APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

N.E.L.; M.M.A., Plaintiffs-Appellants, v. DOUGLAS COUNTY, COLORADO; LESA ADAME, in her individual capacity; CARL GARZA, in his individual capacity, Defendants-Appellees, and MONICA GILDNER, in her individual capacity; ANGELA WEBB, in her individual capacity; TINA ABNEY, in her individual capacity, Defendants.	No. 17-1120 (D.C. No. 1:15-CV-02847-REB-CBS) (D. Colo.)

ORDER AND JUDGMENT*

(Filed July 3, 2018)

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **PHILLIPS**, **KELLY**, and **McHUGH**, Circuit Judges.

Kansas child-and-family-services employees obtained an ex parte order from a Kansas state court to take physical custody of ten minor children. Because the children were with their mother visiting her college friends in Douglas County, Colorado, the Kansas family-services employees somehow arranged for a counterpart in Colorado, along with a local deputy sheriff, to execute the ex parte Kansas order.[1] Two of the minor children, N.E.L. and M.M.A. (after reaching the age of majority), sued the Kansas and Colorado governmental employees, as well as Douglas County, Colorado, under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado.

The Colorado district court dismissed the claims against Douglas County and the Colorado governmental employees under Federal Rule of Civil Procedure 12(b)(6) and transferred the claims against the Kansas defendants to the United States District Court for the District of Kansas. N.E.L. and M.M.A. now appeal the dismissal of their claims against the Colorado defendants.[2] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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[1] The First Amended Complaint doesn't specify which Kansas employees communicated with the Colorado employees or in what order the communications occurred.

[2] N.E.L. and M.M.A. do not appeal the transfer of their claims against the Kansas defendants.

BACKGROUND

A. The First Amended Complaint's Allegations[3]

N.E.L., M.M.A., and their eight siblings lived with their parents, Mr. and Mrs. Doe, in Johnson County, Kansas. In spring 2008, "one of the younger" Doe children "began exhibiting troubling behavior and making troubling comments" that suggested Mrs. Doe's brother, the children's uncle, had sexually abused her in 2006 or earlier. J.A. at 15–16 ¶¶ 18–19. Alarmed by these revelations, the Does sought counseling for the girl and any siblings who may have witnessed the abuse. In June 2008, the Does reported the alleged sexual abuse to the Kansas Department of Children and Families. The Does told agency employees that since 2006 they had barred the suspected uncle and all other members of Mrs. Doe's family from any contact with the children.[4] The Kansas Department of Children and Families assigned Monica Gildner, a defendant in this case, to serve as the Does' social worker.

On June 13, 2008, after the Does made the report, Gildner conducted a safety assessment of the Doe home and found no evidence that the Does "were neglecting their children's physical needs." *Id.* at 16 ¶ 26(f). Gildner then referred the allegedly abused child to a facility called the Sunflower House, where

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[3] When reviewing Rule 12(b)(6) dismissals, we accept the well-pleaded allegations of the complaint as true and view them in the light most favorable to the plaintiff. *Jones v. Hunt*, 410 F.3d 1221, 1223 (10th Cir. 2005).

[4] N.E.L. and M.M.A. don't disclose why the Does ceased contact with all Mrs. Doe's relatives, not just her brother.

staff interviewed the child and three of her older siblings. In her Sunflower House interview, the child repeated her allegations. Gildner never interviewed the child. The child later shared more details of the abuse with her parents, and the Does reported these additional details to the Kansas Department of Children and Families. In response to these additional allegations, Gildner referred the child back to the Sunflower House.

In December 2008, a second Doe child reported sexual abuse by the same uncle.[5] As with the first child, Gildner referred this child to the Sunflower House for an interview.

Despite the two children's reports, "Gildner took a position that the abuse never occurred," *Id.* at 18 ¶ 42, and then "engaged on a course of conduct to smear Mrs. Doe." *Id.* at 18 ¶ 43. Specifically, Gildner "baselessly pronounced that Mrs. Doe had post-partum depression and mental instability." *Id.* at 18–19 ¶ 45. Gildner also "took a position that Mrs. Doe" and "the Doe children needed counseling to overcome their supposed false beliefs about the abuse." *Id.* at 19 ¶¶ 48, 49.

Mrs. Doe agreed to go to counseling "in an effort to satisfy Gildner's outrageous demands that she do so." *Id.* at 19 ¶ 50. Despite her efforts, Gildner told the Does that if they "pursued legal action against the [uncle], either civilly, criminally, or through further investigation" by the Kansas Department of Children and

[5] The First Amended Complaint doesn't specify when the alleged abuse occurred.

Families, "the children would be harmed by 'borderline emotional abuse.'" *Id.* at 19 ¶ 51. So the Does "attempted to cease contact with Gildner," communicating this desire to Angela Webb and Tina Abney, Gildner's supervisors at the Kansas Department of Children and Families (and also defendants in this case). *Id.* at 19 ¶ 53. "Gildner retaliated by threatening to initiate a court action," and by requiring that the entire family participate in counseling through Family Preservation Services. *Id.* at 20 ¶ 58. Through this counseling, Gildner intended to dissuade the Does and their children from believing the abuse allegations. Instead of participating in Family Preservation Services, Mrs. Doe informed Gildner she would "seek counseling services through Catholic Charities," and Gildner didn't object. *Id.* at 20 ¶ 62.

In February 2009, Gildner received two additional reports that the second-reporting Doe child had been sexually abused.[6] When Gildner failed to act, Mr. Doe filed a formal complaint with the Kansas Department of Children and Families. Despite the complaint, Gildner remained the Does' primary contact for the case, and she opposed having the reporting children undergo further interviews or medical exams. After Mr. Doe met with Gildner concerning the children's abuse claims, Gildner "threatened him" and said that she'd "possibly have to staff the case with the District Attorney's Office and possibly get the Court involved" if the Does refused to participate in Family Preservation

[6] The First Amended Complaint doesn't identify who made these reports to Gildner.

Services. *Id.* at 21–22 ¶¶ 73–74. After Gildner issued this warning, she met with Abney and Webb. Together, they decided that if the Does refused to participate in Family Preservation Services, Gildner would ask the District Attorney to file child-in-need-of-care petitions for the Doe children. Then in March 2009, the Does reported to the Kansas Department of Children and Families that the same uncle had sexually abused a third child of theirs.[7]

On April 20, 2009, in the Johnson County, Kansas district court, Gildner filed ten child-in-need-of-care petitions, one for each Doe child.[8] The petitions sought to terminate the Does' parental rights, to appoint a permanent custodian for the Doe children, to remove the children temporarily from the Does' custody, and to require the Does to pay child support. That same day, the court set the petitions "for a non-emergency hearing three weeks later, on May 11, 2009," *id.* at 25 ¶ 92, and appointed a Guardian Ad Litem (GAL) for the ten Doe children.

Just eight days after Gildner filed the petitions, Mr. Doe communicated with Abney to express his willingness to participate in Family Preservation Services, but Abney referred him to Gildner. Mr. Doe instead communicated with Webb, but she too referred him to Gildner.

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[7] Again, the First Amended Complaint doesn't specify when the alleged abuse happened.

[8] At the time, the Doe children ranged in age from six months to thirteen years.

On April 30, 2009, a Doe relative called Gildner and asked her whether the Does had "left town" and taken their children with them. *Id.* at 25 ¶ 100. That same day, Gildner called Mr. Doe and left him a message about Family Preservation Services but made no further effort to contact him for the next four days.

On May 4, 2009, Gildner "decided to make an uninvited visit to the Doe home," even though she knew that the family, except Mr. Doe, had gone to Douglas County, Colorado to visit the Does' college friends, Dr. and Mrs. G. *Id.* at 26 ¶ 104. Mr. Doe met Gildner outside the home, telling her that "all contact needed to be through his attorney, whose name he provided." *Id.* at 26 ¶ 105. When local police officers asked for Dr. and Mrs. G's address, Mr. Doe provided it.

On May 5, 2009, Gildner, Abney, and Webb sought an ex parte protective-custody order for each Doe child.[9] That same day, the Kansas state court issued the orders, concluding (1) that "[r]easonable efforts have been made and have failed to maintain the family and prevent the unnecessary removal of the [children] from" their home and (2) that "reasonable efforts are not required to maintain the child[ren] in the home because an emergency exists which threatens the safety

[9] N.E.L. and M.M.A. attached to the First Amended Complaint one of the Kansas ex parte orders as an example. Because they refer to this example in their complaint and the order is central to their claims, we consider it. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

of the child[ren]." J.A. at 47.[10] The court also found that "remaining in the home or returning home would be contrary to the welfare of the child[ren]" and that "immediate placement is in the best interest of the child[ren]" because:

> after the child in need of care petitions were filed alleging physical, sexual, mental, or emotional abuse, it is reported that the children have been taken out of the area. The father was contacted on May 4, 2009, and he would not provide any information on the whereabouts of the children. The whereabouts and safety of the children are unknown.

Id.

Despite these conclusions, the issuing judge left blank some parts of the protection-order forms. In the section concerning custody, for example, the judge didn't list where the children should be placed once recovered. And the judge didn't check the box that, if so marked, would have denied Mr. and Mrs. Doe visitation rights during their children's protective custody. Further, the judge didn't check a box empowering law-enforcement officers to take physical custody of the children. Nor did the judge check another box providing for a restraining order (with a corresponding blank space to identify who would be restrained). And the court didn't set a hearing date.

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[10] The court issued an order for each child, but N.E.L. and M.M.A. provide us with only one order as an example.

After obtaining the ex parte orders, Gildner, Abney, and Webb began "working" with Lesa Adame, a social worker at the Colorado Department of Social Services and the Douglas County Department of Human Services, and Carl Garza, a deputy in the Douglas County Sheriff's Office, "in meetings and over the phone and by other means of electronic communication." *Id.* at 40 ¶ 194. Together, the group "conspired and agreed to deprive" N.E.L., M.M.A., and the eight other Doe children of their rights. *Id.* at 41 ¶ 194.

Despite state laws, chiefly the Colorado Uniform Child-Custody Jurisdiction and Enforcement Act (Colorado UCCJEA), Colo. Rev. Stat. §§ 14-13-101 to -403 (2009), requiring them to do so, Adame and Deputy Garza didn't register the Kansas ex parte protection order with a Colorado court before executing it.[11]

On May 6, 2009, the day after the court entered the ex parte protection orders, Adame and Deputy Garza took the orders to Dr. and Mrs. G's home. Deputy Garza and Adame arrived at the home in his patrol car and together went to the front door. After Dr. G

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[11] *See* Colo. Rev. Stat. Ann. § 14-13-204 (official comment) ("In order for a protective order that contains a custody determination to be enforceable in another State it must comply with the provisions of [the Colorado UCCJEA] and the [Parental Kidnapping Prevention Act]."); *id.* § 14-13-102 (official comment) ("The definition of 'child-custody proceeding' has been expanded. . . . The inclusion of proceedings related to protection from domestic violence is necessary. . . ."); *see also id.* § 14-11-101(4) ("Notwithstanding [normal docketing procedures required for out-of-state decrees], a child-custody determination, as that term is defined in section 14-13-102(3), issued by a court of another state shall be registered in accordance with section 14-13-305.").

answered the door, Adame or Deputy Garza told him that they had a Kansas court order "to seize custody of all ten" Doe children and "demanded entry and custody of the children."[12] *Id.* at 32 ¶ 132. Adame told Dr. G that employees of the Kansas Department of Children and Families had sought her assistance.

Faced with this alarming situation, Dr. G called an attorney for advice. Acting on the attorney's advice, Dr. G asked Adame and Deputy Garza to produce a warrant. Either Adame or Deputy Garza[13] responded that they weren't required to obtain a warrant to enter, claiming that "[w]e do this all the time." *Id.* at 32 ¶ 137. After Dr. G disputed the legality of the entry, Deputy Garza said something to the effect of, "I don't care what your lawyer says, we're coming in and we're taking these kids." *Id.* at 32 ¶ 139. Deputy Garza wore his sidearm throughout the confrontation, and he threatened Dr. G "with arrest or contempt for interfering with law enforcement." *Id.* at 32 ¶ 138. Over Dr. G's objection, Adame and Deputy Garza entered the home.

Inside, Adame announced and began implementing a safety plan,[14] which (1) required Mrs. Doe to leave

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[12] The First Amended Complaint doesn't specify which person made these statements.

[13] Nor does the First Amended Complaint specify which person made this statement.

[14] To their First Amended Complaint, N.E.L. and M.M.A. attached the safety plan that Adame had implemented at Dr. and Mrs. G's home. Because they refer to the safety plan in their complaint and it's central to their claims, we consider it. *Gee*, 627 F.3d at 1186.

Dr. G's house immediately "to ensure safety of the children"; (2) forbade Mrs. Doe from contacting the children through Dr. G and Mrs. G; (3) declared that "the children are currently in the custody of Kansas state, [sic] social services"; (4) advised Mrs. Doe that she must contact Gildner on May 7, 2009; and (5) advised Dr. G and Mrs. G that they must "follow through with" the safety plan as agreed.[15] *Id.* at 49. All three adults signed the plan. In the same discussion, Adame and Deputy Garza told Dr. G that Kansas officials would arrive later to take physical custody of the Doe children. Later, by phone, Adame prohibited Mr. Doe and the Doe children's grandparents from talking to the children. That evening, seeing the children's distress, Dr. G and his wife chose to drive through the night to take the ten Doe children back to Kansas to turn them over to the state rather than wait for the Kansas officials to arrive.

B. The Court Proceedings

Years later, on December 31, 2015, N.E.L. and M.M.A. filed a complaint in the United States District Court for the District of Colorado, naming Adame, Deputy Garza, Gildner, Abney, Webb, and Douglas County as defendants. Deputy Garza, Adame, and Douglas County moved to dismiss the complaint, and Gildner, Abney, and Webb later filed their own motion to dismiss. The magistrate judge recommended denying

[15] The safety plan included a sixth requirement that is redacted or illegible as scanned into the filed joint appendix.

both motions after granting N.E.L. and M.M.A. leave to amend their complaint.

N.E.L. and M.M.A. then filed their First Amended Complaint, alleging under 42 U.S.C. § 1983 that Adame and Deputy Garza[16] had violated the Fourth Amendment by failing to register the Kansas ex parte order with a Colorado court before executing it, in violation of the Colorado UCCJEA; by entering Dr. and Mrs. G's home without a warrant; and by illegally seizing them. They also alleged that Adame, Deputy Garza, Gildner, Abney, and Webb had interfered with their right to familial association in violation of the Due Process Clause of the Fourteenth Amendment.

Based on these deprivations of their rights, N.E.L. and M.M.A. alleged that Adame, Deputy Garza, Gildner, Abney, and Webb had engaged in a civil conspiracy to deprive them of their rights. And they alleged Douglas County's § 1983 liability for their Fourth Amendment injuries, based on two theories. First, they alleged that Douglas County had an "unwritten policy, custom[,] or practice" of seizing children "based on out-of-state ex parte court orders in violation of the United States Constitution and Colorado law, including but not limited to the Colorado [UCCJEA]." J.A. at 44 ¶ 216. Alternatively, they alleged Douglas County had acted with deliberate indifference in failing to adopt policies requiring compliance, or in failing to train

[16] N.E.L. and M.M.A. also asserted this claim against Gildner, Abney, and Webb, presumably for precipitating Adame and Deputy Garza's actions.

personnel to comply, with "the United States Constitution and Colorado law, including but not limited to the Colorado UCCJEA." *Id.* at 44 ¶ 218.

Adame, Deputy Garza, and Douglas County moved to dismiss the First Amended Complaint, contending that the statute of limitations had run for N.E.L. and M.M.A.'s claims and, alternatively, that absolute, quasi-judicial, or qualified immunity barred the claims. They also contended that the First Amended Complaint insufficiently alleged Douglas County's liability on a custom or policy theory because it asserted only a single instance of unconstitutional conduct. Addressing N.E.L. and M.M.A.'s deliberate-indifference claim, they contended that the First Amended Complaint pleaded no supporting facts. In their motion, Adame and Deputy Garza acknowledged partly relying on a 2007 state-court standing order to enter Dr. and Mrs. G's home. The 2007 state-court standing order permitted law-enforcement and child-and-family-services personnel to interview alleged child-abuse victims "at a school, daycare, or other place where the child may be located," without a court order or signed consent from a parent or a guardian. *Id.* at 63.

Gildner, Abney, and Webb separately moved to dismiss the First Amended Complaint, alleging that the court lacked personal jurisdiction over them.

The magistrate judge recommended granting Adame, Deputy Garza, and Douglas County's motion to dismiss. He concluded that both prongs of the qualified-immunity analysis supported dismissing the

Fourth Amendment claim against Adame and Deputy Garza, reasoning: (1) that N.E.L. and M.M.A. hadn't sufficiently alleged a constitutional violation, and (2) that they hadn't shown that Adame and Deputy Garza had violated clearly established law. Addressing the Fourteenth Amendment claim against Adame and Deputy Garza, he recommended granting the motion to dismiss on the first prong of the qualified-immunity analysis—that the plaintiffs had failed to allege a constitutional violation. He also recommended dismissing the civil-conspiracy claim after applying qualified immunity to defeat the underlying claims.

Having recommended dismissing N.E.L. and M.M.A.'s claims against Adame and Deputy Garza based on qualified immunity, the magistrate judge declined to address their statute-of-limitations affirmative defense. He next recommended dismissing N.E.L. and M.M.A.'s claim against Douglas County because he found no underlying constitutional violation. Addressing the claims against the Kansas defendants, Gildner, Webb, and Abney, he recommended transferring the claims to the United States District Court for the District of Kansas under 28 U.S.C. § 1631 in lieu of dismissing them for lack of personal jurisdiction.

N.E.L. and M.M.A. objected to the magistrate judge's recommendation on several fronts. To establish that he had incorrectly recommended dismissing Douglas County from the case, N.E.L. and M.M.A. offered a 2012 Douglas County internal policy as evidence of the county's deliberate indifference. That policy reads:

> Out-of-State Court Orders are not valid on their face in Colorado. When in contact with a citizen who wants an out-of-state court order enforced, inform them that you can not [sic] do that as their order has no legal standing in Colorado. Direct the person to the Douglas County District Court to obtain a Supplemental Colorado Court Order. Once that has been issued, the out-of-state order is considered 'domesticated' and the Sheriff's Office can enforce those provisions that are appropriate. (**This is not true, however, in the case of foreign Protection or Restraining Orders. Those are enforceable.** See PAT-D-201 – *Foreign Protection Orders*.)

Id. at 209.

But the district court was unpersuaded and adopted the magistrate judge's recommendations. In so doing, the court granted Adame, Deputy Garza, and Douglas County's Rule 12(b)(6) motion to dismiss on qualified-immunity grounds and transferred N.E.L. and M.M.A.'s claims against Gildner, Webb, and Abney to the District of Kansas.

DISCUSSION

N.E.L. and M.M.A. appeal the district court's Rule 12(b)(6) dismissal of their Fourth Amendment and Fourteenth Amendment claims against Adame and Deputy Garza; the dismissal of their civil-conspiracy claim against Adame and Deputy Garza; and the dismissal of their claim against Douglas County. N.E.L.

and M.M.A. don't appeal the district court's transfer of their claims against Gildner, Webb, and Abney to the District of Kansas.

"The legal sufficiency of a complaint is a question of law," so we review de novo a district court's dismissal under Rule 12(b)(6). *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In reviewing Rule 12(b)(6) dismissals, we accept the well-pleaded allegations of the complaint as true and view them in the light most favorable to the plaintiff. *Jones v. Hunt*, 410 F.3d 1221, 1223 (10th Cir. 2005). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff may not solely rely on "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). Pleading facts "that are 'merely consistent with' a defendant's liability" doesn't meet that standard. *Id.* (quoting *Twombly*, 550 U.S. at 557).

We first address the qualified-immunity issue and then turn to N.E.L. and M.M.A.'s claim against Douglas County.[17]

A. Qualified Immunity

Qualified immunity protects government officials from liability for civil damages if their conduct "does not violate clearly established statutory or constitutional rights" that a reasonable person would have known about. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks omitted) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).[18] "[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v Briggs*, 475 U.S. 335, 341 (1986)). To overcome a government official's qualified immunity defense, a plaintiff must demonstrate (1) that the official violated a statutory or

[17] Because we conclude that Adame and Deputy Garza are entitled to qualified immunity, we don't reach their statute-of-limitations affirmative defense.

[18] N.E.L. and M.M.A. assert that the district court incorrectly concluded that clearly established law is proved when the plaintiff proffers case law with closely analogous facts. They contend that the appropriate test for proving clearly established law is found in *Hope v Pelzer*, 536 U.S. 730, 739–40 (2002), which they argue requires plaintiffs to proffer case law that "only provide[s] 'fair warning' that an officer's conduct would violate the constitution." Appellants' Opening Br. at 25 (quoting *Hope*, 536 U.S. at 740). But as we have noted, *Hope v. Pelzer* appears to have fallen out of favor, yielding to a more robust qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016) (citing *Mullenix*, 136 S. Ct. at 308, 312 (2015)).

constitutional right and (2) that the law clearly establishes that right. *Pyle v. Woods*, 874 F.3d 1257, 1262 (10th Cir. 2017). We may dispose of N.E.L. and M.M.A.'s claims on either prong. *See id.* at 1263. Here, we dispose of them on the second.

The law clearly establishes a right if "existing precedent . . . place[s] the statutory or constitutional question beyond debate." *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 742). A case directly on point from the Supreme Court or our circuit clearly establishes a right. *See White*, 137 S. Ct. at 551. The clearly-established-law inquiry "must be undertaken in light of the specific context of the case," and isn't met by proving "a broad general proposition." *Mullenix*, 136 S. Ct. at 308 (internal quotation marks omitted) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). The proffered case law "must be 'particularized' to the facts" of the instant case. *White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). And it's the plaintiff's burden to identify the relevant clearly established law. *Rios v. Riedel*, 456 F. App'x 720, 725 (10th Cir. 2012) (citing *Hilliard v. City & Cty. of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991)). We conclude that no law clearly establishes that Adame or Deputy Garza violated N.E.L. and M.M.A.'s Fourth Amendment and Fourteenth Amendment rights. We address each claim in turn.

1. Fourth Amendment

N.E.L. and M.M.A. argue that Adame and Deputy Garza failed to first register the ex parte Kansas order with a Colorado court as required by the Colorado UCCJEA, entered Dr. and Mrs. G's home without a warrant, and illegally seized them. Alternatively, N.E.L. and M.M.A. allege that Adame and Deputy Garza relied on the facially invalid Kansas ex parte order to enter the home. Each of these claims alleges a Fourth Amendment violation.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. But our inquiry is narrower than whether Adame and Deputy Garza violated the Fourth Amendment. We address only whether our precedent clearly establishes that they did.

For clearly established law, N.E.L. and M.M.A. point us to cases broadly discussing the Fourth Amendment warrant requirement and its exceptions,[19] and

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[19] Appellants' Opening Br. at 16 (citing *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that warrantless entries into a home are presumptively unreasonable)); Appellants' Opening Br. at 22 (citing *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that evidence gathered as a result of a facially valid search warrant that is ultimately determined to lack probable cause shouldn't be suppressed)); Appellants' Opening Br. at 16 n.2 (citing *United States v. Rhiger*, 315 F.3d 1283, 1286 (10th Cir. 2003) (holding that social guests have Fourth Amendment expectations of privacy in others' homes)); Appellants' Opening Br. at 22, 28 (citing *United States v. Moland*, 996 F.2d 259, 261 (10th Cir. 1993) (stating that the *Leon* good-faith exception is inapplicable to an improperly executed warrant)).

more helpfully, to two cases where social-services employees attempting to help abused children allegedly ran afoul of the Fourth Amendment.[20]

In *Roska v. Peterson*, 328 F.3d 1230, 1238, 1242 (10th Cir. 2003), we concluded that state employees violated the Fourth Amendment by entering a home without a warrant to remove a young boy suffering from Munchausen Syndrome by Proxy (MSBP) from his parents' custody. We stressed that the social workers "did not even attempt to obtain an ex parte order" before entering the Roskas' home without a warrant to take the boy, Rusty, into their custody. *Id.* at 1246. We determined that because "various doctors had suspected that Rusty was a victim of MSBP for quite some time, and the record indicate[d] that there was nothing particularly unusual about Rusty's condition at the time he was removed," "no evidence" existed that could have led "a reasonable state actor to conclude that there were exigent circumstances" permitting entry without a warrant. *Id.* at 1240–41.

Here, Adame and Deputy Garza did have an ex parte order when they entered Dr. and Mrs. G's home without a warrant and purported to place N.E.L., M.M.A., and the eight other Doe children in Kansas's

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[20] Appellants' Opening Br. at 24 (citing *Roska v. Peterson*, 328 F.3d 1230, 1238, 1242 (10th Cir. 2003)); Appellants' Opening Br. at 15 (citing *Jones*, 410 F.3d at 1224–25). *But see* Appellants' Opening Br. at 24 (citing *Gomes v. Wood*, 451 F.3d 1122, 1125–27 (10th Cir. 2006) (concerning Fourteenth Amendment claim brought under § 1983 by parents of child where social services had removed their child from their home after the child's pediatrician reported suspected child abuse)).

custody. The social workers in *Roska* never even attempted to get such an order. 328 F.3d at 1246. So though *Roska* may be generally analogous to the present case, *see al-Kidd*, 563 U.S. at 742, it is far from "particularized" to the instant facts, *see White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640). In short, *Roska* doesn't clearly establish that Adame and Deputy Garza acted unreasonably.

In *Jones v. Hunt*, a woman sued a county sheriff and a social worker under § 1983 for illegally seizing her under the Fourth Amendment when she was sixteen. 410 F.3d at 1224–25. There, the county sheriff and social worker had met with her at school and told her that she couldn't live with her mother. *Id.* at 1224. They also informed her that contrary to a temporary protection order against her father, she had to live with him. *Id.* We found this seizure unreasonable under the Fourth Amendment because the sheriff and social worker met the girl in "a small, confined school counselor's office"; the girl "knew that [the sheriff and social worker] had the authority to determine her custodial care"; the sheriff and social worker repeatedly threatened to "arrest her and follow her for at least the next two years, ensuring that her 'life would be hell' "; the meeting lasted "an 'hour or two' "; and she was "emotionally fragile and distraught" throughout the meeting. *Id.* at 1226.

Unlike the governmental employees in *Jones*, Adame and Deputy Garza purported to place N.E.L. and M.M.A. into Kansas's custody under the authority of an ex parte order. That order stated that an

emergency threatened the safety of the Doe children, that "remaining in the home . . . would be contrary to the welfare of the child[ren]," and that child-in-need-of-care petitions had been filed alleging "physical, sexual, mental, or emotional abuse." J.A. at 47. The social worker and county sheriff in *Jones* acted contrary to a temporary protection order, not under the authority of one. 410 F.3d at 1224. So *Jones* doesn't clearly establish that Adame and Deputy Garza acted unreasonably.

Finally, N.E.L. and M.M.A. cite no authority concluding that failing to register an out-of-state ex parte order with a Colorado court before its execution constitutes a Fourth Amendment violation. No case they cite even mentions the Colorado UCCJEA or its registration requirement. Having failed to provide us authority clearly establishing that violating the Colorado UCCJEA is a Fourth Amendment violation, N.E.L. and M.M.A. haven't met their burden. So their Fourth Amendment claim fails on this theory, too.

2. Fourteenth Amendment

N.E.L. and M.M.A. next allege that Adame and Deputy Garza deprived them of their Fourteenth Amendment right to familial association by requiring Mrs. Doe to leave Dr. and Mrs. G's home; by prohibiting N.E.L. and M.M.A. from leaving with Mrs. Doe; by prohibiting N.E.L. and M.M.A. from traveling with Mrs. Doe, Mr. Doe, and their grandparents; and by detaining N.E.L. and M.M.A. for the purpose of terminating Mr. and Mrs. Doe's parental rights.

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under that provision, "[a] child has a constitutionally protected liberty interest in a relationship with her parent." *Lowery v. Cty. of Riley*, 522 F.3d 1086, 1092 (10th Cir. 2008). To state a claim for interference with familial association, a plaintiff must sufficiently allege that the government actor "inten[ded] to interfere with" the family relationship. *Trujillo v. Bd. of Cty Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

Here, N.E.L. and M.M.A. fail to provide us any authority clearly establishing their right to be free from state interference into their familial relationships on similar facts.[21] In so doing, they have failed to meet

[21] N.E.L. and M.M.A. fail to cite in their opening brief any authority clearly establishing that Adame and Deputy Garza violated the Due Process Clause of the Fourteenth Amendment. *See* Appellants' Opening Br. at 28–32; Appellants' Reply Br. at 24–25; *see also* Appellees' Answer Br. at 38 (noting lack of cited authority). But they do cite to *Gomes*, 451 F.3d at 1128, a Fourteenth Amendment § 1983 case, as clearly establishing their Fourth Amendment claim. *See* Appellants' Opening Br. at 24–25 (arguing that *Gomes* clearly establishes a parent's right to a prompt post-deprivation hearing and that, because Colorado didn't provide the Does such a hearing, Adame and Deputy Garza unreasonably seized N.E.L. and M.M.A. under the Fourth Amendment). Even if we were to consider *Gomes* as authority supporting N.E.L. and M.M.A.'s Fourteenth Amendment Due Process claim, it wouldn't help them. True, broadly, a parent has a right to a post-deprivation hearing under the Fourteenth Amendment. But that principle sheds no light on a child's placement into state custody under the authority of an ex parte order declaring the child in immediate danger. So *Gomes* isn't particularized to this case's facts and

their burden. *Rios*, 456 F. App'x at 725 (citing *Hilliard v. City & Cty. of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991)). So they haven't shown that the law clearly establishes that Adame and Deputy Garza violated the Fourteenth Amendment's Due Process Clause.[22]

B. Douglas County's Liability

N.E.L. and M.M.A. alleged that Douglas County (1) had a policy or custom of seizing children "based on out-of-state ex parte orders in violation of the United States Constitution and Colorado law, including but not limited to the Colorado [UCCJEA]," J.A. at 44 ¶ 216; or alternatively, (2) acted with deliberate indifference by failing to adopt a policy requiring its deputy sheriffs to comply, or in failing to train its officers to comply, with "the United States Constitution and Colorado law, including but not limited to the Colorado UCCJEA," *Id.* at 44 ¶ 218. And, they contend, this policy or custom, or this failure to adopt a policy or train

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doesn't clearly establish that Adame and Deputy Garza violated the Fourteenth Amendment's Due Process Clause.

[22] Because Adame and Deputy Garza are entitled to qualified immunity against N.E.L. and M.M.A.'s Fourth Amendment and Fourteenth Amendment claims, they are also entitled to such qualified immunity against N.E.L. and M.M.A.'s civil-conspiracy claim based on the alleged violation of those same rights. *See Bisbee v. Bey*, 39 F.3d 1096, 1102 (10th Cir. 1994) (determining that civil-conspiracy claims under 42 U.S.C. § 1985(3) are subject to a qualified immunity defense); *see also Hale v. Townley*, 45 F.3d 914, 921 (5th Cir. 1995) (determining that a conspiracy claim wasn't actionable where officers in the case were "alleged to have violated [the plaintiff's] First Amendment rights" but were also "entitled to qualified immunity.").

its officers, led the county's personnel to violate the Fourth Amendment.

Under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690–91 (1978), counties can be liable under § 1983 even when their individual employees are shielded by qualified immunity. To state a viable *Monell* claim against a county, a plaintiff must sufficiently allege that the county has a "'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell*, 436 U.S. at 694); *see also Moss v. Kopp*, 559 F.3d 1155, 1168 (10th Cir. 2009) (reviewing a plaintiff's § 1983 claim against a county under Rule 12(b)(6)). But a county "may not be held liable under § 1983 solely because it employs a tortfeasor." *Brown*, 520 U.S. at 403.

A county policy or custom may take the form of "a formal regulation or policy statement" or an informal custom "amount[ing] to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010) (alteration in original) (internal quotation marks omitted) (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189–90 (10th Cir. 2010)). When the liability theory rests on a county's "failure to act," the plaintiff must show that the county's inaction was the result of "deliberate indifference." *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (quoting *City of Canton v. Harris*, 489 U.S.

378, 385 (1989)). Typically, a "single incident" of unconstitutional behavior "is not sufficient to impose [municipal] liability." *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993).

N.E.L. and M.M.A. argue that Douglas County had either a formal policy or an unwritten custom that caused their injuries, or alternatively, that the county acted with deliberate indifference, which caused their injuries. We address all three theories in turn.

1. Formal Policy

N.E.L. and M.M.A. allege that, in 2009, Douglas County had a formal policy of complying with a 2007 state-court standing order that, they contend, leads Douglas County employees to violate the Fourth Amendment. But N.E.L. and M.M.A. didn't mention the standing order in their First Amended Complaint or even in their opening brief to this court. *See* J.A. at 44 ¶¶ 216–17; Appellants' Opening Br. at 34–35 (discussing only Douglas County's (1) informal custom or policy and (2) its deliberate indifference as the bases for its liability). N.E.L. and M.M.A. first raise this formal-policy theory of liability in their reply brief on appeal. *See* Appellants' Reply Br. at 1–2. So they have waived the argument. *United States v. Pickel*, 863 F.3d 1240, 1259 (10th Cir. 2017) (determining that when a party "makes [an] argument for the first time in his reply brief," it is waived.).

Even absent waiver, we would have concluded that N.E.L. and M.M.A. failed to sufficiently allege that

the standing order caused their seizure in violation of the Fourth Amendment. The standing order doesn't authorize county officials to enter homes without a warrant. So N.E.L. and M.M.A. haven't stated sufficient facts to sustain their formal-policy-based *Monell* claim.

2. Informal Custom

N.E.L. and M.M.A. allege that the 2012 Douglas County policy concerning the enforceability of out-of-state court orders and Deputy Garza's (or Adame's)[23] statement, "we do this all the time," evince a county custom that caused their illegal seizure. J.A. at 44 ¶ 216. For a § 1983 claim based on custom to withstand Rule 12(b)(6) dismissal, the plaintiff must sufficiently allege that the custom amounts to a widespread, permanent, and well-settled practice with the force of law. *Moss*, 602 F.3d at 1169 (quoting *Melton v. Okla. City*, 879 F.2d 706, 724 (10th Cir. 1989), *rev'd in part en banc on other grounds*, 928 F.2d 920, 932 (10th Cir. 1991)).

To support their argument of a county custom, N.E.L. and M.M.A. first point us to the Douglas County's 2012 policy concerning the enforceability of out-of-state ex parte orders. But N.E.L. and M.M.A. didn't attach this policy to their First Amended Complaint or even reference it by name. Instead, the First Amended Complaint refers vaguely to "Douglas County's discovery responses, including written

[23] It isn't clear from the First Amended Complaint whether Deputy Garza or Adame made this statement.

policies produced in this litigation." J.A. at 44 ¶ 216. And N.E.L. and M.M.A. fail to allege facts plausibly showing that Douglas County followed this policy in 2009 (when the alleged illegal seizure occurred). *See Gee*, 627 F.3d at 1186 (permitting consideration of documents outside of the complaint under Rule 12(b)(6) when (1) the complaint refers to the documents or incorporates them by reference or (2) the documents are undisputed, authentic, and central to the plaintiffs' claims, among other inapplicable exceptions). So because N.E.L. and M.M.A. didn't quote or reference this policy in their First Amended Complaint, and because it hasn't been sufficiently alleged as the county's authentic and undisputed policy in 2009, the policy fails to meet *Gee*'s exceptions. Thus, we don't consider it in our Rule 12(b)(6) analysis.

We see just one fact allegation in the First Amended Complaint that could possibly support their *Monell* county-custom claim—Deputy Garza's (or Adame's) statement, "we do this all the time." J.A. at 44 ¶ 216. But a single statement doesn't suffice to allege a continuing, persistent, and widespread county custom. So N.E.L. and M.M.A. haven't alleged sufficient facts to state a custom-based *Monell* claim against Douglas County.

3. Deliberate Indifference

N.E.L. and M.M.A. contend that Douglas County's failure to adopt a policy mandating compliance with, or its failure to train its deputy sheriffs to comply with,

"the United States Constitution and Colorado law, including but not limited to the Colorado UCCJEA" amounted to deliberate indifference. *Id.* at 44 ¶ 218. Deliberate indifference may be shown "when the [county] has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Carr v. Castle*, 337 F.3d 1221, 1229 (10th Cir. 2003) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)).

The First Amended Complaint makes the following allegations related to deliberate indifference:

> 190. Douglas County failed to adopt and/or implement any policy or policies prohibiting the unconstitutional seizure of children on the basis of out-of-state *ex parte* orders when such policy was needed to prevent predictable violations by Douglas County personnel.
>
> 191. The need for a policy or policies prohibiting the unconstitutional seizure of children on the basis of out-of-state *ex parte* orders was so obvious that Douglas County's failure to adopt and implement any such a policy is properly characterized as deliberate indifference.
>
> 192. Douglas County was deliberately indifferent to training its employees, including Adame and Garza, in protecting the Plaintiffs' procedural and substantive rights under the United States Constitution and the [Colorado UCCJEA] to be free from unlawful seizure without probable cause.

> 193. In the alternative, Douglas County acted with deliberate indifference in authorizing or in failing to adopt a policy or in failing to train personnel, including Garza and Adame, to ensure that the *Ex Parte* orders to seize Plaintiff and his siblings were executed upon only after such orders were examined for facial validity as to probable cause.
>
> . . . .
>
> 218. In the alternative, prior to seizing Plaintiffs, Douglas County acted with deliberate indifference in failing to adopt a policy requiring Garza, or in failing to train personnel, including Garza, to comply with the United States Constitution and Colorado law, including but not limited to the Colorado UCCJEA

J.A. at 40 ¶¶ 189–93, 44 ¶ 218.

But none of these facts plausibly show that Douglas County's failing to adopt a policy on, or in failing to train its officers on, the enforceability of out-of-state ex parte orders "is substantially certain to result in" illegal seizures or entries into homes without warrants. *Carr*, 337 F.3d at 1229 (quoting *Barney*, 143 F.3d at 1307); *see also Shue v. Laramie Cty. Det. Ctr.*, 594 F. App'x 941, 946 (10th Cir. 2014) (affirming a Rule 12(b)(6) dismissal of a deliberate indifference claim where the complaint failed to aver that the municipality's failure to act was the "moving force" behind the plaintiff's constitutional injury). And even if we were to assume that the First Amended Complaint plausibly alleges a causal relationship between Douglas

County's failure to act and the Fourth Amendment violations claimed here, the First Amended Complaint would still fail to state a claim under Rule 12(b)(6).

As written, the First Amended Complaint's allegations don't plausibly show that Douglas County had (1) "actual or constructive notice" that its failure to act would lead to illegal seizures or entries into homes without warrants, and (2) that the county "consciously or deliberately [chose] to disregard the risk of harm." *Carr*, 337 F.3d at 1229 (quoting *Barney*, 143 F.3d at 1307); *see Lewis v. McKinley Cty. Bd. of Cty. Comm'rs*, 425 F. App'x 723, 728 (10th Cir. 2011) (affirming a Rule 12(b)(6) dismissal where the complaint "lack[ed] sufficient allegations to meet the element of deliberate indifference"). N.E.L. and M.M.A.'s allegations at best show that it's a "sheer possibility" that Douglas County's failure to act led to N.E.L. and M.M.A.'s injuries, not that the county's liability is plausible. *Iqbal*, 556 U.S. at 678. So N.E.L. and M.M.A. have failed to allege sufficient facts to state a deliberate-indifference *Monell* claim against Douglas County.

CONCLUSION

For the above reasons, we AFFIRM the district court.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 15-cv-02847-REB-CBS

N.E.L., and M.M.A.,

Plaintiffs,

v.

DOUGLAS COUNTY, COLORADO,
MONICA GILDNER, in her individual capacity,
ANGELA WEBB, in her individual capacity,
TINA ABNEY, in her individual capacity
LESA ADAME, in her individual capacity, and
CARL GARZA, in his individual capacity,

Defendants.

ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 13, 2017)

Blackburn, J.

The matters before me are (1) the **Recommendation of United States Magistrate Judge re Motion to Dismiss** [#91], filed January 27, 2017; and (2) **Plaintiffs' Objections to the Recommendation on Pending Motions** [#93], filed February 10, 2017. I overrule the objections, approve and adopt the recommendation, grant the Douglas County defendants' motion to dismiss, grant the Kansas defendants' motion

to dismiss for lack of personal jurisdiction in this forum, and transfer the claims against the Kansas defendants to the United States District Court for the District of Kansas.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed. I have considered carefully the recommendation, the objections, the underlying motions, and all applicable caselaw. The recommendation is thorough and well-reasoned, and I approve and adopt it in all relevant respects.

The magistrate judge found that defendants Lesa Adame and Carl Garza, the two Douglas County, Colorado, employees who executed the *ex parte* orders issued by the Johnson County, Kansas, court, were entitled to qualified immunity from plaintiffs' claims under the Fourth and Fourteenth Amendments.[1] Although I do not concur with some of the magistrate judge's analysis of the Fourth Amendment Claim,[2] I do agree that, assuming *arguendo* plaintiffs have stated a

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[1] Ms. Adame was employed by Douglas County as a social worker, and OfficerGarza was employed by the Douglas County Sheriff's Office.

[2] Specifically, I believe the magistrate judge misread the complaint in finding plaintiffs were not seized because they were already in the custody of the state of Kansas by virtue of the *ex parte* orders. (**Recommendation** at 19-20.) Plaintiffs plainly allege that claim was false (***see*** **First Am. Compl.** ¶¶ 143-144 at 21, ¶ 150 at 22); indeed, the magistrate judge himself discussed how the *ex parte* orders did not contain *any* affirmative order, let alone a directive to take the children into custody (**Recommendation** at 10).

constitutional right, they have failed to demonstrate that such right was clearly established on May 6, 2009. ***See Pearson v. Callahan***, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").[3]

As the magistrate judge's cogent and competent discussion of these decisions amply demonstrates (***see*** **Recommendation** at 20-22), neither of the two Tenth Circuit decisions on which plaintiffs rely in attempting to satisfy their burden in this regard involve facts sufficiently similar to those alleged here such that a reasonable official in Ms. Adame's and Officer Garza's circumstances would have understood their actions violated the Fourth Amendment. ***See Dodds v. Richardson***, 614 F.3d 1185, 1206 (10th Cir. 2010), ***cert.***

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[3] I find it appropriate to exercise that discretion in this instance on several of the bases which have been identified as justifying addressing the clearly established prong first: (1) because the constitutional violation alleged " 'is so factbound that the decision provides little guidance for future cases' "; (2) because "discussing both elements risks 'bad decisionmaking' because the court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right"; and (3) because "the doctrine of 'constitutional avoidance' suggests the wisdom of passing on the first constitutional question because 'it is plain that a constitutional right is not clearly established but far"from obvious whether in fact there is such a right.' " ***See Kerns v. Bader***, 663 F.3d 1173, 1180-81 (10th Cir. 2011) (quoting ***Pearson***, 129 S.Ct. at 818-21).

denied, 131 S.Ct. 2150.[4] Additionally, I note that in these and the other cases to which plaintiffs point, state officers seized and removed a child from the parent. ***Gomes v. Wood***, 451 F.3d 1122, 1126 (10th Cir. 2006); ***Jones v. Hunt***, 410 F.3d 1221, 1224-25 (10th Cir. 2005), ***cert. denied***, 127 S.Ct. 676. ***See also Wooley v. City of Baton Rouge***, 211 F.3d 913, 917-18 (5th Cir. 2000). Here, the opposite occurred – Ms. Adame and Officer Garza allegedly required plaintiffs' mother, Mrs. Doe, to leave, but left the children where they first encountered them, in the home of Mrs. Doe's friends, Dr. and Mrs. G. Plaintiffs have presented no authority, and the court has found none, in which officers were found to have seized a child under closely analogous circumstances. Qualified immunity thus is proper as to this claim.

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[4] The two other federal appellate court decisions to which plaintiffs cite hardly constitute "the clearly established weight of authority from other courts," even if those decisions were on point. ***Harman v. Pollock***, 586 F.3d 1254, 1261 (10th Cir. 2009). Moreover, plaintiffs' reliance on the Sixth Circuit's unpublished decision in ***Wendrow v. Michigan Department of Human Services***, 534 Fed. Appx. 516 (6th Cir. Aug. 28, 2013), which carries no precedential weight, ***see Braggs v. Perez***, 73 Fed. Appx. 147, 148 (6th Cir. 2003), ***cert. denied***, 124 S.Ct. 2113 (2004), is inapposite in any event, as it post-dates the allegedly unconstitutional actions in this case by more than four years, ***see Reichle v. Howards***, 566 U.S. 658, ___, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (right must be clearly established "by prior case law" "at the time of the challenged conduct"). ***See also Ashcroft v. al-Kidd***, 563 U.S. ___, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate.").

Likewise, Ms. Adame and Officer Garza are entitled to qualified immunity from plaintiffs' substantive due process claim. Here, the magistrate judge relied on the first prong of the qualified immunity analysis, concluding plaintiffs failed to plead a viable claim of violation of their Fourteenth Amendment right to familial association because these defendants' alleged interference (as opposed to the arguably more substantial interference that occurred once the children returned to Kansas) was limited and incidental to the legitimate goal of keeping the children safe pending their return to Kansas. ***See Silvan v. Briggs***, 309 Fed. Appx. 216, 223 (10th Cir. Jan. 23, 2009) (citing ***Nicholson v. Scoppetta***, 344 F.3d 154, 172 (2nd Cir. 2003)).[5] I thus concur with the magistrate judge's conclusion that plaintiffs have failed to state a claim for violation of their constitutional right of familial association as against Ms. Adame and Officer Garza.[6]

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[5] Plaintiffs' objection – that Ms. Adame and Officer Garza may be liable because they allegedly conspired with the Kansas defendants in the subsequent, lengthier detention of the children – assumes what it would seek to prove. Plaintiffs first must prove these defendants violated their civil rights before they may be held liable for civil conspiracy to violate those rights. ***See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott***, 463 U.S. 825, 833, 103 S.Ct. 3352, 3358, 77L.Ed.2d 1049 (1983).

[6] Moreover, and although the magistrate judge did not reach the second prong of the qualified immunity test, his analysis further makes plain that plaintiffs have failed to satisfy their burden to show the right was clearly established as to these defendants. Although the issue was fairly joined in the apposite motion to dismiss (***see*** **Motion To Dismiss Amended Complaint** at 8-10 [#57], filed May 12, 2016), plaintiffs' response failed to address

In the absence of a viable claim that either Ms. Adame or Officer Garza violated their constitutional rights, it should go without saying that plaintiffs cannot sustain a claim for civil conspiracy to violate those rights against them. ***See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott***, 463 U.S. 825, 833, 103 S.Ct. 3352, 3358, 77L.Ed.2d 1049 (1983). Moreover, in the absence of an underlying constitutional violation by one of its employees, Douglas County, Colorado, cannot be held liable for allegedly maintaining an unconstitutional policy or practice. ***Trigalet v. City of Tulsa, Oklahoma***, 239 F.3d 1150, 1155-56 (10th Cir.), ***cert. denied***, 122 S.Ct. 40 (2001). These claims therefore also must be dismissed.

As for the motion to dismiss for lack of personal jurisdiction filed by defendants Monica Gildner, Angela Webb, and Tina Abney (the "Kansas defendants"), there is no need for this court to engage in a festooned reiteration of the magistrate judge's incisive and well-reasoned analysis. It is pellucid that this court lacks personal jurisdiction over these defendants. All Mses. Gildner's, Webb's, and Abney's relevant actions took place in Kansas, under the auspices of a Kansas court, for the purpose of returning the children to Kansas. The mere fortuity that plaintiffs happened to be staying temporarily in Colorado at the time is far too ephemeral a contact to support a conclusion that the Kansas defendants purposefully directed their actions

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this claim at all, much less attempt to demonstrate the right was clearly established.

toward this forum. Even if it did, I agree with the magistrate judge that exercising personal jurisdiction over these defendants in this forum would offend due process.

Neither plaintiffs nor the Kansas defendants have objected to the magistrate judge's recommendation that these claims be transferred to the District of Kansas as contemplated by 28 U.S.C. § 1631. This recommendation also is prescient and well-taken. Given that the statute of limitations may have expired since the case was filed, the interests of justice plainly dictate that these claims should be transferred rather than dismissed outright.

While the substantive viability of plaintiffs' claims against the Kansas defendants thus remains for determination by a court of competent jurisdiction, the Douglas County defendants are entitled to a judgment in their favor. ***See Cain v. Graf***, 1998 WL 654987 at *2 (10th Cir. Sept. 21, 1998). It is pellucid in this instance that "the claims under review [are] separable from the others remaining to be adjudicated and . . . the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.'" ***Stockman's Water Co., LLC v. Vaca Partners, L.P.***, 425 F.3d 1263, 1265 (10th Cir. 2005) (quoting ***Curtiss-Wright Corp. v. General Electric Co.***, 446 U.S. 1, 8, 100 S.Ct. 1460, 1465, 64 L.Ed.2d 1 (1980) (alterations in ***Stockman's***). There is no just reason to delay entry of judgment in favor of the Douglas County defendants while the factually distinct claims against

the Kansas defendants are adjudicated in a different federal court. Pursuant to Fed. R. Civ. P. 54(b), I therefore will direct the entry of final judgment in favor of the Douglas County defendants.

THEREFORE, IT IS ORDERED as follows:

1. That the **Recommendation of United States Magistrate Judge re Motion to Dismiss** [#91], filed January 27, 2017, is approved and adopted as an order of this court;

2. That the objections stated in **Plaintiffs' Objections to the Recommendation on Pending Motions** [#93], filed February 10, 2017, are overruled;

3. That the **Motion to Dismiss Amended Complaint** [#57], filed May 12, 2016 by defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, is granted;

4. That the **Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the Alternative, Motion for Summary Judgment** [#65], filed May 26, 2016, by defendants Tina Abney, Monica Gildner, and Angela Webb is granted in part and denied in part as follows:

   a. That the motion is granted to the extent it seeks dismissal for lack of personal jurisdiction over these defendants in this forum; and

   b. That in all other respects, the motion is denied without prejudice;

5. That plaintiffs' claims against defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, are dismissed with prejudice;

6. That plaintiffs' claims against defendants Tina Abney, Monica Gildner, and Angela Webb are dismissed without prejudice;

7. That, there being no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), judgment with prejudice shall enter on behalf of defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, and against plaintiffs, N.E.L. and M.M.A., on all claims for relief and causes of action asserted in this action; and

8. That this case is transferred to the United States District Court for the District of Kansas (500 State Ave, Kansas City, Kansas 66101).

Dated March 13, 2017, at Denver, Colorado.

BY THE COURT:

/s/ Bob Blackburn
Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02847-REB-CBS

N.E.L. and M.M.A.,

Plaintiffs,

v.

DOUGLAS COUNTY, COLORADO;
MONICA GILDNER, in her individual capacity;
ANGELA WEBB, in her individual capacity;
TINA ABNEY, in her individual capacity;
LESA ADAME, in her individual capacity; and
CARL GARZA, in his individual capacity.

Defendants.

RECOMMENDATION ON PENDING MOTIONS TO DISMISS

(Filed Jan. 27, 2017)

Magistrate Judge Craig B. Shaffer

This matter comes before the court on the Motion to Dismiss Amended Complaint (doc. # 57) filed by Defendants Lesa Adame, Carl Garza, and Douglas County (hereinafter referred to collectively as the "Douglas County Defendants"), and the Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the alternative, Motion for Summary Judgment (doc. # 65) filed by Defendants Monica Gildner, Angela Webb, and Tina Abney (hereinafter

referred to collectively as the "Kansas Defendants"). These motions have been fully briefed by the parties.

On March 1, 2016, this matter was referred to the Magistrate Judge to, *inter alia*, "hear and make recommendations on dispositive matters that have been referred." By separate memoranda, both of the pending motions have been referred to this court for recommendation. I have carefully reviewed the motions, all related briefing and attached exhibits, the entire court file, and the applicable case law.

PROCEDURAL HISTORY

This action was commenced with the filing of the original Complaint on December 1, 2015. The First Amended Complaint (doc. #55), filed on April 29, 2016, asserts six claims for relief. The First Claim asserts a Fourth Amendment violation and contends that all Defendants "approved and/or conducted an unlawful seizure . . . by which Plaintiffs were deprived of their liberty without due process when they were prohibited . . . from any movement or travel with their mother, father and grandparents." The Second Claim is brought against Defendants Gildner, Webb and Abney and asserts that Plaintiffs' Fourth Amendment rights were violated when they were "held against their will for five days prior to a hearing on the CINC petitions." The Third Claim is brought against Defendants Gildner, Webb, Abney, Adame, and Garza and asserts a violation of Plaintiffs' Fourteenth Amendment right to maintain a familial relationship with their parents,

siblings, and grandparents. The Fourth Claim alleges that Defendants Gildner, Abney, Webb, Adame and Garza conspired to deprive Plaintiffs of their constitutional rights. The Fifth Claim contends that Plaintiffs are entitled to exemplary damages because "[t]he actions of Gildner, Abney, Webb, Adame and Garza were attended by retaliation, malice, ill will, intent and/or recklessness, [and] callous disregard of Plaintiffs' rights, or indifference to Plaintiffs' rights." Finally, the Sixth Claim alleges that Defendant Douglas County violated Plaintiffs' Fourth Amendment rights by adopting an unlawful policy that authorized county sheriff's personnel "to seize Plaintiffs based on an out-of-state *ex parte* order in violation of the United States Constitution and Colorado law," or through deliberate indifference by failing to "adopt a policy requiring . . . or in failing to train personnel . . . to comply with the United States Constitution and Colorado law."

As the parties are well-familiar with the underlying circumstances of this case, I will only briefly summarize those facts and circumstances that are necessary to place the pending motions and this Recommendation in context.

It appears that Mr. and Mrs. Doe had their first contact with the Kansas Department of Social and Rehabilitation Services[1] in June 2008 after one of the

[1] This state agency is now called the Kansas Department of Children and Families, and is referenced in the First Amended Complaint as "SRS/DCF." *See* First Amended Complaint, at ¶5.

Doe children[2] began exhibiting troubling behavior and making troubling comments that allegedly stemmed from improper interaction with that child by one of Mrs. Doe's relatives. *See* First Amended Complaint at ¶¶ 17 and 21. Later, other Doe children reported having suffered abuse from the same suspected relative. *Id.* at ¶¶ 38, 65 and 77. During the time period relevant to this case, the Kansas Defendants were employed by SRS/DCF. The Kansas Defendants' contacts with the Doe family continued into 2009 and eventually became contentious. As some point, Mr. Doe apparently "communicated to [Ms.] Webb and [Ms.] Abney that he did not wish to have further contact with [Ms.] Gildner due to the animosity created by her antagonistic, biased and baseless positions." *Id.* at ¶ 55. In February 2009, Mr. Doe "filed a formal complaint with SRS/DCF" against Ms. Gildner. *Id.* at ¶ 66. The actual cause of this deteriorating situation is a matter of some dispute and wholly irrelevant to the disposition of the pending motions.

On or about April 20, 2009, ten Child-in-Need of Care (CINC) petitions were filed in the District Court for Johnson County, Kansas by the District Attorney's Office. Those petitions "requested termination of Mr. and Mrs. Doe's parental rights, appointment of a permanent custodian for Plaintiffs and their siblings, temporary removal of Plaintiffs and their siblings from their Parents' custody, and an order of child support."

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[2] The Plaintiffs in this action, N.E.L. and M.M.A., are two of the Does' ten children. Although Plaintiffs have reached the age of majority, during the relevant time period, both were minors.

Id. at ¶ 86. The Johnson County District Court set a non-emergency hearing on these petitions for May 11, 2009. On May 5, 2009, SRS/DCF sought *Ex Parte* Orders of Protective Custody in the District Court of Johnson County. Although Mr. and Mrs. Doe dispute the information proffered in support of the petitions for those orders, the District Court entered *Ex Parte* Orders on May 5, 2009.

On that same day, Mrs. Doe and her children were visiting long-standing family friends, Dr. and Mrs. G, who were living in unincorporated Douglas County, Colorado. At some point, Defendants Adame and Garza were made aware of the *Ex Parte* Orders issued by the Johnson County District Court and they went to the G's residence.[3] After some discussion on May 6, 2009, Mrs. Doe left the G residence. Later that same day, Dr. G and his wife drove the Doe children back to Kansas where they were placed in the temporary custody of SRS/DCF.

In moving to dismiss the First Amended Complaint, the Douglas County Defendants contend that Plaintiffs' claims are barred by the applicable statute of limitations, as well as the doctrines of absolute and qualified immunity. The Douglas County Defendants further insist that the First Amended Complaint fails to state a viable claim for relief against Douglas

[3] On May 6, 2009, Ms. Adame was a social worker either employed by the Colorado Department of Social Services or the Douglas County Department of Human Services, and Mr. Garza was employed by the Douglas County Sheriff's Office. *See* First Amended Complaint, at ¶¶ 10 and 11.

County. The Kansas Defendants have moved to dismiss the claims against them based upon a lack of personal jurisdiction. In the alternative, the Kansas Defendants insist that Plaintiffs' claims are barred by the statute of limitations and the doctrines of absolute or qualified immunity, and that Plaintiffs' alleged Fourth Amendment violation fails to state a cognizable claim for relief. Plaintiffs naturally take strong exception to all of these arguments.

ANALYSIS

I. The Douglas County Defendants' Motion

Rule 12(b)(6) states that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri,* 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). However, a plaintiff may not rely on mere labels or conclusions "and a formulaic recitation of the elements of a cause of action will not do." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, the court's analysis is two-fold.

> First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is those allegations that are legal conclusions, bare assertions, or

> merely conclusory. Second, the court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. Notwithstanding, the court need not accept conclusory allegations without supporting factual averments.

Wood v. Wells Fargo Bank, N.A., No. 13-cv-01731-CMA-KMT, 2013 WL 5763101, at *2 (D. Colo. Oct. 23, 2013) (internal citations omitted).

As the Tenth Circuit explained in *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007),

> the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.

"The burden is on the plaintiff to frame 'a complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atl. Corp.*, 555 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

Plaintiffs attached to the First Amended Complaint a redacted *Ex Parte* Order of Protective Custody, dated May 5, 2009 (Exhibit 1) (doc. #55-1) and a redacted document entitled Colorado Department of Social Services, Douglas County Department of Human Services Safety Plan, dated May 6, 2009 (Exhibit 2) (doc. #55-2). The parties also have attached exhibits to their briefs in support of or in opposition to the Douglas County Defendants' motion to dismiss. Those exhibits consist of judicial records from Colorado's Eighteenth Judicial District (Defendants' Exhibit A, doc. # 57-1 and Plaintiffs' Exhibit 3, doc. #67-3) and the District Court for Johnson County, Kansas (Plaintiffs' Exhibit 2, doc. #67-2 and Plaintiffs' Exhibit 4, doc. #67-4). The parties also included as exhibits excerpts from the Colorado Code of Regulations, 12 CCR 2509-2 (Defendants' Exhibit B, doc. #57-2 and Exhibit C, doc. #76-1).[4]

Generally, a court considers only the contents of the complaint when ruling on a Rule 12(b)(6) motion. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Exceptions to this general rule include: documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes their authenticity; and "matters of which a court may take judicial notice." *Id.* (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S.

[4] The Kansas Defendants and Plaintiffs also attached exhibits to their briefs in support of or in opposition to the Kansas Defendants' motion to dismiss. Most of those exhibits are judicial records subject to judicial notice by this court.

308, 322 (2007)). *Cf. Gilbert v. Bank of Am. Corp.*, No. 11-cv-00272-BLW, 2012 WL 4470897, at *2 (D. Idaho Sept. 26, 2012) (noting that a court may take judicial notice "of the records of state agencies and other undisputed matters of public record" without transforming a motion to dismiss into a motion for summary judgment). *Cf. Catchai v. Fort Morgan Times*, No. 15-cv-00678-MJW, 2015 WL 6689484, at *4 (D. Colo. Nov. 3, 2015) (in ruling on the pending motion to dismiss, the court acknowledged its ability to take judicial notice of court records from Morgan County District Court); *Reyes v. Hickenlooper*, 84 F. Supp. 3d 1204, 1207 (D. Colo. 2015) (noting that the court could take judicial notice of court filings from other cases without converting a Rule 12(b)(6) motion into a summary judgment motion). While the court has read and considered the parties' exhibits, I will analyze the issues and arguments under the standard governing motions to dismiss under Rule 12(b)(6).

A. Defendants' Claim to Absolute Immunity

Defendants Adame and Garza contend that all claims against them must be dismissed based on the doctrine of absolute or quasi-judicial immunity because on May 6, 2009 they were simply executing orders issued by a Kansas court. Plaintiffs argue in response that "absolute immunity does not apply because the Kansas *Ex Parte* Orders were not facially valid" and because "Adame and Garza exceeded the scope of the orders." *See* Response to Douglas Defendants' Motion to Dismiss, at 12.

The Tenth Circuit has held that "enforcing a court order or judgment is intrinsically associated with a judicial proceeding" and that "[a]bsolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel." *Valdez v. City & Cty. of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989) ("it is simply unfair to spare the judges who give orders while punishing the officers who obey them"). *See also Moss v. Kopp*, 559 F.3d 1155, 1163-1168 (10th Cir. 2009) (holding that "[j]ust as judges acting in their judicial capacity are absolutely immune from liability under section 1983, 'official[s] charged with the duty of executing a facially valid court order enjoy [] absolute immunity from liability for damages in a suit challenging conduct prescribed by that order") (quoting *Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990). "The 'fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised.'" *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987). *Cf. Smeal v. Alexander*, No. 5:06 CV 2109, 2006 WL 3469637, at *6 (N.D. Ohio Nov. 30, 2006) ("quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that they are considered an arm of the judicial officer who is absolutely immune").

"[F]or the defendant state official to be entitled to quasi-judicial immunity, the judge issuing the disputed order must be immune from liability in his or

her own right, the officials executing the order must act within the scope of their own jurisdiction, and the officials must only act as prescribed by the order in question." *Moss*, 559 F.3d at 1163. The doctrine of quasi-judicial immunity further requires that the court order in question be "facially valid." *Id.* at 1164. The Tenth Circuit has recognized, however, that a court order may be "facially valid" even if that order is infirm or erroneous as a matter of state law.

> "State officials 'must not be required to act as pseudo-appellate courts scrutinizing the orders of judges,' but subjecting them to liability for executing an order because the order did not measure up to statutory standards would have just that effect." Further, "[t]o allow plaintiffs to bring suit any time a state agent executes a judicial order that does not fulfill every legal requirement would make the agent 'a lightning rod for harassing litigation aimed at judicial orders." "Simple fairness requires that state officers 'not be called upon to answer for the legality of decisions which they are powerless to control.' "

Id. at 1165 (internal citations omitted).

Plaintiffs contend that the First Amended Complaint "alleges specifically that the [*Ex Parte* Orders] were facially invalid by being issued from a Kansas court and being incomplete, such that Adame and Garza could see for themselves that no one from 'Kansas State Social Services' was granted custody by the [*Ex Parte* Orders]." *See* Plaintiffs' Response to Douglas

Defendants' Motion to Dismiss, at 14 (emphasis in original). Plaintiffs also argue a Kansas judge "had no jurisdiction to issue *ex parte* orders for execution in Colorado." *Id.* at 15 (emphasis in original).

The *Ex Parte* Orders in question purportedly were issued "pursuant to K.S.A. 38-2242"[5] and specifically state that the District Court of Johnson County, Kansas found, in part, that "[r]easonable efforts are not required to maintain the child in the home because an emergency exists which threatens the safety of the child," that "remaining in the home or returning home would be contrary to the welfare of the child," and that "immediate placement is in the best interest of the child." *See* Exhibit 1 (doc. #55-1) attached to First Amended Complaint. The Orders further noted allegations of "physical, sexual, mental or emotional abuse." These documents bear the caption "*EX PARTE* ORDER OF PROTECTIVE CUSTODY and the signature of "Kathleen L. Sloan, Judge of the District Court," and apparently ere [sic] time-stamped by the Clerk of the

[5] This statute provides that a court "upon verified application, may issue ex parte an order directing that a child be held in protective custody and, if the child has not been taken into custody, an order directing that child be taken into custody." A court may issue such an ex parte order "only after the court has determined there is probable cause to believe the allegations in the application are true." "If the court issues an order of protective custody, the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child, other family member or witness; or attempting to visit, contact, harass or intimidate the child, other family member or witness."

District Court on "2009 May-5 PM 3:40." Although these court filings set forth "findings" of fact, Judge Sloan did not direct any action to be taken based upon those findings. So, for example, the *Ex Parte* Order did not explicitly require that the identified child be taken into custody. The district judge also did not check the box that "FURTHER ORDERED that any duly authorized law enforcement officer of the jurisdiction where the child(ren) can be found shall take the child(ren) named above into custody and deliver the child(ren) to" a specified location or government official. Judge Sloan also did not indicate that a "restraining order shall be filed against" anyone." In short, from the face of the *Ex Parte* Order, it is difficult to discern exactly what actions Judge Sloan required or even contemplated.

As this matter comes before the court on a motion to dismiss, I must confine my analysis to the well-pled facts (but not conclusory allegations) contained in the First Amended Complaint and the exhibits properly before the court. The court is required to construe those facts and documents in a light most favorable to Plaintiffs.

The First Amended Complaint contends that the *Ex Parte* Orders issued by Judge Sloan were not based upon probable cause and falsely presented or omitted material facts concerning Mr. and Mrs. Doe and their children. There are no well-pled facts in the First Amended Complaint that would suggest Defendants Adame or Garza were aware of these alleged deficiencies in the *Ex Parte* Orders. *But see Moss*, 559 F.3d at 1165 ("Simple fairness requires that state officers 'not

be called upon to answer for the legality of decisions which they are powerless to control.' ").

However, there is a fundamental problem with the Douglas County Defendants' invocation of quasi-judicial immunity. As the Tenth Circuit has explained, "an official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit *challenging conduct prescribed by that order.*" *Valdez*, 878 F.2d at 1286 (emphasis added). Stated differently the government official is entitled to quasi-judicial immunity because he or she is taking actions commanded by the court orders in question. *Cf. Martin v. Bd. of Cty. Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990) (holding that quasi-judicial immunity protects defendants from damage claims directed to the conduct prescribed in the court order itself, but not to the manner of its execution). Here, Judge Sloan's *Ex Parte* Orders simply make findings of fact; nothing is specifically or inferentially "ordered."[6]

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[6] At some point, Judge Sloan apparently realized that her *Ex Parte* Orders did not mandate any specific action. Exhibits attached to the Kansas Defendants' motion to dismiss include two documents captioned "Pick Up Order," dated May 5, 2009 and time stamped 3:40 PM. These Orders state that "on the 5TH DAY OF MAY, 2009, [each Plaintiff] was placed in the care, custody and control of [the State of Kansas] with authority for suitable placement" and direct "ANY LAW ENFORCEMENT AGENCY" to take said child into your custody and transport said child to court approve [sic] Juvenile Intake and Assessment Center." *See* Exhibits I and J (doc. ## 64-9 and 64-10) attached to Motion to Dismiss. Another exhibit proffered by the Kansas Defendants consists of a "Journal Entry Nunc Pro Tunc" filed in the District Court of Johnson County on May 8, 2009 purporting to "correct[] the Ex Parte Orders of Custody filed on May 5, 2009 . . . to read as follows: THE

Therefore, the rationale for quasi-judicial immunity seems to be lacking in this case. I recommend that the motion to dismiss be denied to the extent Defendants Adame and Garza are relying in whole or in part on the doctrine of absolute or quasi-judicial immunity.

B. Defendants' Claim to Qualified Immunity

Even if Defendants Adame and Garza are not protected by quasi-judicial immunity, they are entitled to qualified immunity for conduct performed within the scope of their official duties. "The doctrine of qualified immunity protects government officials 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." *Messerschmidt v. Millender,* 565 U.S. 535, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks and citations omitted). *See also Duncan v. Gunter,* 15 F.3d 989, 992 (10th Cir. 1994) (same). Stated differently, the affirmative defense of qualified immunity "protects all but the plainly incompetent [government official] or those who knowingly violate the law." *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1185 (10th Cir.

COURT HEREBY ORDERS THAT the above named children shall be placed in the custody of: The Secretary of Social and Rehabilitation Services." *See* Exhibit K (doc. # 64-11), attached to Motion to Dismiss. The foregoing orders are not referenced in the First Amended Complaint, and it is not clear whether Defendants Adame and Garza ever received the foregoing court filings prior to arriving at the G's residence on May 6, 2009. But again, on a motion to dismiss the court must construe the allegations in a light most favorable to Plaintiffs.

2001). Whether Defendants Adame and Garza are entitled to qualified immunity is a legal question. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007).

In resolving a motion to dismiss based on qualified immunity, the first prong of the court's analysis asks "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This determination turns on the substantive law regarding the constitutional right at issue. *See McGettigan v. Di Mare*, 173 F. Supp. 3d 1114, 1121 (D. Colo. 2016) (citing *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1282-83 (10th Cir. 2007)).

Under the second prong of the qualified immunity doctrine, the plaintiff must show that the right at issue was "clearly established" at the time of the defendant's alleged violation.[7] *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). "The clearly established inquiry examines whether the contours of the constitutional right were so well-settled, in the particular circumstances presented, that every reasonable . . . official would have understood that what he is doing violates that right." *Lane v. Yohn*, No. 12-cv-02183-MSK-MEH, 2013 WL 4781617, at *3 (D. Colo. Sept. 6,

[7] The court has the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009). However, "[q]ualified immunity is applicable unless" the plaintiff can satisfy both prongs of the inquiry. *Id.*

2013) (internal quotation marks and citation omitted), *appeal dismissed*, No. 13-1392 (10th Cir. Oct. 31, 2013). "[T]he salient question . . . is whether the state of the law at the time of [the] incident provided 'fair warning'" to Defendants Adame and Garca [sic] that their alleged conduct was unconstitutional. *Tolan v. Cotton,* ___ U.S. ___, 134 S. Ct. 1861, 1866 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "To satisfy this prong, the burden is on the plaintiff to point to Supreme Court or Tenth Circuit precedent (or the clear weight of other circuit courts) that recognizes an actionable constitutional violation in the circumstances presented." *Havens v. Johnson*, No. 09-cv-01380-MSK-MEH, 2014 WL 803304, at *7 (D. Colo. Feb. 28, 2014) (citing *Schwartz v. Booker*, 702 F.3d 573, 587-88 (10th Cir. 2012)), *aff'd*, 783 F.3d 776 (10th Cir. 2015). "It is not necessary for the plaintiff to adduce a case with identical facts, but the plaintiff must identify some authority that considers the issue not as a broad general proposition, but in a particularized sense. . . ." *Havens*, 2014 WL 803304, at *7. There must be "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994) (internal quotation marks and citations omitted).

In the past, the Tenth Circuit has employed a "sliding scale" in applying the second prong of the qualified immunity doctrine: "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior

case law to clearly establish the violation." *Casey*, 509 F.3d at 1284 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)). "As long as the unlawfulness of the [defendant's] actions was 'apparent' 'in light of pre-existing law,' then qualified immunity is inappropriate." *Estate of Booker v. Gomez*, 745 F.3d 405, 433-34 (10th Cir. 2014) (quoting *Hope*, 536 U.S. at 739).

The Supreme Court recently shed additional light on how the second prong of the qualified immunity doctrine should be applied in the context of a Fourth Amendment claim. In vacating the decision of a divided panel of the Tenth Circuit, the Supreme Court in *White v. Pauly,* 580 U.S. ___, 2017 WL 69170, at *4 (Jan. 9, 2017), reiterated that clearly established law "should not be defined 'at a high level of generality' " and "must be 'particularized' to the facts of the case." Otherwise, " '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.' " *Id.* The lower court in *White* "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *Id.* at *5. The Supreme Court's *per curiam* opinion emphasized that *White* "present[ed] a unique set of facts and circumstances" and that "alone should have been an important indication to [lower courts] that [the defendant] did not violate a 'clearly established' right." *Id.*

1. Plaintiffs' First Claim Alleging A Fourth Amendment Violation

Plaintiffs' First Claim asserts that Defendants Adame and Garza violated their Fourth Amendment right to be free from unlawful seizure.

A violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). A seizure for purposes of the Fourth Amendment occurs when "government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *JL v. N.M. Dep't of Health*, 165 F. Supp. 3d 996, 1042 (D. N.M. 2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989)).

> [A] person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatsoever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the policy and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." * * * We conclude that a person has been "seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to

> leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (internal citations omitted). *Cf. United States v. Beamon*, 576 F. App'x 753, 757 (10th Cir. 2014) ("until a citizen's liberty is actually restrained, there is no seizure" for purposes of the Fourth Amendment).

Every "seizure," however, does not necessarily equate to a constitutional violation, because the Fourth Amendment only prohibits "unreasonable" seizures. *See JL,* 165 F. Supp. 3d at 1043. *Cf. Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994) (to state a violation of the Fourth Amendment, a plaintiff must allege both that a defendant's conduct constituted a seizure and that the seizure was unreasonable). The Fourth Amendment's "central requirement" is one of reasonableness. *See Brower*, 489 U.S. at 599 (emphasizing that a seizure "alone is not enough for § 1983 liability; the seizure must be unreasonable") (internal quotation marks omitted). "[C]ourts have long recognized that the reasonableness of a seizure depends not just on why or when it is made, but also on how it is accomplished." *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (citation omitted). "[T]o determine whether a seizure is reasonable, which is the Fourth Amendment's 'ultimate standard,' a court must balance the government's interest in conducting the

seizure against the individual's interest in being free from arbitrary governmental interference." *JL*, 165 F. Supp. 3d at 1043 (internal citations omitted).

The First Amended Complaint alleges the following pertinent facts which, for purposes of the pending motion, the court will presume are true and construe in a light most favorable to Plaintiffs. On May 6, 2009, Mrs. Doe and all of her children were visiting Dr. and Mrs. G at their home in Douglas County, Colorado. *See* First Amended Complaint at ¶ 123. On that same day, Defendants Adame and Garza, "at the instigation of the Kansas SRS/DCF, Gildner, Abney and Webb," went to the home of Dr. and Mrs. G "to carry out official business on behalf of the Douglas County Sheriff's Office, the Department of Human Services for Douglas County, and the Colorado Department of Social Services." *Id.* at ¶ 125. Either Defendant Adame or Defendant Garza told Dr. G that "they were in possession of a court order from the State of Kansas to seize custody of all ten of the Doe's children and demanded entry and custody of the children."[8] *Id.* at ¶ 132. Defendant Adame also "represented to Dr. G that she had been contacted by the Kansas SRS/DCF." *Id.* at ¶ 133. On the advice of an "attorney-friend [on the] telephone, Dr. G asked Defendants if they had a warrant or an order issued by a Colorado court. *Id.* at ¶ 135. Defendants allegedly responded that they were not required

[8] Based upon other allegations in the First Amended Complaint, it would appear that Plaintiffs are alluding to the *Ex Parte* Orders issued by the District Court for Johnson County, Kansas on May 5, 2009. *See* First Amended Complaint at ¶¶ 150 and 172.

to have a warrant to enter the residence and "that they 'do this all the time.'" *Id.* at ¶¶ 136-137. Plaintiffs allege that at some point during this exchange, Defendant Garza "became belligerent, raised his voice and threatened Dr. G with arrest or contempt for interfering with law enforcement." *Id.* at ¶ 138. Deputy Garza allegedly also stated that he and Defendant Adame were "coming in and we're taking these kids." *Id.* at ¶ 139. Throughout the incident, Defendant Garza was wearing a sidearm. *Id.* at ¶ 130. Plaintiffs allege that "[d]ue to the Colorado Agents' visible weapon, their false claims of legal authority, their use of force, intimidation, and loud and belligerent demeanor, Dr. G was powerless to prevent them from entering his house over his objection." *Id.* at ¶ 140.

Once inside the G's residence, Defendants Adame and Garza "falsely claimed that Plaintiffs and the other Doe children were in the custody of the State of Kansas." *Id.* at ¶ 143. Although they allegedly found no evidence of "emergency conditions" that threatened the safety of the Plaintiffs or the other Doe children, Defendants Adame and Garza "commanded Mrs. Doe to vacate the G's home immediately." *Id.* at ¶ 142. Plaintiffs allege that Defendants Adame and Garza Defendants [sic] "issued summary orders inside the G's house, both verbal and written, without a supporting court order, without prior notice, hearing or probable cause, which the G's, Mrs. Doe and the Doe children were forced to obey by virtue of the Colorado Agents'

threats of force, intimidation and false claims of legal authority."[9] *Id.* at ¶ 146.

The First Amended Complaint also alleges that Defendant Adame signed a document that Plaintiffs refer to as the "Colorado Order." That document purportedly required Dr. and Mrs. G "to take custody of the Doe's children" and prohibited Mrs. Doe from having any "contact, physical or verbal with any of the children, including any communication through Dr. G and his wife Mrs. G or any third party." *Id.* at ¶¶ 147 and 151-52. Plaintiffs further assert that in a later telephone conversation with Dr. G, Defendant Adame "prohibit[ed] Dr. G from allowing Mr. Doe, or even his parents, to talk to the children on the phone or have any contact with them." *Id.* at ¶ 153. Defendants Adame and Garza purportedly "informed the G's that government agents from Kansas would arrive at an unspecified time/day to take physical custody of the Doe children from Dr. and Mrs. G." *Id.* at ¶ 161. That

[9] *Compare Siliven v. Ind. Dep't of Child Servs.*, 635 F.3d 921, 926-27 (7th Cir. 2011) (recognizing, in a case where a parent agreed to remove their minor child from the family home and place him with his grandmother [sic] home when told that the child otherwise would be placed in foster care, that a Fourth Amendment seizure may occur where "coercive conduct on the part of the police . . . indicates cooperation is required;" the court concluded, however, that the defendants' conduct did not rise to the level of a Fourth Amendment violation because the information available to defendants "[was] sufficient to warrant a prudent caseworker in believing that [the minor child] was in danger"). *See also Schattilly v. Daugharty*, 656 F. App'x 123, 129-30 (6th Cir. 2016) (holding that officials did not violate the plaintiff's constitutional rights by threatening removal proceedings in order to obtain consent to temporary placement).

same day, after the exchange with Defendants Adame and Garza, Dr. G and his wife "personally transported the ten Doe children to Kansas from Colorado" and "delivered the Doe children the next day to the custody of SRS/DCF in Johnson County. *Id.* at ¶¶ 164 and 166.

The so-called "Colorado Order" is attached to the First Amended Complaint as Exhibit 2. Notably, the word "order" does not appear any where [sic] in that document. To the contrary, Exhibit 2 is captioned "Colorado Department of Social Services, Douglas County Department of Human Services" and entitled "Safety Plan." In addition to the provisions cited in the First Amended Complaint, the Safety Plan apparently required Mrs. Doe "to contact Kansas casework [sic]; Monica Gildner on 5/7/09." At the bottom of the single-page document is space for the signatures of "Safety Plan Participants and Parents" which is prefaced by the following:

> Family Agreement with Safety Plan
>
> We have participated in the development of and reviewed this safety plan and agree to work with the provisions and services as described above.[10]

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[10] Colorado law provides that a county department of social services and "any person who is believed to be responsible for the abuse or neglect of a child" may enter into a safety plan agreement. *See* Colo. Rev. Stat. § 19-3-309.5. That statute further provides that "[p]articipation in a safety plan agreement by an [sic] county department and by any person who is believed to be responsible for child abuse or neglect shall be at the discretion of

Exhibit 2 bears two illegible signatures and is dated May 6, 2009.

This court finds the allegations in the First Amended Complaint are insufficient to allege a violation of Plaintiffs' Fourth Amendment rights by either Defendant Adame or Garza.[11] As noted earlier, Fourth Amendment seizure requires an intentional acquisition of physical control. If I credit Plaintiffs' own allegations, Defendants Adame and Garza announced that Plaintiffs and the other Doe children already "were in the custody of the State of Kansas." *See* First Amended Complaint at ¶ 143. If that allegation is accepted as true, the Safety Plan Agreement executed on May 6, 2009 did not further restrict Plaintiffs' freedom of movement. That seems consistent with Dr. and Mrs. G's understanding and subsequent actions, since it is undisputed that they returned Plaintiffs and their siblings to Kansas that same night. While the First Amended Complaint portrays the Defendants (and particularly Deputy Garza) as intimidating, loud and belligerent, those behaviors did not change Plaintiffs' status or restrict their movements. I also do not find that the Safety Plan executed on May 6, 2009 was unreasonable for purposes of the Fourth Amendment in light of the findings contained in Judge Sloan's *Ex*

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the person who is believed to be responsible for the child abuse or neglect."

[11] It bears noting that the First Amended Complaint does not assert any Fourth Amendment claims on behalf of Dr. and Mrs. G, or Mrs. Doe.

Parte Orders which apparently were available to Defendants Adame and Garza.

Finally, and most importantly, I do not find that Plaintiffs have sustained their burden under the second prong of the qualified immunity analysis. As the Supreme Court re-affirmed in *White*, the clearly established law element "must be 'particularized' to the facts of the case" and "should not be defined 'at a high level of generality." In challenging Defendants' claim of qualified immunity under the Fourth Amendment, Plaintiffs' response brief relies on four reported decisions. In *Jones v. Hunt*, 410 F.3d 1221 (10th Cir. 2005), the court held that a sixteen year old student was "seized" within the meaning of the Fourth Amendment when she was confronted at school and coerced into returning to live with her father. The Tenth Circuit noted that the deputy sheriff and social worker repeatedly threatened the student with arrest if she did not comply with their directives. The Tenth Circuit also found that the Fourth Amendment seizure "was not 'justified at its inception' " since there was no indication that the child's mother was suspected of abusive or neglectful behavior. In *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006), parents brought a due process claim under the Fourteenth Amendment after their minor daughter was removed from their home and placed in protective custody. In holding that the defendants were entitled to qualified immunity from the plaintiffs' claim for damages under the Fourteenth Amendment, the appellate court acknowledged that "[s]ocial workers face extreme difficulties in trying simultaneously to help

preserve families and to serve the child's best interests" and are required to "balance the parents' interest in the care, custody and control of their children with the state's interest in protecting the children's welfare." *Id.* at 1138.

Plaintiffs also rely on two appellate decisions from other Circuits.[12] The facts in *Wendrow v. Michigan Department of Human Services*, 534 F. App'x 516 (6th Cir. 2013) are demonstrably different from those in this case. In *Wendrow*, the Sixth Circuit held that a thirteen year old child was seized when she was removed from class and then interviewed by prosecutors and police officers in a separate area on school grounds. The child in question had been diagnosed with Asperger's syndrome. The court concluded that "it was objectively unreasonable for [defendants] to subject [this child] to an interview of this type without consent." In *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000), a panel of the Fifth Circuit held that a minor child was "seized" in violation of the Fourth Amendment when he was physically removed from his home without a warrant or probable case [sic]. The court specifically found that it was not "objectively reasonable for the

[12] I am not convinced these two cases demonstrate "the clearly established weight of authority from other courts" as contemplated by the qualified immunity doctrine. *See PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1196-97 (10th Cir. 2010) ("A right is clearly established 'when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as [the] plaintiff maintains.") (quoting *Harman v. Pollock*, 586 F.3d 1254, 1260 (10th Cir. 2009).

officers to believe that [the minor child] was in danger of imminent harm" and further noted that the judicial order in the officers' possession "in no way indicated that [the minor child's] safety might be jeopardized." Indeed, the appellate court noted that "the police were not informed of any abuse prior to arriving" at the child's home.

Here, Plaintiffs were not taken into custody by Defendants Adame and Garz [sic]. Defendants were in possession of court orders that specifically found that "an emergency exists which threatens the safety of" the Plaintiffs, that "remaining in the home or returning home would be contrary to the welfare of the child, and that "immediate placement is in the best interest of the child." Judge Sloan's *Ex Parte* Orders also referred to allegations of physical, sexual, mental, or emotional abuse involving these children. Echoing the Supreme Court's observation in *White*, I find that Plaintiffs have "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." Accordingly, I recommend that Defendants Adame and Garza be dismissed from the first claim for relief on the basis of qualified immunity.

2. Plaintiffs' Third Claim Alleging A Fourteenth Amendment Violation

In their Third Claim, Plaintiffs allege that Defendants Adame and Garza "caus[ed] Plaintiffs to be deprived of their familial associations in violation of the

14th Amendment." *See* First Amended Complaint at ¶ 208. More specifically, Defendants Adame and Garza allegedly prohibited "Plaintiffs from leaving [the G's residence] with their mother and . . . prohibit[ed] Plaintiffs, through written and verbal orders, from movement and travel with their mother, father, and grandparents." Plaintiffs further allege that Defendants Adame and Garza knew their "actions could and did result in Plaintiffs' detention." *Id.* at ¶ 205.

In moving to dismiss this claim, Defendants Adame and Garza argue, in rather cursory fashion, that they placed only "limited restrictions" on Plaintiffs' interaction with their parents that lasted "for a single day when [Plaintiffs] left [Colorado] without the permission or even knowledge of Garza or Adame." *See* Motion to Dismiss, at 9. Defendants insist that they "are not aware of any Constitutional right to uninterrupted familial relations in the face of credible evidence of imminent danger of abuse" and that they

> acted reasonably when they determined that to protect the Plaintiffs and their siblings, it was best to separate them from their parents and leave them in the care of a family friend of the parents for a short time pending further investigation.

Id. Plaintiffs' analysis of their Fourteenth Amendment claim is equally perfunctory.

In addition to the factual allegations enumerated in support of Plaintiffs' Fourth Amendment claim, the First Amended Complaint avers that after Plaintiffs

and their siblings returned to Johnson County on May 7, 2009, "SRS/DCF disregarded the children's best interest and proceeded arbitrarily to separate them from each other, from their parents, from their grandparents, from the G.'s and from anyone known to them, causing the children obvious mental and physical nxiety, needless worry and grief." *See* First Amended Complaint at ¶ 168.

The Due Process Clause of the "Fourteenth Amendment provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.'" *Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1339 (10th Cir. 2007) (quoting the Due Process Clause of the U.S. Const. amend. XIV, § 1). "The Supreme Court's interpretation of this clause recognizes two different kinds of constitutional protection: procedural due process and substantive due process." *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). "In its substantive mode, the Fourteenth Amendment provides protection against arbitrary and oppressive government action, even when taken to further a legitimate governmental objective." *Seegmiller v. LaVerkin City,* 528 F.3d 762, 767 (10th Cir. 2008). One strand of the substantive due process doctrine "protects an individual's fundamental liberty interest, while the other protects against the exercise of governmental power that shocks the conscience." *Id.* Plaintiffs' Third Claim fails under either application of the substantive due process doctrine.

The "protections of substantive due process have for the most part been accorded to matters relating to

marriage, family, procreation, and the right to bodily integrity." *Becker v. Kroll*, 494 F.3d 904, 923 (10th Cir. 2007) (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994)). *See also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992) (acknowledging that constitutional protections extend to personal decisions relating to, *inter alia*, family relationships and child rearing, and that Supreme Court precedents "have respected the private realm of family life which the state cannot enter"). As the Tenth Circuit noted in *Starkey ex rel. A.B. v. Boulder County Social Services*, 569 F.3d 1244, 1253 (10th Cir. 2009) (internal citations omitted),

> "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." But this right to family integrity "has never been deemed absolute or unqualified." "Courts have recognized that the constitutional right to familial integrity is amorphous and always must be balanced against the governmental interest involved."

Cf. Tenenbaum v. Williams, 193 F.3d 581, 601 (2d Cir. 1999) ("It does not follow from the principle that brief seizures of people may be unreasonable and therefore violate the Fourth Amendment that brief removals [of minor children] from their parents to protect them from abuse are 'without any reasonable justification in the service of a legitimate government objective' under the Due Process Clause.") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

The Tenth Circuit also addressed the constitutionally protected right of familial association in *Silvan W. v. Briggs*, 309 F. App'x 216, 223 (10th Cir. 2009). There, the court acknowledged that:

> The substantive component of the Fourteenth Amendment "protects an individual's fundamental liberty interests" and guards "against the exercise of governmental power that shocks the conscience." * * * The right of familial association arises from the concept of ordered liberty. It is violated when government officers intend to interfere with a protected relationship and the reason for interfering "constitute[s] an undue burden on [the plaintiffs'] associational rights."

Id. (internal citations omitted). In *Silvan*, the Tenth Circuit found no evidence that plaintiffs' familial association rights were unduly burdened where defendants acted "on the basis of a reasonable suspicion of past and impending harm." The court concluded that plaintiffs' associational rights "[did] not outweigh the government's 'interest in protecting [the minor child] from abuse and from situations where abuse might occur.'" *Id.* (citing *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993)). *Cf. Vigil v. S. Valley Acad.*, No. 06-2309, 247 F. App'x 982, 988 (10th Cir. 2007) ("a plaintiff claiming a violation of the right to familial association must show that the defendant had the specific intent to interfere with the family relationship"). *Cf. Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (noting that to properly allege a substantive due process violation, "a plaintiff must do more than show

that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power") (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006)).

Although I accept as true the well-pled allegations of the First Amended Complaint, I do not find that Plaintiffs have alleged facts that rise to the level of a plausible substantive due process violation by Defendants Adame and Garza.[13] Stated differently, the allegations in the First Amended Complaint do not plausibly demonstrate that Defendants Adame and Garza on May 6, 2009 intended to interfere with a protected relationship or that the Safety Plan they put in place on that day constituted "an undue burden" on Plaintiffs' right of familial association.

Plaintiffs' allegations make clear that even if Defendants' underlying assumptions may have been incorrect or misguided, they were acting in response to the *Ex Parte* Orders issued by the District Court of Johnson County. *See* First Amended Complaint at ¶ 132 (Defendants represented that "they were in possession of a court order from the State of Kansas"). *Cf. Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267,

[13] In reaching this conclusion, the court expresses no views as to the actions of other Defendants taken either before or after May 6, 2009. Under § 1983, the court must consider to what extent, if at all, Defendants Adame and Garza personally participated in the alleged constitutional violations because to assert a viable claim under § 1983, the plaintiff must plausibly allege that the defendant's own individual actions violated the Constitution. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

275 (2d Cir. 2011) (to prove a due process violation of the right to familial association, it is not enough to show that the government action was "incorrect or ill-advised"). The allegations in the First Amended Complaint also demonstrate Defendants' appreciation of their limited role on May 6, 2009. *See* First Amended Complaint at ¶¶ 143 and 161 (Defendants Adame and Garza stated that "Plaintiffs and the other Doe children were in the custody of the State of Kansas" and that "government agents from Kansas would arrive at a [sic] unspecified time/day to take physical custody of the Doe children from Dr. and Mrs. G"). The Safety Plan put in place by Defendants Adame and Garza specifically directed Mrs. Doe to contact Ms. Gildner, the social worker in Kansas, the very next day (May 7, 2009), presumably to discuss the children's current and future situation. *Cf. Cox*, 654 F.3d at 275 ("Absent truly extraordinary circumstances, a brief deprivation of custody is insufficient to state a substantive due process custody claim."); *Silvan*, 309 F. App'x at 223 (in finding that the defendants had not violated plaintiffs' familial association rights, the court noted "the relatively short duration" of the child's placement with her aunt and uncle and cited with favor *Nicholson v. Scoppetta*, 344 F.3d 154, 172 (2d Cir. 2003) which held that "brief removals generally do not rise to the level of a substantive due process violation, at least where the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal"); *Wofford v. Evans*, No. 7:02CV00762, 2002 WL 32985799, at *7 (W.D. Va. Dec. 17, 2002) (holding that state action that affects a familial relationship

only incidentally is not cognizable in a § 1983 due process claim). There is absolutely no allegation that Defendant Adame or Defendant Garza had any role or input in the subsequent decision by Kansas authorities to separate the Doe children "from each other, from their parents, from their grandparents, from the G's and from anyone known to them."

Finally, in finding that Defendants Adame and Garza must be dismissed from Plaintiffs' Third Claim on the basis of qualified immunity, I remain mindful of the Tenth Circuit's observations regarding the "difficult and essential" judgments that social workers must make when they are confronted with allegations of child abuse and are forced to make "on-the-spot judgments on the basis of limited and often conflicting information." *Gomes*, 451 F.3d at 1138. *Cf. Hedger v. Kramer*, No. CIV-13-0654-HE, ___ F. Supp. 3d ___, 2016 WL 3945816, at *9 (W.D. Okl. Jul. 19, 2016) (heeding "the Tenth Circuit's admonition that 'considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse"), *appeal pending.* " '[I]f officers of reasonable competence could disagree' about the lawfulness of the challenged conduct, then '[qualified] immunity should be recognized." *Gomes*, 451 F.3d at 1136 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

> "Officials do not lose their qualified immunity because of a mistaken, yet reasonable belief, nor do officials lose their immunity because of a reasonable mistake as to the legality of their

> actions." "[T]he purpose of the qualified immunity doctrine is to provide ample room for mistaken judgments and to protect 'all but the plainly incompetent or those who knowingly violate the law.'"

Dupree v. City of Jacksonville, No.4:08CV00327 JMM, 2009 WL 1392578, at *6 (E.D. Ark. May 13, 2009) (internal citation omitted).

Accordingly, I recommend that Defendants Adame and Garza be dismissed from Plaintiffs' Third Claim for Relief based upon the doctrine of qualified immunity.[14]

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[14] If the substantive claims against Defendants Adame and Garza are dismissed pursuant to this Recommendation, those Defendants also must be dismissed under Plaintiffs' Fourth Claim which alleges they participated in a conspiracy to deprive Plaintiffs of their constitutional rights. *See Fernandez v. N. Kern State Prison*, No. 1:16-cv-1612 AWI JLT, 2016 WL 7324708, at *6 (E.D. Cal. Dec. 16, 2016) (holding that "[b]ecause Plaintiff's complaint fails to allege any substantive claims . . . it follows that Plaintiff's claim for civil conspiracy must be dismissed"). *Cf. Aleynikov v. McSwain*, No. 15-1170 (KM), 2016 WL 3398581, at *19 (D. N.J. Jun. 15, 2016) (citing the "established rule . . . that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability;" because the court found no violation of the plaintiff's constitutional rights, the companion conspiracy claim was dismissed), *clarified on other issues*, 2016 WL 5340513 (D. N.J. Sep. 22, 2016); *Everling v. Ragains*, No. 1:14-cv-00024-TWP-DML, 2015 WL 1319707, at *5 (S.D. Ind. Mar. 23, 2015) (holding that in the absence of an underlying substantive claim, plaintiff's conspiracy cause of action must be dismissed; "[b]ecause all the federal claims under 42 U.S.C. § 1983 are barred by prosecutorial immunity, there is no underlying cause of action on which to base a conspiracy claim"). Also, because this court is recommending Defendants Adame's and Garza's dismissal based upon qualified

C. The Claim Against Defendant Douglas County

The Sixth Claim in the First Amended Complaint asserts that "[u]nder 42 U.S.C. § 1983, Douglas County is liable for causing Plaintiffs to be seized and deprived of their liberty in violation of the 4th Amendment of the United States Constitution." Plaintiffs allege in conclusory fashion that "Douglas County had adopted an unwritten policy, custom, or practice by which it authorized county sheriff's personnel to seize Plaintiffs based on out-of-state *ex parte* court orders in violation of the United States Constitution and Colorado law." *See* First Amended Complaint, at ¶ 216.

This claim cannot survive if Defendants Adame and Garza are dismissed from this action. It is axiomatic that a local government body cannot be liable for damages if the plaintiff suffered no constitutional injury at the hands of a government employee. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1264 (10th Cir. 2008). *Cf. Maco v. Baldwin Union Free Sch. Dist.*, No. CV 15-3958, 2016 WL 4028274, at *6 (E.D.N.Y. Jul. 26, 2016) ("[W]here there is no underlying violation of a plaintiff's constitutional rights, any claim for municipal liability necessarily fails as well."); *Bonilla, v. City of York*, No. 1:14-CV-2238, 2016 WL 3165619, at *12 (M.D. Pa. Jun. 7, 2016) ("[T]here is no municipal liability under *Monell* where there is no underlying violation of a constitutional

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immunity, there is no need to address their statute of limitations affirmative defense.

right by the individual officers."), *appeal pending*; *Caputo v. Rio Ranche Police Dep't*, No. CIV 05-321-JB/DJS, 2006 WL 4063020, at *9 (D.N.M. Jun. 30, 2006) (while the acts of a single employee may sometimes give rise to a *Monell* claim, "such a *Monell* claim still requires that a constitutional violation occurred").

II. The Kansas Defendants' Challenge to Personal Jurisdiction

Where a defendant is moving to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a cognizable claim for relief, the court should first address the challenge to personal jurisdiction. "The question of personal jurisdiction must be addressed before a court can reach the merits of a case, because 'a court without jurisdiction over the parties cannot render a valid judgment.'" *Doe v. May*, No. 14-cv-01740-WJM-NYW, 2015 WL 8519519, at *3 (D. Colo. Nov. 16, 2015) (quoting *Omi Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998)), *rec. adopted*, 2015 WL 8479808 (D. Colo. Dec. 10, 2015).

In every action, the plaintiff bears the burden of establishing personal jurisdiction over a non-resident defendant. *See Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). "In the preliminary stages of litigation, Plaintiff's burden is light." *Walker v. Wegener*, No. 11-CV-3238-PAB-KMT, 2012 WL 1020673, at *3 (D. Colo. Mar. 2, 2012) (citing *Wenz*, 55 F.3d at 1505), *rec. adopted*, 2012 WL 1020954 (D. Colo. Mar. 26, 2012).

"Where, as here, there has been no evidentiary hearing, and the motion to dismiss for lack of personal jurisdiction is decided on the basis of affidavits and other materials, Plaintiff[] need only make a *prima facie* showing that jurisdiction exists." *Id.* at *3 (internal citation omitted). *See also Pytlik v. Prof'l Res., Ltd*., 887 F.2d 1371, 1376 (10th Cir. 1989) (Plaintiff "has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading"). This court must resolve any factual disputes in Plaintiffs' favor. *See Beyer v. Camex Equip. Sales & Rentals, Inc.*, No. 10-CV-01580-WJM-MJW, 2011 WL 2670588, at *2 (D. Colo. July 8, 2011) ("Any factual conflicts must be resolved in the plaintiff's favor."), *aff'd*, 465 F. App'x 817 (10th Cir. 2012). "However, 'only the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true." *Wise v. Lindamood*, 89 F. Supp. 2d 1187, 1189 (D. Colo. 1999). The court also should accept as true those facts presented in defendant's affidavits or exhibits that remain unrefuted by plaintiff. *See Glass v. Kemper Corp*., 930 F. Supp. 332, 337 (N.D. Ill. 1996).

Here, both the Kansas Defendants and Plaintiffs have attached exhibits to their motion and response brief, respectively. "A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of . . . personal jurisdiction," without converting "the motion into one for summary judgment; 'the plain language of Rule 12(b) permits only a 12(b)(6)

motion to be converted into a motion for summary judgment.'" *1-800-Contacts, Inv. v. Mem'l Eye, PA*, No. 1:08-CV-983 TS, 2009 WL 1586654, at *1 n.1 (D. Utah, Jun. 4, 2009). *Cf. Rich Food Servs., Inc. v. Rich Plan Corp.*, No.5:99-CV-677-BR, 2001 WL 36210598, at *9 n.2 (E.D.N.C. May 12, 2001) ("Rule 12(b) does not impose a restriction on [a] trial court in considering matters outside the pleadings in ruling on a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction"); *Sunwest Silver, Inc. v. Int'l Connection, Inc.* 4 F. Supp. 2d 1284, 1285 (D. N.M. 1998) ("The submission of affidavits in connection with a motion to dismiss for lack of personal jurisdiction does not convert the motion into one for summary judgment, thus, the court examines this jurisdictional issue pursuant to the standards applicable to a Rule 12(b)(2) motion.").

"To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show both that jurisdiction is proper under the laws of the forum state and that the exercise of jurisdiction would not offend due process." *Intercon, Inc. v. Bell Atl. Internet Sols.*, 205 F.3d 1244, 1247 (10th Cir. 2000) (citation omitted). Because Colorado's long-arm statute permits the exercise of any jurisdiction that is consistent with the United States Constitution, the personal jurisdiction inquiry under Colorado law "collapses into the single due process inquiry." *Id.* at 1247 (citation omitted). *See also Beyer*, 2011 WL 2670588, at *3 (The court "need only address the constitutional question of whether the exercise of personal jurisdiction over [Defendants] comports with due process.").

"The Due Process Clause permits the exercise of personal jurisdiction over a nonresident defendant so long as there exist minimum contacts between the defendant and the forum State." *Intercon*, 205 F.3d at 1247 (internal quotation marks and citation omitted). The minimum contacts requirement protects a defendant from "being subject to the binding judgment of a forum with which [it] has established no meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (internal quotation marks and citation omitted). The defendant must have "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Id.* at 472. "[T]he question of whether a non-resident defendant has the requisite minimum contacts with the forum state to establish in personam jurisdiction must be decided on the particular facts of each case." *Benton v. Cameco Corp*., 375 F.3d 1070, 1076 (10th Cir. 2004) (internal quotation marks omitted).

In this case, Plaintiffs are asserting the court has specific personal jurisdiction over the Kansas Defendants. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. ___, 134 S. Ct. 1115, 1121 (2014). As the Supreme Court explained in *Walden*, the

> "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. . . . But the plaintiff cannot be

> the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.

Id. at 1122. *Cf. Giduck v. Niblett*, No. 13CA0775, 2014 WL 2986670, at *5 (Colo. App. Jul. 3, 2014) ("[i]n properly viewing the focus of the minimum contacts analysis . . . it is the defendants, not plaintiffs or third parties, who must create contacts with the forum state. . . ."), *cert. dismissed*, Aug. 28, 2015.

"[A] court may, consistent with due process, assert specific jurisdiction over a nonresident defendant if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Intercon*, 205 F.3d at 1247 (citation omitted). "[P]urposeful direction exists when there is 'an intentional action . . . expressly aimed at the forum state . . . with [the] knowledge that the brunt of the injury would be felt in the forum state," and the "plaintiff's injuries must 'arise out of [the] defendant's forum-related activities." *Anzures v. Flagship Restaurant Group*, 819 F.3d 1277, 1280 (10th Cir. 2016) (quoting *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.,* 514 F.3d 1063, 1071-72 (10th Cir. 2008)). "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1419 (10th Cir.

1988) (quoting *Burger King*, 471 U.S. at 474-75). *Cf. New Frontier Media, Inc. v. Freeman*, 85 P.3d 611, 614 (Colo. App. 2003) (contacts that exist with a state due to a plaintiff's unilateral acts have been held insufficient to establish personal jurisdiction).

For this court to assert personal jurisdiction over the Kansas Defendants, there must be more than "mere injury to a forum resident." *Walden*, 134 S. Ct. at 1125. Indeed, the Tenth Circuit has acknowledged that "personal jurisdiction cannot be based on a [defendant's] interaction with a plaintiff known to bear a strong connection to the forum state." *Rockwood Select Asset Fund XI(6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1180 (10th Cir. 2014) (citing *Walden,* 134 S. Ct. at 1122-26)). In this case, it seems clear that on May 6, 2009, Plaintiffs did not qualify as residents of Colorado or have a strong connection with Colorado.[15] In reaching that conclusion, I find instructive the Colorado Supreme Court's analysis in *Brandt v. Brandt*, 268 P.3d 406 (Colo. 2012). Although that case arose under the Uniform Child Custody Jurisdiction and Enforcement Act and considered when a non-issuing jurisdiction could modify an out-of-state custody order, the Colorado Supreme Court held that a determination of where a parent and child "presently reside" for purposes of a residency determination must be based on a

[15] The First Amended Complaint alleges that at all relevant times in 2009, Plaintiffs, as well as their parents, and their siblings, were residents of the State of Kansas and resided in Johnson County, Kansas. *See* First Amended Complaint at ¶ 16.

"totality of the circumstances determination." *Id.* at 415. Factors that should be weighed include:

> the length and reasons for the parents' and the child's absence from the issuing state; their intent in departing from the state and returning to it; . . . where they maintain a home, car, driver's license, job, professional licensure, and voting registration; where they pay state taxes; the issuing state's determination of residency based on the facts and the issuing state's law; and other circumstances demonstrated by evidence in the case.

Id. This court has not been provided with any evidence that would suggest Plaintiffs qualified as "residents" of Colorado on May 6, 2009. With the recommendation to dismiss the claims against Defendants Douglas County, Adame, and Garza, the remaining parties to this action were all Kansas residents at the time of the relevant conduct in 2009.

Moreover, I do not find that the Kansas Defendants' very brief contact with Colorado officials is sufficient to demonstrate that these Defendants "purposefully directed" their activities at this forum with "[the] knowledge that the brunt of the injury would be felt in the forum state." I also do not find that any violation of Plaintiffs' constitutional rights arose "out of [the] defendant's forum-related activities."

The First Amended Complaint alleges that on April 20, 2009, Defendant Gildner allegedly enlisted the assistance of Assistant District Attorney Jaclynn J.B. Moore, "who filed ten Child-in Need-of-Care ("CINC")

petitions in the District Court for Johnson County, Kansas." *See* First Amended Complaint at ¶ 85. A "non-emergency hearing" on those petitions was set for May 11, 2009 in the District Court for Johnson County. *Id.* at ¶ 92. Thereafter, on May 4, 2009, Assistant District Attorney Donald W. Hymer, Jr. moved for issuance of *Ex Parte* Orders of Protective Custody Pursuant to K.S.A 38-2242 in the District Court of Johnson County, Kansas. *Id.* at ¶ 111. *See also* Exhibit A (doc. #64-1) attached to Motion to Dismiss. *Cf. Fitzgerald v. Zakheim & Lavrar, P.A*, 90 F. Supp. 3d 867, 873 (D. Minn. Feb. 11, 2015) (holding that the defendant law firm did not "purposely direct" its actions at a Minnesota resident when it obtained from a Florida state court a writ of garnishment aimed at an individual the defendant believed resided in Florida). Plaintiffs contend that after Dr. and Mrs. G returned the Doe children to Kansas on May 7, 2009, "SRS/DCF [the Kansas Defendants' employer] . . . proceeded arbitrarily to separate them from each other, from their parents, from their grandparents, from the G's and from anyone known to them." The "purposeful activities" which form the basis for the instant action all took place in Kansas and the consequences of the Kansas Defendants' conduct also were felt in that state. Accordingly, I do not find that the Kansas Defendants had sufficient contacts with Colorado to permit this court to exercise specific personal jurisdiction over those individuals.

"Even if defendant's actions created sufficient minimum contacts," the court "must still consider whether the exercise of personal jurisdiction over defendant

would offend traditional notions of fair play and substantial justice." *Intercon*, 205 F.3d at 1247 (internal quotation marks and citation omitted). "This inquiry requires a determination of whether the district court's exercise of jurisdiction over defendant is reasonable in light of the circumstances surrounding the case." *Id.* The court considers the following factors in deciding whether the exercise of jurisdiction is reasonable: "(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies." *Id.* at 1249.

> In assessing the reasonableness of jurisdiction, we also take into account the strength of a defendant's minimum contacts. [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less a defendant need show in terms of unreasonableness to defeat jurisdiction.

Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1161-62 (10th Cir. 2010) (internal citations omitted). The Supreme Court has cautioned that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in

comparison to his opponent." *Burger King*, 471 U.S. at 478.

On balance, I am not convinced that exercising personal jurisdiction over the Kansas Defendants in Colorado would comport with traditional notions of fair play and substantial justice. Colorado does not appear to be the most efficient place to litigate the dispute, and certainly does not have a greater interest in protecting the interests of the children in this case than Kansas. To the contrary, this action arises out of orders issued by the District Court for Johnson County, Kansas. I have no reason to believe that proceeding against the Kansas Defendants in that forum would impose undue burdens on Plaintiffs or impair their ability to resolve their claims on the merits. Basic notions of due process mandate that this case proceed, if at all, in the District of Kansas.

In lieu of dismissing the claims against the Kansas Defendants, the court may exercise its discretion and transfer the remaining claims and parties to the District of Kansas pursuant to 28 U.S.C. § 1631. That statute provides that if a court finds that it lacks personal jurisdiction, it "shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." *Cf. Doe v. May*, 2015 WL 8519519, at *5; *Reynolds v. Henderson & Lyman*, No. 13-cv-03283-LTB, 2014 WL 5262174, at *4-5 (D. Colo. Oct. 14, 2014). It would appear that Plaintiffs could have brought their claims against the Kansas Defendants originally in that forum. I further find that transferring this

action to the District of Kansas would further the interests of justice, particularly if Plaintiffs' claims might be time-barred if filed anew in that jurisdiction. At this point, I cannot say with certainty that Plaintiffs' claims against the Kansas Defendants are "unlikely" to have merit, just as I will not presume that Plaintiffs are pursuing their claims in bad faith. On balance, I recommend that the action and the remaining claims against Defendants Gildner, Webb and Abney be transferred to the District of Kansas.[16]

CONCLUSION

Accordingly, for the reasons set forth above, this court RECOMMENDS that the Motion to Dismiss Amended Complaint (doc. #57) filed by Defendants Lesa Adame, Carl Garza, and Douglas County be GRANTED and that the claims against those defendants be dismissed with prejudice. I further RECOMMEND that Defendants Monica Gildner, Angela Webb, and Tina Abney's Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the alternative, Motion for Summary Judgment (doc. #65) be DENIED WITHOUT PREJUDICE, and that this case and the claims against Defendants Gildner, Webb, and Abney be transferred to the United States District

[16] In view of this Recommendation, the court need not address the substantive arguments advanced in the Kansas Defendants' motion to dismiss. Those arguments should be resolved by the assigned judicial officer in the District of Kansas.

Court for the District of Kansas pursuant to 28 U.S.C. § 1631.

DATED this 27th day of January, 2017.

BY THE COURT

s/ Craig B. Shaffer
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

N.E.L., M.M.A., and E.M.M., **Plaintiffs,** **v.** **MONICA GILDNER, et al.,** **Defendants.**	**Case No. 17-2155-CM**

MEMORANDUM AND ORDER

(Filed Mar. 1, 2018)

This matter is before the court on plaintiffs N.E.L., M.M.A., and E.M.M.'s Motion to Transfer Case (Doc. 130). Plaintiffs ask this court to reverse the United States District Court for the District of Colorado's decision to transfer the case to this court because it lacked specific jurisdiction over defendants.

This case was transferred to this court from the District of Colorado on March 14, 2017. Plaintiffs filed the present motion on September 25, 2017, more than six months after the case was transferred. Plaintiffs allege the District of Colorado erred in finding it lacked specific jurisdiction because the suit arises out of, or relates to, the contacts defendants had with two Colorado officials and their conspiracy to commit an unlawful seizure in Colorado, and because the deprivation of plaintiffs' constitutional rights occurred in Colorado.

Plaintiffs claim their legal basis for their motion to retransfer is found in *F.D.I.C. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996). In *McGlamery*, the Tenth Circuit found that a transferee court and transferee circuit have the power to "indirectly review the transfer order if the [plaintiff] moves in those courts for retransfer the case." *Id.* at 221. Courts considering a motion to retransfer, however, are constrained by the "law of the case" doctrine. *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order."). A prior ruling of a transferor court, therefore, may only be reconsidered when 1) the governing law has been changed by the subsequent decision of a higher court, 2) when new evidence becomes available, or 3) when clear error has been committed or to prevent manifest injustice. *Id.* Additionally, a party may choose to challenge the transferor court's decision to transfer a case for lack of personal jurisdiction on appellate review after final judgment. *McGlamery*, 74 F.3d at 222 ("In terms of the effectiveness of review after final judgment, a transfer for lack of personal jurisdiction provides no less opportunity for review than a transfer for improper venue under § 1406(a).").

In reviewing plaintiffs' motion, however, the court finds no good reason to overturn the decision of the magistrate judge in the District of Colorado, which was later adopted by the district court judge. Plaintiffs have not shown any intervening law changes or the

discovery of new evidence, nor have they made a sufficient case to show the District of Colorado committed clear error. Personal jurisdiction exists only when the suit arises out of or is related to the defendant's contact with the forum. *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1780 (2017). The District of Colorado found defendants did not have the requisite contacts with Colorado, as all of defendants' conduct took place in Kansas with the goal of returning the children to Kansas. The fact they may have contacted officials in Colorado during the execution of a Kansas order or that the children were in Colorado at the time of their alleged illegal seizure are too slight of contacts to overcome the fact that most of the complained of conduct occurred in Kansas.

The court finds plaintiffs have failed to meet their burden to show this court should alter the District of Colorado's decision to transfer the case for lack of personal jurisdiction under the law of the case doctrine. The motion is therefore denied.

IT IS THEREFORE ORDERED that plaintiffs' Motion to Transfer Case (Doc. 130) is denied.

Dated March 1, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

N.E.L., et al., Plaintiffs-Appellants, v. DOUGLAS COUNTY, COLORADO, et al., Defendants-Appellees, and MONICA GILDNER, in her individual capacity, et al., Defendants.	No. 17-1120

ORDER

(Filed Jul. 17, 2018)

Before **PHILLIPS**, **KELLY**, and **McHUGH**, Circuit Judges.

Appellants' petition for rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

N.E.L., M.M.A. and
E.M.M, individually as

Plaintiffs

v. Case No. 17-2155-CM

MONICA GILDNER,
ANGELA WEBB AND
TINA ABNEY, in their
individual capacities

Defendants

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that Plaintiffs N.E.L., M.M.A. and E.M.M., in the above named case, through counsel, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the *Memorandum and Order* [#135], entered in this action on March 7, 2018, which dismissed Plaintiffs' claims against Monica Gildner, Angela Webb and Tina Abney. Plaintiffs also appeal the Order [#134], entered on March 1, 2018, which denied *Plaintiffs' Motion to Re-Transfer the Case to the United States District Court for the District of Colorado* [#130].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca R. Messall, do hereby certify that a true and correct copy of the foregoing PLAINTIFFS' NOTICE OF APPEAL was electronically filed on March 28, 2018, using CM/ECF which sends a notice of electronic filing to all counsel of record.

For Defendants: shon.qualseth@ag.ks.gov;
For Plaintiffs: Mike@TheWhiteheadFirm.com

By: s/ Rebecca R. Messall
Rebecca R. Messall, Esq.