross-motions for summary judgment do not necessarily permit the court to render judgment in favor of one side of [sic] the other. *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975). The Court must consider each motion separately "on its own merits" to determine whether any genuine issue of material fact exists. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001); *Starsky*, 512 F.2d at 112. When evaluating cross-motions for summary judgment, the court must analyze whether the record demonstrates the existence of genuine issues of material fact, both in cases where both parties assert that no material factual issues exist, as well as where the parties dispute the facts. *See Fair Housing Council of Riverside County*, 249 F.3d at 1136 (citing *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 & n.5 (9th Cir. 2000)).

DISCUSSION

I. Plaintiffs' *Monell* claims against the County, HHSA, and Polinsky

Plaintiffs bring *Monell* challenges to the County's policies of (1) preventing parents or guardians from being present during medical procedures, including examinations performed at Polinsky; and (2) allowing medical examinations to be performed at Polinsky in the absence of exigency, valid parental consent, or

court order specific to the child being examined.[2] Pls. Mot. 14, 30.

a. Factual Disputes

At the outset, it should be noted that the parties dispute whether issues of fact remain that preclude summary judgment on these claims. In its previous Summary Judgment Order, the Court found that disputed issues remained as to (1) whether the Polinsky examinations were overly intrusive in light of Defendants' justifications; (2) whether the County's policy of excluding all parents from examinations is warranted in light of Defendants' justifications; (3) whether the examinations were conducted primarily for investigatory purposes; and (4) whether the parents in this case consented to the examinations, but that since Plaintiffs failed to prove that the Polinsky examinations violated a clearly established right, Defendants were entitled to qualified immunity to the extent that Plaintiffs' § 1983 claims rested on the Polinsky examinations. Summ. J. Order 24–27. Subsequently, the parties indicated that there were no factual disputes underlying Plaintiffs' *Monell* claims. *See* Defs. Ex Parte Mot. Requesting Leave to File 2nd Summ. J. Mot. 2 ("Defs. Ex Parte Mot."), ECF No. 135; Pls. Statement of Proposed Legal Issues to be Determined by the Court 3,

[2] Plaintiffs bring both facial and as-applied *Monell* challenges. Pls. Mot. 14. However, as Plaintiffs do not point to any specific written statute, ordinance, or regulation being challenged on its face, the Court will analyze Plaintiff's *Monell* claims as as-applied challenges. *See id.*

ECF No. 189. This remains Plaintiffs' position, *see* Pls. Mot. 6, but Defendants now argue that there are disputed factual issues, *see* Defs. Resp. 2.

District courts retain inherent authority to revise interim or interlocutory orders any time before entry of judgment. *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000) (citing *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) ("[T]he interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment."); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 465 (9th Cir.1989); Fed. R. Civ. P. 54(b) (noting that unless final judgment has been entered, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). A district court may reconsider and reverse a previous interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law. *Id.* (citing *Sport Squeeze, Inc. v. Pro–Innovative Concepts, Inc.*, 51 U.S.P.Q.2d 1764, 1771, 1999 WL 696009 (S.D. Cal. 1999); *Washington v. Garcia*, 977 F.Supp. 1067, 1068 (S.D. Cal. 1997)). But a court should generally leave a previous decision undisturbed absent a showing that it either represented clear error or would work a manifest

injustice. *Id.* (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

The Court now concludes that it erred in previously finding that there were genuine issues of material fact as to the conduct of the Polinsky examinations. The Court now concludes that the disputed issues it previously identified (that is, (1) whether the Polinsky examinations were overly intrusive in light of Defendants' justifications; (2) whether the County's policy of excluding all parents from examinations is warranted in light of Defendants' justifications; (3) whether the examinations were conducted primarily for investigatory purposes; and (4) whether the parents in this case consented to the examinations) are properly understood as legal issues that can be decided by the Court. As Defendants previously put it, "[t]here are no disputes about how the exams were conducted, or who conducted them, or whether the parents were present. The only question is whether the exams were lawful; this question should be decided by the Court." Defs. Ex Parte Mot. 2. Upon thorough review of the record, the Court now agrees with that position.

First, whether the Polinsky examinations were overly intrusive in light of Defendants' justifications is a legal question, not a factual one. We previously found, Summ. J. Order 24, and Defendants now argue, Defs. Resp. 11, that expert testimony may be required to resolve the question of whether the examinations were unconstitutionally intrusive. Defendants also now argue that "how the specific exams were conducted on

the Mann children" themselves is a disputed issue. Defs. Resp. 11.

However, Defendants cannot materially dispute "how the exams were conducted, or who conducted them." Dr. Graff, the Co-Director of Polinsky who conducted the contested medical examinations on the Mann children, did testify that she did not specifically recall performing the medical exams on the Mann children, Graff. Dep. 67:22–24, ECF No. 198-2, and that because "[n]ot all of the children were cooperative with [external genital] examination," she was not able to "remember if [she] was able to complete that portion of the examination on all of the children," *id.* at 27:16–19. However, Dr. Graff previously declared that she "conducted the medical examinations of the Mann children in this case when they were admitted to Polinsky." Graff Decl. 2, ECF No. 77-5. Her declaration is supported by the record. Each of the Mann children's "Admission Physical Examination" forms carries Dr. Graff's signature. *See* Pls. Mot., Exs. 8–11; *see also* Graff Dep. 67:16–18 ("Q. Okay. And whose signature is that? A. Where it says date and then going across to M.D., that's my signature. And that's my date there."). The nature of the examinations is also well-established by the record. Dr. Graff repeatedly agreed that the "frog leg" external genital examination was "the type of examination that was being conducted of children in 2010," *id.* at 26:25–27:7; *see also* 25:3–26:8; 68:1–11, and that the medical records confirm that she conducted at least N.G.P.M.'s exam, including an external genital/hymen examination, *id.* at 67:6–21 ("Q. So

on 4-13-10, you conducted this examination of N.G.P.M.; correct? A. Yes." *Id.* at 67:19–21). Moreover, each form contains filled-in checkmarks and comments for the 22 assessment criteria. The "Extl Genitalia/Hymen" category is checked off under the first column "NL," the same as most of the other categories (such as "Skin," "Head," "Eyes," "Ears," "Nose/Mouth/Teeth," etc.), for each form except one, where it is checked off under the third column "NA," and under the "Description" field for that category the form states "unable to assess." *See id.* Thus, even viewing evidence in the light most favorable to the Defendants, there is no genuine dispute of material fact as to what type of examinations PCC conducted on the Mann children and whether Dr. Graff conducted the exams.

Defendants' contention that expert testimony is required to resolve the question of intrusiveness is likewise without merit. As an initial matter, it is difficult to countenance Defendants' argument that further testimony from Dr. Graff as to "how the specific exams were conducted on the Mann children" would be helpful, Defs. Resp. 11, given that Dr. Graff has already testified that she did not specifically recall performing those examinations, Graff. Dep. 67:22–24. But more importantly, as discussed above, what the examinations actually consisted of is not materially disputed. Instead, the legal question before the Court is the constitutionality of a medical examination with this *degree* of intrusiveness. In *Greene v. Camreta*, 588 F.3d 1011, 1036–37 (9th Cir. 2009), *Wallis v. Spencer*, 202 F.3d 1126, 1141–42 (9th Cir. 1999), *Swartwood v.*

County of San Diego, 84 F. Supp. 3d 1093, 1116–19 (S.D. Cal. 2014), and *Parkes v. County of San Diego*, 345 F. Supp. 2d 1071, 1092–95 (S.D. Cal. 2004), the Ninth Circuit and the Southern District of California respectively considered the constitutionality of several different types of medical examinations which took place during the course of child abuse proceedings, some of which concerned the same institutional Defendants as the present case. In each case, after the factual content of the medical examinations was established, the respective courts evaluated the constitutionality of the level of intrusiveness as a legal matter. *See id.*

Second, whether the County's alleged policy of excluding all parents from examinations was warranted in light of Defendants' justifications is a legal question. It is undisputed that parents were not permitted to be present during the medical examinations at the time the examinations on the Mann children were conducted. *See id.* at 110:17–110:22; 112:17–113:3; 113:17–113:24; *see also* Defs. Resp. to Pls. Separate Statement of Undisputed Material Facts 8 ("Defs. Resp. to Pls. SSUF", ECF No. 201-3 (stating that "[p]arents were allowed to be present at Polinsky in the visitation area, and to meet with the medical staff to discuss their child's medical issues," but not designating any specific facts to show that parents were permitted to be present in the medical examination itself). Whether that alleged policy violated Plaintiffs' constitutional rights is a legal question for the Court to decide. *See Greene*, 588 F.3d at 1036–37; *Wallis*, 202 F.3d at 1142; *Swartwood*, 84 F. Supp. 2d at 1117–19.

Third, whether the examinations were conducted primarily for investigatory purposes is a legal question. Again, what the examinations actually consisted of is not materially disputed. Instead, the legal question presented is whether this type of medical examination should be understood as investigatory. *See Greene*, 588 F.3d at 1036; *Wallis*, 202 F.3d at 1141–42; *Swartwood*, 84 F. Supp. 2d at 1118–19.

Fourth, whether the parents in this case consented to the examinations is a legal question. The only action the Manns took that could conceivably be construed as consent for the medical examinations is signing the "Consent to Treatment-Parent" forms. *See* Defs. Resp. 10. Whether this form constituted actual consent is a legal question for the Court.[3] *See Swartwood*, 84 F. Supp. 2d at 1122–24.

Thus, although, as discussed below, other issues of material fact may remain that preclude grant of summary judgment on Plaintiff's *Monell* claims, the "disputed issues" previously identified by this Court are legal, not factual, disputes that are within the province of the Court to decide at the summary judgment stage.[4]

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[3] Parties also dispute whether the "Consent to Treatment-Parent" forms were signed before or after the medical examinations were conducted. *See* Defs. Mot. 10. However, as discussed below in Part I.b.i.3, that issue is immaterial since in any event, the Court finds that the forms did not constitute legal consent.

[4] Defendants also contend that any reconsideration of our previous factual findings should be barred as untimely pursuant to Civ. L. R. 7.1(i)(2). However, Civ. L. R. 7.1(i)(2) is inapplicable because the Court is not entertaining a motion for reconsideration

b. Legal Analysis

Under *Monell v. Dept. of Social Servs. of City of New York*, a municipality like the County can be sued for "constitutional deprivations visited pursuant to governmental custom." 436 U.S. 658, 690 (1978). To establish municipal liability where a municipality's inaction in failing to protect the plaintiffs' constitutional rights is the source of the deprivation, the plaintiffs must show that (1) they were deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to the constitutional right; and (4) the policy was the "moving force behind the constitutional violation." *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1111 (9th Cir. 2001) (citing *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996)).

i. Deprivation of a Constitutional Right

The first prong of the *Monell* analysis is whether there was the deprivation of a constitutional right. Here, Plaintiffs challenge two of the County's alleged policies: (1) allowing medical examinations to be performed at Polinsky in the absence of exigency, valid

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of our previous Summary Judgment Order. Indeed, the Court's previous factual findings were not necessary to the conclusion in that Order that Plaintiff's § 1983 claims should be dismissed insofar as they were based on the Polinsky examinations, because that decision also rested on the independent ground that Plaintiffs had not shown that their constitutional rights were clearly established at the time of the examinations. *See* Summ J. Order 27.

parental consent, or court order specific to the child being examined; and (2) preventing parents or guardians from being present during medical procedures, including examinations performed at Polinsky. Pls. Mot. 14, 30. While, as discussed below in Part I.b.ii., it will be for the jury to decide whether the County did in fact have these policies, the Court now finds that only the second alleged policy of excluding parents from the medical examinations runs afoul of Ninth Circuit precedent delimiting the boundaries of Plaintiffs' rights to family association.[5]

1. Applicable Law

"Parents and children have a well-elaborated constitutional right to live together without governmental interference." *Wallis*, 202 F.3d at 1136 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). This "right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Id.* at 1141 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999)).

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[5] Defendants argue that disputed issues of fact preclude a decision on whether the medical examinations violated Plaintiffs' constitutional rights. Defs. Resp. 4. But as discussed above in Part I.a, the Court now finds that the disputed issues previously identified represent questions of law that the Court can decide on summary judgment.

Such a right is not absolute: the "rights of children and parents to be free from arbitrary and undue governmental interference" must be balanced against "the legitimate role of the state in protecting children from abusive parents." *Id.* at 1130; *see also Greene*, 588 F.3d at 1015–1016 ("On one hand, society has a compelling interest in protecting its most vulnerable members from abuse within their home. . . . On the other hand, parents have an exceedingly strong interest in directing the upbringing of their children. . . ."). But as the Ninth Circuit has cautioned, "in the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the Constitution." *Wallis*, 202 F.3d at 1130.

In *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999), police officers removed the plaintiffs' minor children from their home without a warrant following a baseless accusation from Mrs. Wallis' mentally-ill sister that Mr. Wallis was planning to sacrifice his son in a satanic ritual. 202 F.3d at 1131–34. Three days after the children were removed, a hospital performed an evidentiary physical examination of both children, which included internal body cavity examinations of the children, and photographs of their genital areas. *Id.* at 1135. There was no prior judicial authorization or parental consent for the examinations. *Id.* In addition, the examinations were conducted without prior notice to the parents and without their physical presence. *Id.* In reversing a grant of summary judgment to defendants, the Ninth Circuit found that,

> [I[n the absence of parental consent, [physical examinations] of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances. Barring a reasonable concern that material physical evidence might dissipate, or that some urgent medical problem exists requiring immediate attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations.

Id. at 1141 (quotations omitted) (internal quotation mark omitted) (citations omitted). The court continued:

> Moreover, parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention (or to be in a waiting room or other nearby area if there is a valid reason for excluding them while all or a part of the medical procedure is being conducted). Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations—particularly those, such as here, that are invasive or upsetting.

Id. at 1142.

Wallis stands for two propositions. First, when the state conducts an evidentiary physical examination of a child which involves internal body cavity examinations or the collection of material physical evidence of abuse, "[b]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate attention," the state is constitutionally required to notify parents and to obtain judicial approval specific to that child prior to the examination. Second, when the state conducts such an evidentiary physical examination, parents have a constitutional right to be present at the examination, or to be in a waiting room or other nearby area if there is a valid reason for excluding them while the examination is being conducted.

In *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), *vacated in part*, 563 U.S. 692, 131 S. Ct. 2020 (2011) *and vacated in part*, 661 F.3d 1201 (9th Cir. 2011) *as to unrelated Fourth Amendment issue*, the Ninth Circuit extended the scope of *Wallis*, but only with respect to the second issue of a parent's right to be present during the medical examination. In that case, the plaintiff's two daughters were removed from her custody pursuant to court order after plaintiff's husband and the father of the children, Mr. Greene, was arrested for suspected sexual abuse of another child. *Id.* at 1016–19. Several weeks after the children were removed, a medical center specializing in child sexual abuse performed "assessments" on the children, which involved visual examination of the children's genital areas, pictures of the genital areas, and the use

of a magnifying glass scope to visually examine the children. *Id.* at 1019. The assessments took place with the parents' notice and consent as well as judicial authorization. *Id.* at 1018–19. However, when Mrs. Greene arrived at the medical center in advance of the scheduled assessments, she was barred from attending either child's medical assessment. *Id.* at 1019. The court found that *Wallis* established that:

> [F]irst, parents and children maintain clearly established familial rights to be with each other during potentially traumatic medical examinations; and second, this right may be limited in certain circumstances to presence nearby the examinations, if there is some "valid reason" to exclude family members from the exam room during a medical procedure.

Id. at 1036 (citing *Wallis*, 202 F. 3d at 1142).

In *Greene*, the issue of whether such medical assessments require prior judicial authorization or parental consent did not arise, since the assessments took place with the parents' notice and consent as well as judicial authorization. *Id.* at 1018–19. Thus, the Ninth Circuit solely addressed the question of whether Mrs. Greene had a constitutional right to be present at her children's medical assessments. *Greene* stands for the proposition that when the state conducts a "potentially traumatic" medical examination of a child, such as one involving an external genital examination, parents have a constitutional right to be present at the examination, or to be in a waiting room or other nearby

area if there is a valid reason for excluding them while the examination is being conducted.

The Court finds that *Wallis* and *Greene* establish constitutional rights that depend on the nature and intrusiveness of medical examinations of children conducted by the state.

First, *Wallis* establishes that where the medical examination at issue involves invasive *internal* body cavity examinations or the potential collection of material physical evidence, judicial authorization specific to the child or parental consent, plus notice to the parents is required. In addition, parents have a right to be present during the examination unless there is a valid reason to exclude them, such as a medical emergency, allegations of abuse, or a credible reason for believing they would interfere with the medical examination.

Second, *Wallis* and *Greene*, taken together, establish that where a "potentially traumatic" medical examination is at issue, such as one involving an *external* genital examination, parents have a right to be present unless there is a valid reason to exclude them, such as a medical emergency, allegations of abuse, or a credible reason for believing they would interfere with the medical examination. This right to be present necessarily encompasses a right to receive actual notice that the examination will occur.[6] However, there is no

[6] That said, this notice requirement does not require Polinsky to schedule examinations around the availability of parents. The Court is mindful of Dr. Wright's concern that scheduling around the availability of the parents could negatively impact the

constitutional requirement that the state secure judicial authorization specific to the child or parental consent before the examination is conducted.

Third, where a medical examination is *not* "potentially traumatic," neither *Wallis* nor *Greene* are implicated. A routine pediatric examination involving, for instance, auscultation or the testing of a child's reflexes would require neither judicial authorization nor parental consent, notice, or presence.[7]

2. Application to the Present Case

Under the facts of the present case, Plaintiffs' constitutional rights were implicated by Mrs. Manns' exclusion from the Polinsky examinations, but not by the County's failure to obtain judicial authorization

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ability of Polinsky's medical staff to perform a timely examination of each child, creating the possibility that "[b]ruising or other evidence of injury would diminish and medical problems could worsen" in the interim. Wright Decl. 6.

[7] The Court is mindful that another court in this district has seemingly extended *Wallis* and *Greene* to find that either judicial authorization specific to the child or parental consent is required before the County can conduct Polinsky-style medical examinations involving external genital examinations. *See Swartwood*, 84 F. Supp. 3d at 1121. However, in so holding, the *Swartwood* court did not distinguish between the different factual predicates, and the different legal issues, presented in *Wallis* and *Greene*. *See id.* at 1116-24. For the reasons discussed above, this Court finds that *Greene* addressed only the issue of parental presence, and so does not extend the scope of *Wallis*' holding when it comes to the issue of whether judicial authorization or parental consent is necessary before the state conducts medical examinations of children.

specific to the Mann children or the Manns' consent prior to conducting the examinations.

The critical question is whether the medical examinations conducted at *Polinsky* are more like the examination conducted in *Wallis*, or those conducted in *Greene*. In *Swartwood v. County of San Diego*, 84 F. Supp. 3d 1093, 1121–22 (S.D. Cal. 2014), the district court considered the same exams conducted by Polinsky that are at issue in the present case, and found them to be virtually indistinguishable from the "assessments" conducted in *Greene.*[8] First, Judge Whelan noted that the context and duration of the exams in *Greene* and here are similar. In both cases, what the County calls a "medical assessment" and what in *Greene* were called "KIDS Center assessments" involve a visual examination of the children's external genitalia. *See id.* at 1118; *see also* Part I.a. In *Greene*, photographs of the children's private parts were also taken; here, Dr. Wright testified that it was the policy of Polinsky as of 2011 to take pictures where sexual or physical abuse is discovered. *See Swartwood*, 84 F. Supp. 3d at 1118. As Judge Whelan put it,

> In light of these undisputed facts, the only distinguishing feature between the County's

[8] This Court has previously declined to give *Swartwood* issue preclusive effect, since "each of *Swartwood*'s decisions on the County's justifications were supported by at least one determination specific to the facts of that case." Scheduling Order 4. And as discussed above in Part I.b.i.1, this Court disagrees with *Swartwood*'s reading of the scope of *Wallis* and *Greene*. However, those findings do not preclude the Court from adopting reasoning from that case that the Court finds persuasive.

> exams and the exam in *Greene* is the use of the magnifying scope. Nothing in *Wallis* or *Greene* suggests that the Fourteenth Amendment liberty interest only applies when a magnifying scope is used.

Id. Second, Judge Whelan observed that while there is a health component to the examination, there is no dispute that the exams also had an "investigatory nature" because the physician is "looking for" signs of physical and sexual abuse. *Id.* Indeed, here, Dr. Graff repeatedly confirmed that one of the purposes of the assessment was to investigate whether child abuse or neglect occurred. *See* Graff Dep., 51:3–14; 92:10–16. By contrast, comparing the present examinations with that conducted in *Wallis*, a significant difference emerges. The exams at Polinsky involve external genital examinations, not internal body cavity examinations of the type disapproved of in *Wallis.* Indeed, as Dr. Wright, Co-Medical Director at Polinsky testified, physically invasive "forensic sexual examinations to obtain and preserve medical evidence . . . are not conducted at Polinsky at all." Wright Decl. 5, ECF No. 96-7.

The Court finds Judge Whelan's reasoning persuasive on this issue. Accordingly, the Court finds that the type of medical examinations conducted in this case by Polinsky are similar to the medical assessments conducted in *Greene*, not the evidentiary physical examination conducted in *Wallis.* Thus, under the facts presented, Plaintiffs' constitutional rights were implicated by Mrs. Manns' exclusion from the Polinsky examinations, but not by the County's failure to obtain

judicial authorization specific to the Mann children or the Manns' consent prior to conducting the examinations.

3. Defendants' Counterarguments

Defendants argue Plaintiffs' constitutional rights were not violated because (1) there was judicial and statutory authorization for excluding the parents; (2) Plaintiffs were notified of and consented to the medical examinations; and (3) Defendants had valid reasons for excluding the parents.[9] The Court will consider each argument in turn.

A. Judicial and Statutory Authorization

Defendants argue that the medical examinations were authorized by both the 2007 Juvenile Court General Order ("General Order" or "Order"), Pls. Mot., Ex. 12, ECF No. 197-12, as well as Cal. Welf. & Inst. Code § 324.5. Defs. Resp. 4.

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[9] Defendants also argue that *Wallis* and *Greene* apply only to "forensic investigatory exam[s]", not a "standard pediatric exam" as was conducted here. Defs. Resp. 5. Defendants assert that there are "many differences" between the two, "including the context and duration of the exams, the instruments used, and the purposes of the exams." *Id.* However, as discussed above, the Court finds that the relevant distinction is not whether or not an examination is "investigatory." Indeed, as Defendants suggest, all examinations include an "investigatory" component. *Id.* at 9. Instead, the key factual distinction is the *degree of invasiveness* of the examination.

First, the General Order, issued on February 1, 2007 by Judge Susan D. Huguenor of the Superior Court of San Diego County, states in relevant part:

> 1. HHSA may obtain a comprehensive health assessment as recommended by the American Academy of Pediatrics, including a mental status evaluation, for a child prior to the detention hearing in order to ensure the health, safety, and well-being of the child. The assessment may include one or more of the following, as is necessary and appropriate to meet the child's needs:
>
> . . .
>
> b. A physical examination by a licensed medical practitioner.

General Order 1. The Order further provides that the Order itself will expire four years after date of issuance. *Id.* at 2. Since the medical examinations of the children were performed on April 13, 2010, *see* Mann Children's Admission Physical Exams, Pls. Mot., Exs. 8–11, Defendants argue that the Order was operative when the children were examined. Plaintiffs respond that even if the Order was operative, *Wallis* and *Greene* impose constitutional restraints on the operation of the Order. Pls. Mot. 25.

As an initial matter, the Court observes that the General Order does not actually address the role of the parents in any medical examination directed by HHSA. *See* General Order 1–2. Defendants urge that the absence of any mention of parental involvement

should be understood as permission to proceed with the medical examinations without parental presence. But this Court does not understand the absence of any mention of parental role in the General Order as license to affirmatively bar parents from their children's medical exams. "In the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the Constitution." *Wallis*, 202 F.3d at 1130. As discussed above in Part I.b.i.1, the Constitution mounts no barrier to the County's practice of conducting the Polinsky examinations in the absence of exigency, parental consent, or specific judicial authorization. But it does require that parents be allowed to be present during the examination unless there is an emergency or valid basis for exclusion.

Second, § 324.5 states in relevant part:

> (a) Whenever allegations of physical or sexual abuse of a child come to the attention of a local law enforcement agency or the local child welfare department and the child is taken into protective custody, the local law enforcement agency, or child welfare department may, as soon as practically possible, consult with a medical practitioner, who has specialized training in detecting and treating child abuse injuries and neglect, to determine whether a physical examination of the child is appropriate. If deemed appropriate, the local law enforcement agency, or the child welfare department, shall cause the child to undergo a physical examination performed by a

> medical practitioner who has specialized training in detecting and treating child abuse injuries and neglect, and, whenever possible, shall ensure that this examination take place within 72 hours of the time the child was taken into protective custody.

Whether § 324.5 authorizes the County's medical examinations has not been squarely addressed by previous courts. In *Wallis*, the Ninth Circuit suggested that "there is no apparent conflict between the requirements of this opinion and the statute in question." 202 F.3d at 1141 fn. 12 (citing *Tenenbaum v. Williams*, 907 F. Supp. 606 (E.D.N.Y. 1995) (holding "that a New York statute authorizing local officials to give consent for medical services for a child in protective custody did not affect the court's conclusion that, nonetheless, due process required those officials to obtain judicial authorization for a purely investigatory examination issued after notice and an opportunity to be heard had been furnished to the parents," 202 F.3d at 1141 fn. 12), *aff'd in part and vacated in part*, 193 F.3d 581, 604 (2nd Cir. 1999)). However, the *Wallis* court also found that they had "no occasion to consider whether or to what extent that law is affected by our decision here," since the law was not enacted until 1998, seven years following the medical examinations in that case. *Id.* By contrast, here, the medical examinations took place in 2010, and § 324.5 was in effect when the Mann children were examined.

The Court agrees with the Ninth Circuit's preliminary reasoning in *Wallis* that the statutory

authorization for the medical examinations provided by § 324.5 does not override the due process guarantees of the Constitution. In *Greene*, defendants similarly argued that the medical examinations conducted in that case conformed with Oregon statutory and administrative law. 588 F.3d at 1021. But notwithstanding that fact, the Ninth Circuit concluded that the defendants nevertheless violated plaintiffs' clearly established constitutional rights by excluding the mother from the examination room. *Id.* at 1036–37.

B. Notice and Consent

Defendants argue that Plaintiffs were notified and consented to the medical examinations by signing the "Consent to Treatment-Parent" forms. Defs. Resp. to Pls. SSUF 5. This form states, in relevant part,

> CONSENT FOR TREATMENT – PARENT
>
> . . .
>
> I hereby authorize and give my consent for medical, developmental, dental, and mental health care to be given to the above-named child while he or she is in any facility operated by the Health and Huma Services Agency of the County of San Diego or any licensed/certified foster home or public or private institution, if the treatment is recommended by a licensed physician, dentist, psychiatrist or other mental health practitioner.

> Medical, developmental, dental, or mental health care can include:
>
> - Routine admission and placement examinations including blood test, immunization, and cervical cultures (when indicated).
>
> . . .
>
> I prefer treatment by: [ ] Private Physician
> [ ] Other Licensed Hospital/Medical Facility
>
> Name of Family Physician: _____
> Telephone: _____
> Type of Medical Insurance: _____
> Policy Number: _____
>
> If private treatment is selected and cannot, for any reason, be performed, I hereby authorize treatment at a licensed hospital/medical facility.

"Consent to Treatment-Parent" Form ("Consent Form" or "Form"), Pls. Mot., Ex. 13, ECF No. 208-4.

The argument that this same Consent Form constituted legal notice and consent was considered and rejected by the *Swartwood* court. Judge Whelan observed that there were multiple problems with construing the Form as providing notice and consent. Several of those rationales apply here.

First, the consent forms only permit "treatment at a licensed hospital/medical facility" "[i]f private treatment is selected and cannot, for any reason, be performed." In the form presented to the Court, Ms. Mann

chose the "private physician" option and listed the name and telephone number of the family physician, as well as the type of medical insurance and policy number the family had. Consent Form. The form gives the impression that treatment by a "licensed hospital/ medical facility" only occurs if the private treatment cannot be performed. However, Defendants have failed to argue, much less provide any evidence, that the Manns' family physician could not perform the children's medical assessments. *See also Swartwood*, 84 F. Supp. 3d at 1123.

Second, the Court agrees with Judge Whelan that:

> The form is misleading because it strongly suggests at the time the document is signed that there are no plans to provide 'treatment' to the child. Instead, by indicating that such treatment will be provided 'if . . . recommended by a licensed' doctor, the form leaves the parent with the impression that there has been no determination made as to whether the child will receive any treatment. In reality, pursuant to the County's policy, when the form is signed, the child *shall* undergo a 'routine admission and placement examination.'

Id.

Thus, the Court agrees that the County's consent forms employ "'ambiguous language[']" such that "a typical reasonable parent would not have understood the forms to constitute [notice or] consent to the administration of 'general physical exams.'" *Id.* at 1124

(citing *Dubbs v. Head Start, Inc.*, 336 F.3d at 1199, 1208 (10th Cir. 2003)).

C. Valid Reasons for Exclusion

Defendants argue that constitutional requirements notwithstanding, the County had valid reasons for excluding parents from the exams, including "not knowing the extent to which a 'non-offending' parent is involved in the allegations of abuse when children are first brought to Polinsky, the need to determine whether the children require urgent medical attention, the need to protect other children from contagious diseases, and the need to get a health baseline for future treatment and to protect the institution from allegations of abuse." Defs. Resp. 5.

As an initial matter, a number of these justifications can be dispensed with. First, it is not clear, and Defendants advance no evidence, as to why parents would pose a greater risk to other children in terms of contagious diseases by being permitted into the examination room then if they were otherwise present in the facility. Second, it is not clear how the presence of a parent at the medical examination in and of itself would interfere with the "need to determine whether the children require urgent medical attention" or the "need to get a health baseline for future treatment and to protect the institution from allegations of abuse." Both this objection and the objection regarding the lack of knowledge of the extent to which a 'non-offending' parent is involved in the abuse seem to

presume that the parent might interfere with medical examination.

But as the court found in *Swartwood*, the County cannot use a generalized presumption that parents could be disruptive as a basis for a blanket policy excluding all parents. As Judge Whelan put it, "the County's ability to exclude parents from their child's exam" should be understood as "an exception to the general rule that parents must be allowed to attend." 84 F. Supp. 3d at 1120. To hold otherwise would render meaningless the Ninth Circuit's determination that parents' right to [sic] present "may be limited *in certain circumstances* to presence nearby the examinations, if there is some 'valid reason' to exclude family members from the exam room during the procedure." *Id.* (citing *Greene*, 588 F.3d at 1036 (emphasis added)).

Defendants make the additional argument that in this case, since "social workers believed that Mr. Mann had caused the red welt on his daughter's hip, but the workers also knew that Ms. Mann had thrown the workers out of her house during their investigation after they asked to inspect a bruise on her son's head . . . [t]here were valid reasons to exclude both of the parents from the exams." Defs. Resp. 5. These factors might constitute "reasonable cause to believe that the parent is abusive, or perhaps, [that] the non-abusive parent is so emotionally distraught that they would disrupt the exam." *Swartwood*, 84 F. Supp. 3d at 1120. However, Defendants provide no evidence that these factors were actually relied upon by Polinsky in excluding the Manns. To be clear, allegations of abuse or a

well-founded reason for believing a non-abusive parent may act disruptively are "valid reasons" under *Wallis* and *Greene* to exclude parents from medical examinations. But these determinations must be made specific to the parents in question, rather than being the assumptions underlying the blanket policy of the County as to all parents.

ii. Other *Monell* factors

Having found that Plaintiffs were deprived of their constitutional rights as identified above, the remaining *Monell* factors are whether (2) the county had a policy; (3) the policy amounted to a deliberate indifference to the constitutional right; and (4) the policy was the moving force behind the constitutional violation. As to the second factor, parties dispute whether the County actually had the contested policies at issue here. Plaintiffs argue that Dr. Graff testified that the medical examinations were conducted according to the policies and procedures of the County of San Diego. Pls. SSUF in Support of Mot. Summ. J. 6 (citing Graff Dep., 51:12–14), ECF No. 197-4. Dr. Graff testified that she believed that it was Polinsky policy that parents were not allowed to attend medical examinations at Polinsky from 1994 to 2011. Graff. Dep. 110:17–22. However, when asked whether it was County policy to notify the parents before the examination occurs, she stated that while Polinsky did not notify the parent, she did not know "if the removing social worker or other agent informs the parent." Thus, there is some dispute over whether it was the overall policy of the County not to

notify the parents before the examination occurred. Moreover, Defendants argue that "Dr. Graff was not a County employee and did not testify she was competent or knowledgeable about all County policies at Polinsky." Defs. Resp. to Pls. SSUF 6. Accordingly Court finds that whether the County actually had the contested policies is a disputed issue of material fact that must be decided by the jury.

Next, parties dispute whether the County's alleged policies would rise to the level of deliberate indifference of Plaintiffs' constitutional rights. To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its failure to act would likely result in a constitutional violation. *See Gibson v. Cnty. Of Washoe*, 290 F.3d 1175, 1186 (9th Cir. 2002) (citing *Farmer v. Brennan*, 511 U.S. 825, 841 (1994))."[M]uch more difficult problems of proof" are thus presented in a deliberate indifference case than under traditional *Monell* liability. *Id.* (citing *Board of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 406 (1997)). Deliberate indifference is generally considered a jury question. *See id.* at 1195. The Court finds that whether the County acted with deliberate indifference is a disputed issue of material fact that must be decided by the jury.

The final aspect of the *Monell* inquiry is whether the County's alleged policies were the "moving force" behind the constitutional violation, *Monell*, 436 U.S. at 694, or as the Supreme Court has sometimes put it, whether there is a "direct causal link" between a municipal policy and the alleged constitutional

deprivation, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Dr. Graff testified that she conducted the medical examinations without the presence of the parents in accordance with what she believed to be Polinsky policy. Graff. Dep. 110:17–22. Defendants have designated no facts that would present a material dispute as to Dr. Graff's reliance on what she believed to be County policy. Thus, there seems little doubt that should the other *Monell* prongs be satisfied, there would be a "direct causal link" between the County's policies and the constitutional violation of excluding the parents from the medical examination.

iii. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have satisfied steps (1) and (4) of the *Monell* analysis (as to the unconstitutionality of the County's alleged policy of excluding parents from medical examinations, and the causal relationship between the County's alleged policy and the constitutional violation). However, the Court finds that steps (2) and (3), (i.e.,whether the County had the challenged policy, and whether the policy amounted to a deliberate indifference to the Plaintiffs' constitutional rights), are questions for the jury to decide. Accordingly, Plaintiffs' motion for summary judgment on the *Monell* claims is **GRANTED IN PART** and **DENIED IN PART**.

II. Defendants' qualified immunity defense to Plaintiffs' § 1983 First Amendment retaliation claim

Defendants argue that they are qualifiedly immune from Plaintiffs' claim that the social workers were retaliating against Plaintiffs for complaining about their conduct, in violation of Plaintiffs' First Amendment rights, when the social workers acted to remove the children from the Mann home. Defs. Mot. 10.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, on summary judgment, a court "appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818; *see also Davis v. Scherer*, 468 U.S. 183, 183 (1984) (holding that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue").

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing

his conduct." *Harlow*, 457 U.S. at 818–19. But, "if the [government] official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Id.*; *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law." (quoting *Malley*, 475 U.S. at 341)).

In sum, "[w]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time the action was taken." *Anderson*, 483 U.S. at 635. That is, "[t]he relevant question . . . is the objective question whether a reasonable officer could have believed [the conduct at issue] to be lawful, in light of clearly established law and the information the [officer who engaged in the conduct at issue] possessed." *Id.* at 636; *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (setting forth two-step analysis for resolving government officials' qualified immunity claims); *but see Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (holding that two-step *Saucier* analysis should not be regarded as an inflexible requirement, but that a court may consider the steps as the court deems appropriate in its discretion).

Parties dispute the level of generality at which to define the phrase "clearly established law." Defendants argue that no case has applied the First Amendment

right against retaliation in the context of social workers removing children from their parents' care. Defs. Mot. 9. Plaintiffs rejoin that the proper inquiry is whether the First Amendment right against retaliation applies in the context where there was no probable cause to arrest or prosecute the individuals who brought the action. Pls. Resp. 12.

While the Court is mindful that "[a] right can be established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances," this is not a case that involves the "mere application of settled law to a new factual permutation." *See Ford v. City of Yakima*, 706 F.3d 1188, 1195–6 (9th Cir. 2013) (quotations omitted) (internal quotation marks omitted) (citations omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Here, every case cited by Plaintiffs to support the proposition that Defendants violated clearly established law concerns retaliatory arrests and detentions of individuals exercising their First Amendment rights by *police officers*. *See* Pls. Resp. 11–17. In *Ford*, for instance, the Ninth Circuit found that previous precedent barring police officers from acting based on retaliatory animus clearly established the unconstitutionality of retaliatory booking and jailing by police officers. *See* 706 F.3d at 1196. Plaintiffs point to no cases supporting the proposition that the contours of the right have been held to extend to the actions of

social workers removing children from their parents' homes.

Indeed, the Ninth Circuit has made clear distinctions between criminal and child welfare proceedings in the context of comparing criminal prosecutions and civil foster care proceedings. In *Costanich v. Dept. of Social and Health Services*, 627 F.3d 1101, 1115 (9th Cir. 2010), the court observed:

> The special duties of prosecutors and the unique interests at stake in a criminal action do not parallel the duties and interests at stake in a civil child custody proceeding. [The State's]"paramount concern" for safeguarding and protecting the health and safety of foster children, for example, places a special duty on DSHS officials to vigorously investigate allegations of child abuse. Furthermore, it is clear that [state] foster care licensees' and custodial guardians' interests do not rise to the level of a criminal defendant's interests, which are clear and long-established.

Id. at 1115 (citations omitted). While not all aspects of *Costanich* are on all fours with the instant case, the Court takes into consideration *Costanich*'s general admonition that criminal proceedings are not sufficiently analogous to child welfare proceedings that a court can conclude that a right delineated in the former context is "clearly established" in the latter. *See id.* at 1115–16. Thus, this is not a situation where the right is "sufficiently clear" such that "every reasonable official would [have understood] that what he is doing violates

that right." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Ashcroft*, 131 S. Ct. at 2078) (internal quotation marks omitted) (alteration in original). Accordingly, Defendants' motion for summary judgment based on qualified immunity with respect to Plaintiffs' § 1983 First Amendment retaliation claim is **GRANTED**.

III. All claims against Defendants Fierro, Monge, and Solis

a. Claims against Defendant Fierro

Defendants argue that the seven claims against Defendant Fierro (the manager of Defendant Quadros, who was the supervisor of social worker Defendant Hernandez) should be dismissed. Defs. Mot. 15.

i. Federal § 1983 claim

First, Defendants argue that the federal § 1983 claim for violation of Plaintiffs' Fourth and Fourteenth Amendment rights should be dismissed because Fierro did not prepare, review, or edit the warrant application or detention report.[10] (*Id*.) The Court previously declined to grant Defendants summary judgment on the constitutionality of the process of obtaining and executing the protective custody warrant. Summ. J. Order 19. The Court found that Defendants had omitted material facts in the warrant, and that had the omitted

[10] As discussed above in Part II, the Court dismisses Plaintiffs' First Amendment claim as to all Defendants.

information been included, the warrant would not have supported a finding of probable cause. (*Id*.) The Court then found that genuine issues of material fact remained as to whether the social workers intentionally or recklessly falsified the warrant application or detention report. (*Id*.)

Defendants argue that there is neither evidence that Fierro intentionally or recklessly falsified the warrant application or detention report, nor that he was involved in preparing, reviewing or editing either document. Defs. Mot. 16. Plaintiffs respond that even if this is so, Fierro is still liable under a theory of supervisory liability. Pls. Resp. 20.

Personal participation is not the only predicate for § 1983 liability. *Johnson v. Duffy*, 588 F.2d 740, 743 (1978). Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. *Id.* In order to be held liable, a "supervisor need not be 'directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury.'" *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011) (quotation omitted). A defendant may be held liable as a supervisor under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). "[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury." *Starr*, 652 F.3d at 1207. "The requisite causal connection can be

established . . . by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Id.* at 1207–08 (quotations omitted) (internal quotation marks omitted). "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Id.* at 1208 (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)) (internal quotation marks omitted).

Here, plaintiffs have failed to designate specific facts to show that there is a genuine issue for trial. Plaintiffs argue that Fierro spoke with Melissa Mann about her concerns regarding Defendant Hernandez, participated in at least one meeting concerning the Mann family, and was involved in the decision to remove and detain the children. Pls. Resp. 18. They point out that in response to questioning about who made the decision to request a protective custody warrant, Hernandez testified in her deposition that "[t]he entire time I'm consulting with my supervisor and manager as to how to proceed in the case," and that she "believe[d]" that Fierro was involved with the decision to get the protective custody warrant. (Hernandez Dep. 219:20–24, ECF No. 202-3.) And her supervisor Defendant Quadros testified that the process for deciding to pursue a protective custody warrant included

"consult[ing] with [the] manager . . . to get a consensus about what's the appropriate action[ ] to take at that time." (Quadros Dep. 189:17–20, ECF No. 202-4.)

However, viewing the evidence in the light most favorable to the Plaintiffs, even if Fierro was involved in the decision to pursue the protective custody warrant, Plaintiffs point to no evidence that Fierro knew or reasonably should have known that his employees would intentionally omit material facts in the warrant application or detention report. While Plaintiffs might be able to argue that Fierro "set in motion" the procedure for obtaining the warrant, the requisite "series of acts" set in motion here was not the decision to obtain the warrant, but to omit material facts in the warrant that would have defeated probable cause. Nor are there any facts identified by Plaintiffs that would support a finding that Fierro was culpable in his training Hernandez and Quadros, that he acquiesced in the omission of material facts in the warrant, or that his conduct demonstrated a reckless or callous indifference to the rights of others. Indeed, Fierro was responsive to Melissa Mann's initial complaint to the extent that he responded by sending a more senior social worker to accompany Hernandez on her next visit. Pls. Separate Stipulation of Undisputed Material Facts in Support of Opp. to Defs. Mot. Summ. J. 2, ECF No. 202-1. Accordingly, Defendants' motion for summary judgment on the federal § 1983 claim against Fierro is **GRANTED**, and the claim is **DISMISSED** as to Fierro.

ii. State law claims

Defendants argue that Fierro is entitled to absolute immunity from the six state law claims because government actors such as social workers have absolute immunity when they make discretionary decisions involving removal of children from their parents' care. Defs. Mot. 17–18 (citing Cal. Gov't Code § 820.2; *Alicia T. v. Cnty. of Los Angeles*, 222 Cal. App. 3d 869, 881 (Ct. App. 1990) (noting that because "[i]t is necessary to protect social workers in their vital work from the harassment of civil suits and to prevent any dilution of the protection afforded minors by the dependency provisions of the Welfare and Institutions Code . . . social workers must be absolutely immune from suits alleging the improper investigation of child abuse, removal of a minor from the parental home based upon suspicion of abuse and the instigation of dependency proceedings")).) Plaintiffs contend that this provision does not apply where the government actor, acting with malice, (1) committed perjury; (2) fabricated evidence; (3) failed to disclose known exculpatory evidence; or (4) obtained testimony by duress. Pls. Resp. 20–21 (citing Cal. Gov't Code § 820.21). However, as discussed above in Part III.a.i., Plaintiffs have failed to identify specific facts supporting their claim that Fierro committed any of these acts. Accordingly, Defendants' motion for summary judgment on the state-based claims against

Fierro is **GRANTED**, and the claims are **DISMISSED** as to Fierro.[11]

b. Claims against Defendants Monge and Solis

Defendants argue that the seven claims against Defendants Monge and Solis should be dismissed because they were not involved in the removal of the children. Defs. Mot. 21. Plaintiffs note that they only assert claims against Monge and Solis as to violations of § 1983, IIED, and violations of state civil rights laws under Cal. Civ. Code§ 43 and § 52.1. Pls. Resp. 23.

i. Federal § 1983 claim

Defendants argue that the Fourth and Fourteenth § 1983 claims against Monge and Solis should be dismissed because neither was involved in the initial removal of the children, and both are entitled to absolute immunity from any § 1983 claims arising from their acts or omissions in following a court order.[12] Defs. Mot. 21. Plaintiffs argue that the § 1983 claims survive because a jury could infer that Monge and Solis "continued to conceal the true facts from the court during the continuing legal proceedings in an effort to retaliate

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[11] Because the Court finds that Fierro is entitled to absolute immunity on the state law claims, the Court will not address Defendants' additional arguments as to why Fierro is not liable on each state-based claim. *See* Defs. Mot. 19–20.

[12] As discussed above in Part II, the Court dismisses Plaintiffs' First Amendment claim as to all Defendants.

and cover up the misconduct of Defendants Hernandez, Quadros and Fierro." Pls. Resp. 24.

It is undisputed that social worker Monge and her supervisor Solis only became involved in the case when it was transferred to Monge, a member of the County's Court Intervention Unit, following the issuance of a Protective Order removing the children to Polinsky by the Juvenile Court and the subsequent return of the children to the Mann home. Pls. Opp. and Resp. to Defs. Separate Statement of Undisputed Material Facts 3, ECF No. 203. As such, Monge and Solis played no role in the initial removal of the Mann children. Moreover, Monge and Solis are entitled to absolute immunity with respect to the actions they took following the court order. *See Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 842 (9th Cir. 2010) (noting that "[a]bsolute immunity is extended to state officials, such as social workers, when they are performing quasi-prosecutorial and quasi-judicial functions" such as the execution of court orders); *Mabe*, 237 F.3d at 1109 (holding that "social workers 'enjoy absolute, quasi-judicial immunity when making post-adjudication custody decisions pursuant to a valid court order' " (quotation omitted)); *see also Engebretson v. Mahoney*, 724 F.3d 1034 (9th Cir. 2014) (holding that prison officials charged with executing facially valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders).

Plaintiffs rely on *Tatum v. Moody*, 768 F.3d 806, 816 (9th Cir. 2014) to argue that their Fourteenth Amendment due process rights were violated by

Monge and Solis' failure to come forward with exculpatory evidence. (*See* Pls. Resp. 24. However, *Tatum* held that investigatory officers violate the Fourteenth Amendment where, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, they fail to disclose known, potentially dispositive exculpatory evidence to prosecutors. 768 F.3d at 816. Here, Plaintiffs have failed to designate specific facts demonstrating either that Monge and Solis had investigatory responsibilities with respect to the previous actions of Hernandez and Quadros, or that Monge and Solis knew or should have known that material facts had been omitted in the warrant application and detention report. Although Plaintiffs assert that "[b]y virtue of their review of [the Delivered Service Log, the Detention Report, and the Warrant Application], Monge and Solis knew that evidence concerning the Manns' cooperation with the County had been omitted from the Detention Report and Warrant Application," Pls. Resp. 24, Monge denies, and Solis does not state, that they noticed the omissions in their initial review of the documents, *see* Monge Dep. 178:18; Solis Dep. 17:14–25. Nor do Plaintiffs explain how *Tatum* would defeat Monge and Solis' absolute immunity. Accordingly, the Defendants' motion for summary judgment on the § 1983 claims against Monge and Solis is **GRANTED**, and the claims are **DISMISSED** as to Monge and Solis.

ii. State law claims

Defendants argue that Monge and Solis, like Fierro, are entitled to absolute immunity from the six state law claims because government actors such as social workers have absolute immunity when they make discretionary decisions involving removal of children from their parents' care. Defs. Mot. 22. Plaintiffs again contend that this provision does not apply where the government actor, acting with malice, committed perjury, fabricated evidence, failed to disclose known exculpatory evidence, or obtained testimony by duress. Pls. Resp. 25. As discussed above in Part III.b.i, Plaintiffs have failed to identify specific facts supporting their claim that Monge and Solis committed any of these acts. In particular, Plaintiffs have not designated specific facts demonstrating that Monge and Solis knew of the omissions made by Hernandez and Quadros in the warrant application and detention report. Accordingly, the Defendants' motion for summary judgment on the state-based claims against Monge and Solis is **GRANTED**, and the claims are **DISMISSED** as to Monge and Solis.[13]

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[13] Because the Court finds that Monge and Solis are entitled to absolute immunity on the state law claims, the Court will not address Defendants' additional arguments as to why Monge and Solis are entitled to other forms of immunity and are not liable on each state-based claim. (*See* Defs. Mot. 22–27.

IV. Plaintiffs' state law causes of action against remaining individual Defendants Hernandez and Quadros

i. § 52.1 claims

Defendants argue that Plaintiffs' claim against Hernandez and Quadros for violation of state civil rights under Cal. Civ. Code § 52.1 should be dismissed because § 52.1 requires interference with civil rights by use of threats, intimidation, or coercion. Defs. Mot. 27 (citing *Venegas v. Cnty. of Los Angeles*, 153 Cal. App. 4th 1230, 1242 (2007)). Plaintiffs respond that § 52.1 does not require threats, coercion, or intimidation independent from the threats, coercion, or intimidation inherent in the alleged constitutional or statutory violation, or that in the alternative, Hernandez and Quadros did threaten, coerce, or intimidate Plaintiffs. Pls. Resp. 26–27 (citing *D. V. v. City of Sunnyvale*, 65 F. Supp. 3d 782, 789 (N.D. Cal 2014)).

The Court finds Plaintiffs' position more persuasive. *Venegas* did not determine whether the "threats, coercion, or intimidation" required by § 52.1 must be independent from that inherent in the alleged constitutional or statutory violation, instead focusing on whether qualified immunity applies to § 52.1 actions (and finding it did not). *See Venegas*, 153 Cal. App. 4ths [sic] at 1240–1247. Subsequently, the majority of courts interpreting *Venegas* and its progeny have concluded that where defendants act intentionally rather than negligently, § 52.1 does not require threats, coercion, or intimidation independent from the threats, coercion, or intimidation inherent in the alleged constitutional or

statutory violation. *See*, *e.g.*, *Sunnyvale*, 65 F. Supp. 3d at 787–789; *Estate of Lopez ex rel. Lopez v. City of San Diego*, 2014 WL 7330874, at *15 (S.D. Cal Dec. 18, 2014). Here, the Court already previously found that genuine issues of fact remain as to whether Defendants Hernandez and Quadros were retaliating against Plaintiffs for challenging their authority in preparing and filing the detention report and warrant application and removing exculpatory evidence from those documents. Summ. J. Order 20. If Defendants did retaliate against Plaintiffs by acting to remove their children, those actions would be coercive and intimidatory. Thus, Defendants' motion for summary judgment on Plaintiffs' § 52.1 claims is **DENIED**.

ii. Polinsky examinations

Defendants argue that to the extent that any of Plaintiffs' state law claims rest on the manner in which the Polinsky examinations were conducted, Hernandez and Quadros (the only remaining individual defendants) are not liable because there is no evidence that they ordered, participated in, or were present during the medical exams. Defs. Mot. 28. Plaintiffs argue that the harm caused by the Polinsky examinations is a directly foreseeable consequence of Hernandez and Quadros' actions in seeking the removal of the Mann children, and that Hernandez and Quadros were the "but for" cause of that removal. Pls. Resp. 27.

As to Plaintiffs' state law tort claims, since it is undisputed that Hernandez and Quadros were not

personally involved in the Polinsky examinations, Plaintiffs can only succeed if Hernandez and Quadros "aided and abetted" the examinations. However, California tort law requires that a defendant subjected to liability for aiding and abetting a tort must have (1) known the other's conduct constituted a breach of duty and given substantial assistance or encouragement to the other to so act; or (2) given substantial assistance to the other in accomplishing a tortious result where the person's own conduct, separately considered, constituted a breach of duty to the third person. *Austin B. v. Escondido Union School Dist.*, 149 Cal. App. 4th (2007) (citing *Casey v. U.S. Bank Nat'l Assn.*, 127 Cal. App. 4th 1138, 1144 (2005)). In addition, "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." *Casey*, 127 Cal. App. 4th at 1145. Here, Plaintiffs have pointed to no evidence that Hernandez and Quadros had any actual knowledge of what the procedures at Polinsky were, nor that Hernandez and Quadros had any actual knowledge that those procedures constituted any breach of duty. Accordingly, Defendants' motion for summary judgment on Plaintiffs' state law tort claims against Hernandez and Quadros to the extent that they rely on the Polinsky medical examinations is **GRANTED**.[14]

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[14] Since parties did not provide any argument or citation on whether Plaintiffs' state law civil rights claims can rest on the Polinsky examinations, the Court will not address this issue.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment (ECF No. 194) is **GRANTED IN PART** and **DENIED IN PART**;

    a. Defendants' motion for summary judgment based on qualified immunity with respect to Plaintiffs' § 1983 First Amendment retaliation claim is **GRANTED**;

    b. Defendants' motion for summary judgment on all claims against Fierro, Monge and Solis is **GRANTED**;

    c. Defendants' motion for summary judgment on Plaintiffs' § 52.1 claims as to Hernandez and Quadros is **DENIED**;

    d. Defendants' motion for summary judgment on Plaintiffs' state law tort claims against Hernandez and Quadros to the extent that they rely on the Polinsky medical examinations is **GRANTED**;

2. Plaintiffs' motion for summary judgment on the *Monell* claims (ECF No. 197) is **GRANTED IN PART** and **DENIED IN PART**;

3. Defendants Fierro, Monge, and Solis are **DISMISSED** from this action with prejudice.

IT IS SO ORDERED.

DATED: November 20, 2015

/s/ Gonzalo Curiel
HON. GONZALO P. CURIEL
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK MANN et al., Plaintiffs, v. COUNTY OF SAN DIEGO, et al., Defendants.	Case No. 3:11-cv-0708-GPC-BGS **ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S SUMMARY JUDGMENT ORDER REGARDING PLAINTIFFS' *MONELL* CLAIM REGARDING PARENTAL EXCLUSION FROM POLINSKY EXAMINATIONS** (Filed Jun. 17, 2016) [ECF Nos. 226, 227, 247]

Before the Court is Plaintiffs' March 18, 2016 motion for clarification, or, in the alternative, trial brief regarding Plaintiffs' *Monell* claim arising out of the Polinsky Children's Center Examinations. ECF No. 227. On March 28, 2016, following the pretrial conference, the Court invited additional briefing in response to Plaintiffs' motion, specifically on the issues of (1) whether Defendants are judicially estopped from claiming that County of San Diego ("County") did not have a policy of excluding parents from Polinsky Children's Center ("Polinsky") examinations; and (2) whether Plaintiffs must prove deliberate indifference. Jury Trial Preparation and Scheduling Order ("Trial Preparation Order") 1–2, ECF No. 235. Having reviewed the additional briefing, *see* Pl. Brief, ECF No. 239; Def.

Opp., ECF No. 240; Pl. Reply, ECF No. 241; Def. Request for Judicial Notice, ECF No. 242; Pl. Objection to Def. Request for Judicial Notice, ECF No. 243, and the applicable law, the Court now finds that (1) Defendants are judicially estopped from claiming that the County did not have a policy of excluding parents from Polinsky Children's Center examinations; and (2) Plaintiffs are not required to prove deliberate indifference. Accordingly, the Court now finds that Plaintiffs have satisfied all required steps of the *Monell* analysis, and therefore that, as a matter of law, the County violated Plaintiffs' constitutional rights through its policy of excluding parents from Polinsky examinations.

BACKGROUND

The relevant facts in this case having been described in the Court's previous orders, the Court will not reiterate them in depth here. *See* 1st Summ. J. Order 2–12, ECF No. 102. In short, this is an action brought by Plaintiffs Mark and Melissa Mann and their four minor children N.E.H.M., M.C.G.M., N.G.P.M., and M.N.A.M ("Plaintiffs") challenging actions taken by the County, the County's Health and Human Services Agency ("HHSA"), and the County's Polinsky Children's Center, a temporary emergency shelter for children who are separated from their families (collectively "Defendants"), during the course of a child abuse investigation that led to the removal of the minor children from the family's home. *Id.*

Plaintiffs initially filed a complaint against the County, HHSA, Andrea E. Hernandez (née Cisneros), Lisa J. Quadros, Gilbert Fierro, Kelly Monge, Susan Solis, and six other now dismissed defendants. Compl.; *see also* Orders Dismissing Defs., ECF Nos. 93, 142. Plaintiffs asserted eight causes of action for: (1) assault; (2) battery; (3) false imprisonment; (4) violation of federal civil rights guaranteed by the First, Fourth, and Fourteenth Amendments under 42 U.S.C. § 1983; (5) *Monell* claims related to the County's policies; (6) intentional infliction of emotional distress ("IIED"); (7) violation of state civil rights under Cal. Civ. Code § 43; and (8) violation of state civil rights under Cal. Civ. Code § 52.1. Compl. 30–33. Every cause of action was pled against all the Defendants, with the exceptions of the fourth cause of action for the § 1983 claims, which was pled solely against the individual defendants, and the fifth cause of action for the *Monell* claims, which was pled solely against the County, HHSA, and Polinsky. *Id.*

Following parties' initial cross-motions for partial summary judgment, the Court found that Defendants were entitled to qualified immunity with respect to Plaintiffs' fourth cause of action for the § 1983 claims to the extent that such claims were based on Defendants': (1) interview with N.G.P.M. at school; (2) examination of the children at Polinsky; and (3) listing of Mr. Mann on California's Child Abuse Central Index ("CACI"), but not with respect to their actions in obtaining and executing the protective custody warrant. 1st Summ. J. Order 16–29. Defendants were granted

summary judgment on Plaintiffs' Monell cause of action with regards to the charge of inadequate training. *Id.* at 30–31; Scheduling Order 8, ECF No. 190.

Subsequently, the Court found good cause to direct additional briefing in order to determine whether the following issues can be decided on summary judgment: (1) Plaintiffs' *Monell* cause of action based on the Polinsky exams; (2) Defendants' qualified immunity defense to Plaintiffs' § 1983 First Amendment retaliation claim; (3) all claims against Defendants Fierro, Monge, and Solis; and (4) Plaintiffs' state law causes of action of assault, battery, false imprisonment, IIED, and violations of Cal. Civ. Code § 43 and § 52.1. Scheduling Order 9–10.

On November 23, 2015, the Court issued a second summary judgment order. *See* 2nd Summ. J. Order, ECF No. 211. Therein, the Court found that for Plaintiffs' *Monell* claims based on the County's alleged policies of (1) allowing medical examinations to be performed at Polinsky in the absence of exigency, valid parental consent, or court order specific to the child being examined; and (2) preventing parents or guardians from being present during medical procedures, including examinations performed at Polinsky, only the latter policy constituted a deprivation of Plaintiffs' constitutional rights. *Id.* at 11. The Court then found that Plaintiffs had also established that the latter policy was the moving force behind the violation of Plaintiffs' constitutional rights, but had not conclusively established that the County in fact had such a policy, nor

that the policy amounted to a deliberate indifference to a constitutional right. *Id.* at 22–24.

In the second summary judgment order, the Court also granted Defendants' motions for summary judgment: (1) based on qualified immunity with respect to Plaintiffs' § 1983 First Amendment retaliation claim; (2) on all claims against Defendants Fierro, Monge and Solis; and (3) on Plaintiffs' state law tort claims against Defendants Hernandez and Quadros to the extent that they relied on the Polinsky medical examinations, and dismissed Defendants Fierro, Monge, and Solis. *Id.* at 36. Finally, the Court denied Defendants' motion for summary judgment on Plaintiffs' § 52.1 claims as to Defendants Hernandez and Quadros. *Id.*

On March 18, 2016, Plaintiffs moved to clarify the Court's summary judgment ruling on the *Monell* issue, arguing that at the hearing on the motion for summary judgment held on October 16, 2015, County Counsel openly acknowledged that it was the County's policy to exclude parents from examinations conducted at Polinsky, and that deliberate indifference was not a required prong of the *Monell* inquiry in the instant case. ECF No. 227 at 3–4. On March 25, 2016, the Court conducted a pretrial conference. ECF No. 234. Following the pretrial conference, the Court directed the parties to provide additional briefing on the *Monell* issues of (1) whether Defendants are judicially estopped from claiming that County did not have a policy of excluding parents from Polinsky examinations; and (2) whether Plaintiffs must prove deliberate indifference. Trial Preparation Order 1–2.

LEGAL STANDARD

I. Summary Judgment

Federal Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. *Id.* at 322–23. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

Once the moving party has satisfied this burden, the nonmoving party cannot rest on the mere allegations or denials of his pleading, but must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Id.* at 325. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In making this determination, the court must "view[] the evidence in the light most favorable to the nonmoving party." *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

II. Reconsideration

District courts retain inherent authority to revise interim or interlocutory orders any time before entry of judgment. *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000) (citing *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) ("[T]he interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment."); *Balla v.*

Idaho State Bd. of Corrections, 869 F.2d 461, 465 (9th Cir. 1989); Fed. R. Civ. P. 54(b) (noting that unless final judgment has been entered, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities")). A district court may reconsider and reverse a previous interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law. *Id.* (citing *Sport Squeeze, Inc. v. Pro–Innovative Concepts, Inc.*, 51 U.S.P.Q.2d 1764, 1771, 1999 WL 696009 (S.D. Cal. 1999); *Washington v. Garcia*, 977 F.Supp. 1067, 1068 (S.D. Cal. 1997)). But a court should generally leave a previous decision undisturbed absent a showing that it either represented clear error or would work a manifest injustice. *Id.* (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

DISCUSSION

I. Whether Defendants are Judicially Estopped from Claiming That County Did Not Have a Policy of Excluding Parents from Polinsky Examinations

In the Court's second summary judgment order, the Court found that whether the County actually had the contested policy of excluding parents from the examination room at Polinsky was a disputed issue of

material fact that must be decided by the jury. 2nd Summ. J. Order 23. The Court observed that,

> Plaintiffs argue that Dr. Graff testified that the medical examinations were conducted according to the policies and procedures of the County of San Diego. Pls. SSUF in Support of Mot. Summ. J. 6 (citing Graff Dep., 51:12–14), ECF No. 197–4. Dr. Graff testified that she believed that it was Polinsky policy that parents were not allowed to attend medical examinations at Polinsky from 1994 to 2011. Graff Dep. 110:17–22. However, when asked whether it was County policy to notify the parents before the examination occurs, she stated that while Polinsky did not notify the parent, she did not know "if the removing social worker or other agent informs the parent." Thus, there is some dispute over whether it was the overall policy of the County not to notify the parents before the examination occurred. Moreover, Defendants argue that "Dr. Graff was not a County employee and did not testify she was competent or knowledgeable about all County policies at Polinsky." Defs. Resp. to Pls. SSUF 6.

However, at the October 16, 2015 hearing on the second motions for summary judgment, County Counsel acknowledged that at the time the medical examinations were conducted in this case, County policy excluded parents from their children's medical examinations:

> THE COURT: In *Swartwood*, the Court found there was no dispute that the county's policy excludes parents from their children's

> medical exams at the Polinsky Children's Center.
>
> Do you likewise agree that the county policy excludes parents – excluded the parents in this case from their children's medical exams?
>
> MR. BRODIE: It excluded them from the room. But as we presented testimony, or evidence, I believe, in a declaration, parents are allowed to be at Polinsky in the visiting room, and they can talk to medical staff there about their child's medical issues. But as far as at the time of this exam, 2010, parents were not allowed in the exam room at the time. Yes.

Transcript of October 16, 2015 Hearing 15, ECF No. 225.

Plaintiffs thus argue that the admissions of County counsel, combined with the admission by the County in other cases concerning Polinsky's practices such as *Swartwood v. County of San Diego*, 84 F. Supp. 3d 1093 (S.D. Cal. 2014) and *Parkes v. County of San Diego*, 345 F. Supp. 2d 1071 (S.D. Cal. 2004) that this was County policy, judicially estop the County from now claiming that the County did not have such a policy during the relevant time period of this case. Pl. Brief 5–7.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New*

Hampshire v. Maine, 532 U.S. 742, 749 (2001) (alteration in original) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)) (internal quotation marks omitted). The Supreme Court observes that

> This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); *see* 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory[.]").

Id. "[C]ourts have uniformly recognized that [the] purpose [of this rule] is 'to protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing their positions according to the exigencies of the moment.'" *Id.* at 749–750 (citations omitted). "Because the rule is intended to prevent 'improper use of judicial machinery,' judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *Id.* at 750 (citations omitted). "[S]everal factors [that] typically

inform the decision whether to apply the doctrine in a particular case" include (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled"; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750–51 (citations omitted).

The County now provides a number of declarations from County employees purporting to demonstrate that at the time the examination of the Mann children occurred, Polinsky did not have a policy or practice of excluding parents from medical examinations. The County claims that these declarations demonstrate that it was not the case that parents were not "allowed" to be present in the exam room during the exams, but simply that "parents did not attend the exams because they were not informed about the exams." Def. Opp. 12. But the declarations reveal that the parents were not informed about the exams precisely *because* the County believed that they did not have a right to attend. *See, e.g.*, Brodie Decl. 2–3, ECF No. 240-4 ("[U]pon further analysis and reflection, I realize my statements concerning parental presence at the exams were not entirely accurate. Polinsky is a confidential placement for children, and at the time of the exams in this case and in *Swartwood*, parents and guardians did

not attend the exams. The reason they did not attend is that they were not informed by social workers at the time of the removal that the child would have a medical examination at Polinsky, and there were no steps taken to make provisions for them to attend. They were not informed by the County about the exams because the County did not believe they had a right to be present. . . .").[1]

Monell liability attaches whether the constitutional deprivation is attributable to an "overall policy," a "persistent and widespread practice," or the direction of a policymaking official. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1144–45 (9th Cir. 2012) (citing *Connick v. Thompson*, 131 S. Ct. 1359 (2011)). Here, the County is effectively admitting that even if they did not have a written policy of excluding parents from

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[1] *See also* McCarthy Decl. 2–3, ECF No. 240-3 ("Based on my office's evaluation of the *Wallis* case, we did not believe the holding of the case meant parents had a right to be present at the Polinsky exams. . . . My understanding is that before the changes in 2015, parents and guardians whose children were removed by County social workers were not informed about the Polinsky medical exams because they were just part of the routine admission process. . . ."); Rincon Decl. 2, ECF No. 240-1 ("[T]he medical examinations for children entering Polinsky are conducted in an area not accessible to the public. . . . In 2015, the County moved the medical exam room location at the Polinsky facility, changed its forms so that parents and guardians would be notified about their child having a medical exam in Polinsky, and provided for parents and guardians to attend the exam if they wished. . . . [B]efore 2015, when children were removed from their parents' or guardians' care by County of San Diego social workers, the social workers did not inform the parent or guardian that their child was going to have a medical exam at Polinsky.").

these examinations, they had a persistent and widespread practice of doing so. *See also* Def. Opp. 13 (admitting that "the County is not currently saying parents were allowed into the Polinsky exams").

Moreover, as Plaintiffs point out, the County consistently adopted the position not only that they had a policy of excluding parents from Polinsky examinations, but that doing so did not amount to a *Monell* violation, in multiple cases before courts in this district. *See Swartwood*, 84 F. Supp. 3d at 1116 (noting that Defendant's opposition brief stated that "'there is no factual dispute about parental presence at the Polinsky exams. Parents are not allowed in the exam room when the Polinsky exams are conducted, though they are allowed to visit their children in the visitation area and speak to the doctors about their children's medical issues.'"); *Parkes*, 345 F. Supp. 2d at 1095 ("It is undisputed that the non-offending parent is not permitted to be present at physical examinations conducted by the agency.").

Thus, it is plain both that the County's current position is "clearly inconsistent" with its earlier position, and that the County has previously succeeded in persuading a court to accept the County's earlier position. In addition, the Court observes that to allow the County to adopt its current position would allow the County to derive an unfair advantage, since the County appears to have adopted its current position only because three courts in this district have now found that the parental exclusion policy constitutes a constitutional deprivation under *Monell*. Thus, the

Court finds that the County is judicially estopped from claiming that the County did not have a policy of barring parents from attending their children's medical examinations at Polinsky.

II. Whether Plaintiffs Must Prove Deliberate Indifference

Previously, the parties did not dispute whether deliberate indifference is a required prong for *Monell* liability at the summary judgment stage.[2] However, Plaintiffs now argue that deliberate indifference is not a required prong, Pl. Brief 10, while Defendants maintain that it is, Def. Opp. 8. Upon review of the applicable law, the Court agrees with Plaintiffs that deliberate indifference is not a required element for *Monell* liability in the instant case.

In the Court's previous summary judgment order, the Court stated that "[t]o establish municipal liability where a municipality's inaction in failing to protect the plaintiffs' constitutional rights is the source of the deprivation, the plaintiffs must show that (1) they were deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to the constitutional right; and (4) the policy was the "moving force behind the constitutional violation."

[2] Indeed, at the hearing for the second summary judgment motions, the Court asked Plaintiffs' counsel whether deliberate indifference is a required showing, and Plaintiffs' counsel responded that "deliberate indifference is an element always in a *Monell* cause of action." Transcript of October 16, 2015 Hearing 25, ECF No. 225.

2nd Summ J. Order 10 (citing *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1111 (9th Cir. 2001)) (internal quotation marks omitted). This Court observed that deliberate indifference is generally considered a jury question, and found that whether County acted with deliberate indifference was a disputed issue of material fact that must be decided by the jury. *Id.* at 23–24 (citing *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1195 (9th Cir. 2002)).

However, a closer review of the caselaw discloses two types of *Monell* liability: the "direct" and "indirect" paths to municipal liability. *Monell* itself did not include a deliberate indifference prong. *See Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978). Analyzing the legislative history of the Civil Rights Act of 1871, the Supreme Court concluded that Congress intended for municipalities and other local government units to be included among those "persons" subject to § 1983 liability. Where a local government's "policy statement, ordinance, regulation, decision" or "custom or usage" "so permanent and well settled as to constitute a 'custom or usage' with the force of law" is "responsible for a deprivation of rights protected by the Constitution," that local government may be sued under § 1983. *Id.* at 690–91 (citations omitted). *Monell* also imposed a causation requirement: the policy must have been what the Court termed "the moving force of the constitutional violation," *id.* at 694, and a municipality cannot be held liable under § 1983 on a *respondeat superior* theory, *id.* at 691.

Following *Monell*, the Supreme Court struggled in a series of cases with what to do in instances where the direct causal link between an averred policy and constitutional deprivation was less clear than in *Monell* itself (where an official policy compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons was the straightforward cause of the constitutional deprivation). *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 385–86 (1989) (citing cases). On the one hand, the Court was reluctant to find that municipalities can only be found liable under § 1983 where "the policy in question [is] itself unconstitutional." *See, e.g.*, *id.* at 386 (alteration in original). On the other hand, the Court feared that "[t]o adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983," because "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *See id.* at 391–92 (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985)).

In *City of Canton*, the Supreme Court decided that the "deliberate indifference" test struck the best balance between these competing values in cases where the plaintiff alleges that the municipality's *inaction* in failing to protect plaintiff's constitutional rights is the cause of the constitutional deprivation. *Id.* at 388. In *Canton*, the plaintiff argued that the municipality was liable under § 1983 for a failure to train its police

officers where, after the plaintiff was arrested and brought to the police station, police officers did not summon medical attention for the plaintiff after she became incoherent and slumped on the floor on several occasions over the course of about an hour. *Id.* at 381. The Court found that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 388. Cases that followed *Canton* further developed the meaning of the "deliberate indifference" test, but predominantly in the failure-to-train context, or analogous theories like negligent supervision or hiring. *See, e.g.*, *Connick*, 131 S. Ct. 1359; *Bd. of Cnty. Com'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397 (1997); *Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (holding that, to prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

Thus, the Ninth Circuit has characterized existing *Monell* doctrine as creating "[t]wo [p]aths" to municipal liability. *See Gibson*, 290 F.3d at 1185; *see also Tsao*, 698 F.3d at 1142; *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). First, under the "direct" route to *Monell* liability, "a plaintiff can show that a municipality itself violated someone's rights or that it directed its employee to do so." *See Gibson*, 290 F.3d at 1185 (citing *Bryan Cnty.*, 520 U.S. at 404).

> Examples of this direct path to municipal liability include: a city's policy of discriminating against pregnant women in violation of the Fourteenth Amendment, *Monell*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611; a policymaker's order to its employees to serve capiases in violation of the Fourth Amendment, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); and a county policy that policymakers know will place aggressive and passive homosexuals in the same jail cell in violation of the passive homosexual's Fourteenth Amendment right to personal security. *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc).

Id. at 1185–86.

Second, under the indirect route, "a plaintiff can allege that through its *omissions* the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation." *Id.* at 1186 (emphasis added) (citing *Canton*, 489 U.S. at 387–89). In the latter case, plaintiffs must then show that "the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation." *Id.* at 1186 (citing *Canton*, 489 U.S. at 387).

In *Van Ort*, plaintiffs brought suit against the County of San Diego, the San Diego Sheriff's Department, and

others, seeking damages for mental and physical injuries incurred when a Sheriff's Deputy, while off-duty, "attacked and tortured" plaintiffs during the course of a home invasion conducted by the Deputy. *Id.* at 833–34. The court found that any negligent hiring or supervision of the Deputy was not the proximate cause of the injuries suffered, since the Deputy's actions as a private individual were an intervening cause of the attack on plaintiffs. *Id.* at 837.

Similarly, in *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992), the jury found that a county was "deliberately indifferent" to the right of detainees not to be incarcerated without prompt pretrial procedures where its policymaker knew that "some inmates could not communicate their plight or were out of touch with their families or lawyers[,] some inmates remain[ed] incarcerated for a period of time because they missed their arraignments[, and in] at least 19 incidents between 1981 and 1989[,] individuals sat in jail for periods of undetermined length after they missed arraignment," but did not develop any procedures to alleviate this problem. *Id.* at 1477–78.

As the Ninth Circuit observes, the salient inquiry is thus whether the constitutional violation is the result of an "overall policy," a "persistent and widespread practice," or the direction of a policymaking official. *See Tsao*, 698 F.3d at 1144–45 (citing *Connick*, 131 S. Ct. at 1359). Defendants argue that the indirect path to *Monell* liability ought to apply because the County did not have either a formal policy regarding parental presence at the Polinsky exams, or a practice or custom

of barring parents from the exam. Def. Opp. 9. However, as discussed *supra* in Part I, the Court now finds that the County did indeed have such a policy or practice. As such, the Court also finds that the direct path to *Monell* liability applies, and Plaintiffs do not need to show deliberate indifference.

CONCLUSION

Since the Court found in the Second Summary Judgment Order, ECF No. 211, that a municipal policy or practice of preventing parents or guardians from being present during the Polinsky examinations constituted a deprivation of Plaintiffs' constitutional rights, and that Plaintiffs had also established that such a policy would be the moving force behind the violation of Plaintiffs' constitutional rights, and now finds that the County had such a policy or practice, and that Plaintiffs are not required to show deliberate indifference, Plaintiffs have satisfied all the elements to establish *Monell* liability as to the County's exclusion of Plaintiffs from their children's medical examinations at Polinsky.

Accordingly, **IT IS HEREBY ORDERED** that:

1. The Court **GRANTS** summary judgment in favor of Plaintiffs as to their *Monell* claim relating to the County's exclusion of Plaintiffs from their children's medical examinations at Polinsky.

2. The Court **DENIES** Defendants' request for additional briefing and ruling on an issue of law regarding *Monell* claim for failure to provide

exculpatory evidence. ECF No. 226. Parties may address this issue using one of their allotted motions in limine if they so choose.

3. The Court **DENIES** Defendants' ex parte motion for permission to file additional motions in limine. ECF No. 247. The instant Order reduces the number of triable issues, such that the Court questions whether even eight motions in limine are necessary. That said, the Court will continue to permit each side to file a maximum of eight motions in limine.

IT IS SO ORDERED.

DATED: June 17, 2016

/s/ Gonzalo P. Curiel
HON. GONZALO P. CURIEL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK MANN; et al., Plaintiffs-Appellees, v. COUNTY OF SAN DIEGO; et al., Defendants-Appellants.	No. 16-56657 D.C. No. 3:11-cv-00708-GPC-BGS Southern District of California, San Diego ORDER (Filed Feb. 21, 2019)

MARK MANN; et al., Plaintiffs-Appellants, v. COUNTY OF SAN DIEGO; et al., Defendants-Appellees.	No. 16-56740 D.C. No. 3:11-cv-00708-GPC-BGS

Before: WARDLAW, NGUYEN, and OWENS, Circuit Judges.

Judge Wardlaw, Judge Nguyen, and Judge Owens vote to deny the County of San Diego's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.

35. The petition for rehearing is denied and the petition for rehearing en banc is rejected.