18-7530

IN THE

SUPREME COURT OF THE UNITED STATES

NO. __-____

Tonya Udoh; Emem Udoh,
Individually, and on behalf of their minor
children, K.K.W., and K.C.W.,

Petitioners,

vs.

Minnesota Department of Human Services; Charles E. Johnson; Donothan Bartley; Ann Norton; Daniel E. Engstrom; Catrina Blair; City of Maple Grove; City of Maple Grove Police Department; Melissa Parker; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District, No. 279; Joanne Wallen; Karen Wegerson; Ann Mock; CornerHouse; Patricia Harmon; Bill Koncar; Grace W. Ray; and Linda Thompson,

Respondents.

ON PETITION FOR WRIT FOR CERTIORARI

TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Question One: In the (a) Denial of Plaintiffs Motion to Amend the Complaint; (b) Dismissal of Plaintiffs Claims With and Without Prejudices; and (c) Granting of Defendants Dispositive Motions, Whether "Pro Se Litigants" are Held to the Same Legal Standards as "Counseled Litigants" in light of *Haines v. Kerner*, 404 U.S. 519 (1972); *Davis v. Monroe County Bd*, 526 U.S. 629 (1999); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Skinner v. Switzer*, 562 US __ (2011)?

Question Two: Whether Parent(s) May Assert a Fourth Amendment Challenge Regarding a Search and Seizure of their Minor Children?

Question Three: Whether Evidence of "Reasonable Suspicion of Child Abuse" Standard Does Not Apply To Plaintiffs §1983 (a) Fourth Amendment Warrantless Entry to Home to Conduct Search and Right to Privacy; (b) Fourteenth Amendment Stigma-Plus Preclusion to Seek Employment in their Chosen Profession and Procedural Due Process Claims; and (c) §1985 Conspiracy Claim for Qualified Immunity Purposes?

Question Four: Whether Government Entities Such as City Of Plymouth, City Of Maple Grove, Hennepin County, CornerHouse and Minnesota Department of Human Services are Not Entitled to Judgment on Qualified Immunity Grounds for Municipal Liability in light of *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978); *Pembaur v. Cincinnati*, 475 US 469 (1986)?

Question Five: Whether Defendants Violated Plaintiffs' Clearly Established (a) Fourth Amendment and Minn. Const. Art. I, Sec. 10 Rights Against Unreasonable Search And Seizure, (b) Fifth Amendment Right to Miranda Warnings, and (C) Fourteenth Amendment Substantive And Procedural Due Process Rights and Art. I, Sec. 7 of Minn. Const. in light of *Troxel v. Granville*, 530 U.S. 57 (2000); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Stansbury v. California*, 511 U.S. 318 (1994); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Safford Unified Sch. Dist. v. Redding*, 557 US 364 (2009)?

Question Six: Whether Defendants Falsely Arrested and Imprisoned Plaintiffs and Caused Intentional Infliction Of Emotional Distress on All Plaintiffs?

Question Seven: Whether Minn. Stats. §626.556 and §260.165 Now §260C.175 are Unconstitutional Facially and as Applied to Plaintiffs in light of *Troxel v. Granville*, 530 U.S. 57 (2000); *Chicago v. Morales*, 527 U.S. 41 (1999); *Ferguson v. Charleston*, 532 U.S. 67 (2001); *Stanley v. Illinois*, 405 U.S. 645 (1972)?

Question Eight: Whether Under the Circumstances of this Case, A Municipality Can Be Held Liable Under *Monell* For Arguing Enforcing or Adherence to State Laws MGDPA, Minn. Stats. §626.556 and §260c.175 in light of *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978)?

Question Nine: Whether Competent Parent (Non-Attorney) May Proceed *Pro Se* on Behalf of their Minor Children to Challenge in a Federal Civil Court Violation of their Fourth and Fourteenth Amendments Constitutional Rights and State-Law Claims?

Question Ten: Whether Individual Defendants are Not Entitled to Judgment on Qualified Immunity Grounds on All Plaintiffs §1983 and §1985 Claims?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Attorneys for Respondent are:

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STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

NO. __-____

Tonya Udoh, et al.,

Petitioners,

vs.

Minnesota Department of Human Services, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

Petitioners, Tonya Udoh; Emem Udoh, Individually, and on behalf of their minor children, K.K.W., and K.C.W., respectfully petition for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

STATEMENT OF JURISDICTION

The district court of Minnesota entered its order and judgment, see ECF Nos. 163 (Pet. App. 6 – 14) on September 12, 2017. Plaintiffs filed a timely notice of appeal, see ECF No. 170 on October 6, 2017. The Eighth Circuit Court of Appeals entered its judgment on August 30, 2018. See Pet. App. 1 – 5. This Court's jurisdiction is invoked under 28 U.S.C §1254(1) and §1254(2).

OPINIONS BELOW

The order and judgment of the district court of Minnesota is unpublished. *Udoh, et al v. Minnesota Department of Human Services, et al,* Civ. No. 0:16-cv-3119 (PJS/SER). The magistrate court Report and Recommendation ("R&R") was entered on July 25, 2017 and filed

on July 26, 2017. See ECF No. 143 (Pet. App. 15 – 57). The decision of the Eighth Circuit Court of Appeals appears in the appendix to this petition and is unpublished. See USCA8 Case No. 17-3256. The District Court memorandum of law and order is reprinted in Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory and constitutional provisions involved in this case are reprinted in the Appendix to the Petition.

STATEMENT OF THE CASE

The Udohs initiated this action in the district court of Minnesota on September 19, 2016 alleging sixteen (16) counts of constitutional violations, and several counts under state common law. *See generally* (Compl.). ECF Nos. 1. The original and amended complaint is supplemented by 145 pages of exhibits. ECF No. 143 at 3 (Pet. App. 17). The Udohs sought relief pursuant to 42 U.S.C. §1983 and §1985. They alleged the following unconstitutional conducts by Defendants, in their individual and officials capacities, deprived them of various rights under the United States and Minnesota State Constitutions:

1. Unreasonable Search and Seizure In Violation of the Fourth, Fifth Amendment and Unreasonable Interference With Familial Relationships In Violation of the Fourteenth Amendment. Against Defendants, Wallen, Wegerson and Mock set forth in ¶115 through ¶122 of the complaint. Against Defendants Wallen and Melissa set forth in ¶132 through ¶138. Against Defendants CPS, Bartley, Norton, Johnson, Engstrom, Lynch, Pregler, Blair set forth in ¶149 through ¶172. Against Defendants CPS, Johnson, Engstrom, Blair, Koncar, Ray, Thompson, Harmon, and CornerHouse set forth in ¶175 through ¶187.

2. Unreasonable Search and Seizure By Defendants Entities' Custom and Policy In Violation of the Fourth, Fifth Amendment and Unreasonable Interference With Familial Relationships By Defendants Entities' Custom and Policy In Violation of the Fourteenth Amendment. Substantive allegations are set forth in ¶123 through ¶131, ¶139 through ¶148 of the complaint.

3. Malicious Prosecution By Bartley are set forth in ¶173 and ¶174 of the complaint.

4. Punitive Damages Against All Defendants are set forth in ¶188 through ¶190 of the complaint.

5. Injunctive Relief Against Defendants Entities are set forth in ¶191 and ¶192, ¶193 and ¶194, ¶210 and ¶211 of the complaint.

6. Conspiracy to Interfere With Plaintiffs Civil Rights Against all Defendants are set forth in ¶195 through ¶207 of the complaint.

7. Attorney's Fees are set forth in ¶208 and ¶209 of the complaint.

8. Violation of Fourteenth Amendment Procedural Due Process Rights Against all Defendants are set forth in ¶212 through ¶223 of the complaint.

9. False Arrest and Imprisonment, and Intentional Infliction of Emotional Distress Against all Defendants are set forth in ¶224 through ¶226, ¶227 through ¶229 of the complaint.

The Udohs sought three types of relief based on these claims. The Udohs demanded damages, Attorney fees, and expenses for the constitutional violations resulting from the Government's conducts. See Compl. ¶¶1-2, ¶230. In addition to compensatory and punitive damages, the Udohs sought injunctive relief set forth in ¶¶1-2, ¶¶191-94, ¶¶210-11, and ¶230. The Udohs also sought judicial declarations set forth in ¶230.

Appellees, the Hennepin County Defendants[1] and the CornerHouse Defendants[2] moved for a motion to dismiss. See ECF No. 56. Appellees, the School District Defendants[3] and the State Defendants[4] moved for a motion for judgment on the pleading. See ECF Nos. 65, 73. Appellees, the City Defendants[5] moved for a motion to dismiss and for summary judgment. See ECF No. 90. The Udohs moved for motions and/or leave to amend the original complaint. See ECF Nos. 99, 101, 102, 118, 131. Oral arguments on these motions were held on June 6, 2017. See ECF No. 139. The district court in modifying and adopting the magistrate court report and recommendations denied the City Defendants motion for summary judgment and the Udohs'

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1 The "Hennepin County Defendants" refers collectively to Hennepin County, CPS, Daniel E. Engstrom, Donothan Bartley, Ann Norton, and Catrina Blair.

2 The "CornerHouse Defendants" refers collectively to Patricia Harmon, Bill Koncar (William Koncar), Grace Werner Ray (Kristen Werner Ray) and Dr. Linda Thompson.

3 The "School District Defendants" refers collectively to Independent School District, No. 279, Joanne Wallen, Karen Wegerson and Ann Mock.

4 The "State Defendants" refers collectively to Minnesota Department of Human Services and Charles E. Johnson.

5 The "City Defendants" refers collectively City of Maple Grove, City of Maple Grove Police Department, Melissa Malecha (Melissa Parker), City of Plymouth, City of Plymouth Police Department, Molly Lynch, and Kevin Pregler.

motions and/or leave to amend the complaint, but granted all Appellees dispositive motions under Rule 12(b)(6) and 12(c). See ECF Nos. 163, 164. The Udohs appeals the order and judgment with regards to their claims on the issues presented for review to the Eighth Circuit Court of Appeals, arguing that the appellees conduct, policy, custom and statute on all counts violated their clearly established Fourth, Fifth and Fourteenth Amendment rights. The Eighth Circuit Court of Appeals ("circuit court") affirmed the judgement of the district court. See Pet. App. 1 – 5.

STATEMENT OF THE FACTS

Substantive allegations are set forth in ¶¶48 – 113 of the complaint and Exhibits A –N attached to the complaint. Tonya Udoh ("Tonya") is the mother of four minor children, K.K.W., KC.W., C.U., and C.U. Emem Udoh ("Emem") is Tonya's husband, the father of C.U., and C.U., and the stepfather of K.K.W., and K.C.W. Tonya was a social work student and a DHS-licensed certified nursing assistant. Emem was a Software Engineer at Stratasys, Inc. The Udohs appeared *pro se* in the district court, individually and on behalf of their minor children. See generally (Compl).

A. Statutory Framework.

A summary of the Minnesota statutory provisions, Minn. Stats. §626.556, Subd. 10, 11, §260C.175, Subd. 1(2)(ii) and Chapter 13 of Minnesota Government Data Practices Act ("MGDPA") are reprinted in Pet. App. 58 to 73, and discussed in relevant part in School District, Hennepin County, CornerHouse and State Defendants memorandum, see ECF Nos. 58 at 2-4, 75 at 4-5, 67 at 17-18. See also ECF No. 125 at 11-13 with §13.01 - .88 (MGDPA) provides that the consequences for not providing a *Tennessen warning* is that any Government entities should not store or use the information it collected from the Udohs and their children. See IPAD Adv. Op. 10-014 (May 4, 2010). The Udohs allege that Minn. Stats. §626.556, Subd. 10, 11, §260C.175, Subd. 1(2)(ii), Defendants entities' polices and/or custom, are facially and as applied by Defendants, unconstitutional. Compl. ¶¶57 – 230.

B. Custodial Interrogations and Examinations of the Udohs' Children at School and Disclosure of Confidential Information.

Substantive allegations are set forth in ¶¶57 – 113 of the complaint and Exhibits A – G attached to the complaint. On or around February 19, 2013, an unknown student reported to a teacher that K.K.W. was a subject of abuse. The teacher reported to Defendant Joanne Wallen ("Wallen"), a social worker at K.K.W. school. Wallen removed K.K.W from her classroom and interrogated her. Wallen then called Melissa Parker ("Parker"), a police officer with the City of Maple Grove, who then also interrogated K.K.W. Parker concluded that "the alleged abuse had not happen since... summer 2012 and there was no indication that K.K.W. was in immediate danger staying at her home. This confidential information was disclosed to the City of Plymouth Police Department and Child Protection Services at Hennepin County.

On February 21, 2013, Defendant Donothan Bartley ("Bartley"), a CPS social worker went to K.K.W.'s school and ask to speak with K.K.W. Defendants Karen Wegerson ("Wegerson"), the principal secretary at K.K.W school removed K.K.W from her classroom to speak with Bartley. Bartley conducted a custodial interrogation of K.K.W at the school in a private room where he physically observed and examined K.K.W's privates bodies and found no physical signs of sexual abuse. Bartley then went to K.C.W school. At Bartley request, Defendant Ann Mock ("Mock"), the principal at K.C.W school, removed K.C.W from her classroom. Bartley then conducted a custodial interrogation of K.C.W at the school in a private room where he physically observed and examined K.C.W private bodies and found no physical signs of abuse.

C. The Udohs' Children Removal and Placement at St. Joseph Home, and Warrantless Entry to the Udohs' Private Home to Conduct Inspection and Examination of Other Minor Children.

That day, Bartley disclosed this confidential information and reported that K.K.W said that she did not feel safe at home to the following people: Defendants Molly Lynch ("Lynch") and Kelvin Pregler ("Pregler"), Plymouth officers; Parker, Wallen and Ann Norton ("Norton"), a CPS

social worker supervisor. The Udohs allege that the information was false and that this group of Defendants did not explain to the Udohs and their children their *Miranda or Tennessen warning* and knew:

> K.K.W had a reputation of being untruthful ... knew earlier that week, K.K.W had made an allegation of being assaulted at school by a student at the school gym that was investigated by Melissa to be false ... knew that K.K.W's mother and K.C.W were not aware of any alleged abuse ... Bartley and Lynch could not corroborate or substantiate the alleged abuse with the mother and K.C.W ... knew that K.K.W suffered from developmental disabilities and was prone to "ADHD" acting out ... knew Bartley had physically observed and examined [the children] private bodies and found no injuries, signs of sexual abuse ... knew the mother and stepparent had a clean criminal record with no record involving CSC offenses ... knew that [the children] parents had not consented to Bartley to physically observe and examine [children] private bodies without a Doctor or parental presence at [school and home] ... knew that DHS Statute provisions did not vest Bartley with authority to be physically observing and examining minor children at their [school or home] to find signs of sexual abuse ... knew that two days ago, Melissa investigated this allegation and found that K.K.W was not in any immediate danger. **See also Pet. App. 122 to 301.**

Based on these information, Bartley and Lynch removed K.K.W. and K.CW from their home, family and school.

On February 21, 2013, the children were placed at St. Joseph Home. The Udohs allege that the place was unsanitary for the children, ¶87. Bartley then conducted a warrantless entry to the Udohs home for inspection and physical examination of C.U. and C.U., ¶84 and found no sign of abuse or neglect. Lynch scheduled the interview at CornerHouse for law enforcement purpose, see ¶83, Compl. Ex. E at 5, and to prosecute parents at Hennepin County. See Compl. Ex. E at 8. The Udohs allege that Defendants Wallen, Bartley, Parker, Wegerson, Mock, Pregler, Norton and Lynch did not explain to the Udohs and their children their *Miranda or Tennessen warning* and conspired to deprive them their constitutional rights. ¶¶65-207. The Udohs allege that this group of Defendants falsely arrested and imprisoned their children, ¶¶224-226 and caused all Plaintiffs to suffer an intentional infliction of emotional distress. ¶¶227-229.

D. Further Investigation of the Udohs' Children Occurs at CornerHouse to Gather Evidence for Prosecution and Disclosure of Confidential Information.

Substantive allegations are set forth in ¶¶94 – 102 of the complaint and Exhibits A – G attached to the complaint. On February 25, 2013, Bartley transported K.K.W. and K.C.W. to CornerHouse for custodial interrogation. Bartley and Lynch, Knew K.K.W and K.C.W parents were unaware, had not consented for their children to be transported by strangers and to be talked to on what they have to say during the CornerHouse interrogation. Defendants Grace Ray ("Ray"), a forensic interview at CornerHouse interrogated K.K.W. with Bartley, Lynch and Grace Song ("Song"), a Hennepin County Prosecutor, observed and provided questions. Defendants Bill Koncar ("Koncar"), another forensic interview interrogated K.C.W. on the same day. As with K.K.W., Bartley, Lynch and Song observed the interview and provided questions. The confidential information from CornerHouse interview was disclosed to these Defendants and their entities, and presented to state court as justification for continued removal of K.K.W., and K.C.W. from the Udoh's custody ¶100, and to charge and prosecute parents at Hennepin County ¶177. The Udohs allege that Defendants Wallen, Parker, Bartley, Ray, Koncar and Lynch did not explain to the Udohs and their children their *Miranda or Tennessen warning* and conspired to deprive them of their constitutional rights. The Udohs alleged that this group of Defendants falsely arrested and imprisoned their children and caused all Plaintiffs to suffer an intentional infliction of emotional distress.

E. Bartley and Hennepin County Entering of Maltreatment Findings in Minnesota Child Abuse Registry and Disclosure of Confidential Information.

Substantive allegations are set forth in ¶¶113 – 230 of the complaint and Exhibits A – G attached to the complaint. On February 28, 2013, Bartley entered his findings in a central registry. See Compl. Ex. E at 7; ECF Nos. 59-3, 59-4 at 1-3. The Udohs allege that Bartley and Hennepin County have a policy or custom of entering maltreatment record without adequate hearing. See ECF No. 59-4, 59-3 at 1-3. The maltreatment findings preclude the Udohs from seeking licensing or employment in their chosen profession, as well as working in the Public

Health and Service field. These are some of the consequences of maltreatment inclusion ¶113. See ECF No. 59-4 at 1-3. The Udohs are required to request a hearing to appeal determinations or findings of maltreatment. See Minn. §626.556, Subd. 10 paragraph (h), (i) and (j) (2013). On March 15, 2013, Plaintiffs seek removal from registry by appealing the findings, see ECF No. 59-5, 59-6 at 1-3. The request was denied by Hennepin County on April 1, 2013. See ECF No. 59-8, 59-7 at 1-2. On April 30, 2013, the Udohs made a request, see ECF No. 59-2 at 1-2 and that request was suspended at ECF No. 59-10 at 1-2. Since then, the Udohs have not been given a meaningful opportunity, prompt hearing in time and manner to challenge Bartley's maltreatment findings, even where the findings were *obtained, stored and used* without the required *Tennessen warning*. These findings are disclosed or made availiable to employers and licensing agencies. As a result, the Udohs suffered intentional infliction of emotional distress and sought judicial relief to expunge their maltreatment record.

F. Further Investigation and Examination of the Udohs' Children Occurs Again at CornerHouse Medical and Disclosure of Confidential Information.

On March 6, 2013, Defendants Catrina Blair ("Blair"), a Hennepin County social worker took K.K.W., and K.C.W. to CornerHouse for custodial interrogation and very intrusive physical examinations with Defendant Linda Thompson ("Thompson"), a CornerHouse physician. The confidential information from the CornerHouse interrogations and examinations was disclosed to Defendants and their entities. The Udohs allege that Dr. Thompson did not find any physical evidence of sexual abuse. The Udohs allege that Defendants Bartley, Blair, Thompson and Lynch did not explain to the Udohs and their children their *Miranda or Tennessen warning* and conspired to deprive them of their constitutional rights ¶¶103-207. The Udohs allege that this group of Defendants falsely arrested and imprisoned their children and caused all Plaintiffs to suffer an intentional infliction of emotional distress ¶¶227-229.

REASONS FOR GRANTING THE WRIT

The issues presented in this case is beyond the particular facts and parties involved but for growing interest of the public, society at large and integrity of the judicial system. This is a case where the parents tried to secure a legal counsel following dismissal but to no avail. See Pet. App. 302 – 306. The lower courts holding cannot be squared or reconciled with this Court's decisions on constitutional law. Most significantly, the lower courts decided important constitutional claims in a way that conflicts with relevant decisions of this Court and has so far departed from the usual and accepted course of justice. Allowing such decision to hold will affect other similarly situated in Petitioner's situation because the same Defendants-Respondents have instituted another maltreatment finding and have also initiated a proceeding to terminate the rights of the parents in 2018/2019 based solely on prior false determinations in 2013/2014. See Pet. App. 307 - 310 (in re SSIS 574330451 and 27-JV-185208). This further underscores the importance of granting review in this case.

First, on all grounds, the magistrate and district Court erroneously relied on cases using summary judgment standard instead of Rule 12(c) and 12(b) cases. In relying on these inapposite cases, the lower court erroneously held "pro se litigants" to "counseled litigants" legal standards. The circuit court has charitably construed an appellant's argument on appeal under the reasoning of *United States v. Destefano*, 178 Fed. Appx. 613, 615 n.4 (8th Cir. 2006). Petitioner respectfully ask this court to liberally construe their arguments.

Second, on all grounds, Defendants-Appellees may argue wavier issues but Appellants argues under the reasoning of *Wever v. Lincoln County*, that the circuit court "consider a newly raised argument [or issues]." *Id* at 608. Since, Appellants' argument in sections I through X were presented in the (original and amended) complaint and in briefs at the magistrate and district court, then in light of *Wever, Id* at 608; *Winegar v. Des Moines Indep. Com. Sch. Dist.*, 20 F.3d 895, 899 n.2 (8th Cir. 1994), Appellants respectfully ask this court to consider all claims or issues raised because the claims were "[t]hough not artfully pleaded" in the complaint. These

claims and arguments are purely legal, requires no additional factual developments, and manifest injustice would result if these arguments are not considered for review. *Id.*

I. THE LOWER COURT ERRED IN THE DENIALS OF PLAINTIFFS' MOTIONS AND/OR REQUEST FOR LEAVE TO AMEND THE COMPLAINT BECAUSE "PRO SE LITIGANTS" ARE HELD TO *HAINES V. KERNER* STANDARD.

A. Standard of review

The factual findings of the district court are reviewed for clear error and its legal conclusions are reviewed *de novo*, even where it involves mixed question of fact and law. *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525 (8th Cir. 2005). This standard of review applies to all Appellants' issues raised through section I to X. The circuit court reviews denial of motion and/or leave to amend a complaint for an abuse of discretion. The circuit court reviews a motion to dismiss and for judgment on the pleadings *de novo* with the district court's application of federal and state laws. *Syverson v. Firepond, Inc.*, 383 F.3d 745, 749 (8th Cir. 2004); *Gallagher v. City of Clayton*, 699 F.3d 1013 (8th Cir. 2012). For *pro se complaint*, this Court "hold the district court to the requirement of liberal construction." *Stone v. Harry*, 364 F.3d 912 (8th Cir. 2004). Dismissal of a *pro se* complaint is inappropriate ***unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle him to relief.***" *Haines v. Kerner*, 404 U.S. 519 (1972); *Ulrich v. Pope County*, 715 F.3d 1054, 1058 (8th Cir. 2013); *Davis v. Monroe County Bd*, 526 U.S. 629 (1999)(same); ECF No. 101 at 28 – 29 (same). This district and magistrate court clearly erred under the reasoning of *Rickinyer v. Browne*, 995 F. Supp. 2d 989, 1026 - 27 (D. Minn. 2014), because when faced with a *motion to amend* and a *motion to dismiss* the same complaint, the court should have consider Plaintiffs' *motion to amend first* because (a) in *Coleman v. Correct Care Solutions*, 559 Fed. Appx. 601 (8th Cir. 2014), the circuit court held that an amended complaint supersedes the original complaint, (b) when a complaint is supported by Exhibits, the circuit court in *Brown v. Medtronic, Inc.*, 628 F.3d 451, 460 (8th Cir. 2010) require courts to consider such documents, and (c) this issue was raised in ECF No. 155 at 1 – 3 before the magistrate and district court.

First, the Supreme Court and Eighth Circuit have a separate and specific standard of review for dismissing a *pro se* litigant claim in light of *Whitson v. Stone County Jail*, 602 F.3d 920 (8th Cir. 2010); *Wishnatsky v. Rovner*, 433 F.3d 608 (8th Cir. 2006) (held *pro se* to a liberal, less stringent pleading standard); *Haines*; *Davis v. Boylan,* 670 Fed. Appx. 435, 436 (8th Cir. 2016)(same); argued in ECF No. 99 at 3 – 4 (on legal standard), ECF No. 101 at 3, ECF No. 102 at 5, ECF No. 118 at 3 before the magistrate court. The Supreme Court has never held "*pro se litigants*" to the same legal standards as "*counseled litigants*" in a civil action. The fact that the Eighth Circuit applies the same motion to dismiss standard to a motion for judgment on pleading, it does follows that *Haines*; *Boylan* and *Wishnatsky* standard applies as well to Defendants' motion for judgment on pleading.

Therefore, since the magistrate and district court did not apply *Haines* standard before dismissing any of Plaintiffs' claims, both courts applied incorrect legal standards to Appellants' motion and/or request for leave to amend the complaint. Reversal and remand is necessary on this ground. Furthermore, because *Twombly* and *Iqbal* were formal pleadings *drafted, filed and argued* by trained counsel, both cases do not alter the judicial "pro se litigants" liberal construction philosophy under the reasoning of *Phillips v. County of Allegheny*, 515 F.3d 224 (3rd Cir. 2008); and *Reyes v. Downey, S & L Ass'n, FA*, 541 F. Supp. 2d 1108 (C. D. Cal. 2008)(notice pleading standard).

Second, even if "*counseled litigants*" legal standards applies to Appellants, the amended complaint with "specific facts" in the supporting Exhibits[6], Defendants' Exhibits[7], and the additional facts alleged in Appellants oppositions' briefs[8] in light of *Berman v. Young, ld* at 1038 (collecting *Seventh Circuit* decisions allowing Plaintiffs to assert additional facts in opposition briefs) satisfies *Twombly* and *Iqbal* standard under the reasoning of (a) *Johnson v. City of*

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[6] Plaintiffs' Exhibits (A-I) in ECF No. 1-1 to 1-9, Exhibits (J-M) in ECF No. 108-1 to 108-3, Exhibits N in ECF No. 119 (both J and N were restricted).
[7] Defendants' Exhibits (1-13) in ECF No. 59-1 to 59-13 and Westin Decl., see ECF No. 68-1.
[8] Plaintiffs' opposition briefs in ECF No. 102 at 9 – 14 (on deliberate indifference).

Shelby, (2014) in stating simply, concisely and directly events warranting reliefs; (b) *Berman v. Young*, *ld* at 1038; *Erickson v. Pardus*, 551 U.S. 89 (2007) allowing legal conclusion to be pleaded in *pro se* complaint; (c) *Braden v. Wallmart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) for ignoring reasonable inference in Appellants' favor for any "specific facts" in the Exhibits that is in conflict with the complaint; (d) *Skinner v. Switzer*, 562 US __ (2011) holding that Rule 8(a)(2) does not require an exposition of the Udohs legal theories.

Third, the record supports good cause reasons against dismissal on Norton and Ray claims because Mr. Udoh is wrongfully incarcerated, see Pet. App. 122 to 301, argued in ECF No. 99 at 40 (on dismissal with prejudice fails on procedural defect because pro se pleading are liberally construed under *Erickson v. Pardus*, 551 U.S. 89 (2007)), ECF No. 101 at 28 – 29, ECF No. 102 at 38 – 39, ECF No. 118 at 40 at the magistrate and district court. See ECF No. 155 at 7 – 13.

Fourth, the amended complaint with supporting Exhibits satisfies *Twombly* and *Iqbal* to survive Defendants' dispositive motions on official capacity or Government entities liability and on qualified immunity defense grounds in light of the arguments presented in section II through X.

Fifth, in light of *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 438 -39 (8th Cir. 1983) holding, the district court abuse its discretion under *Michaelis* and in light of the arguments presented in ECF No. 101 at 28 – 29 (collecting cases and arguments in support for leave to amend) for not granting leave to amend before dismissal with or without prejudices where (a) Appellants motioned and sought for a leave to amend any claim insufficiently plead in light of the *facts pleaded in the amended complaint, facts pleaded in the supporting Exhibits, facts in Appellants-Plaintiffs' opposition briefs* and *arguable facts that could be pleaded from the children depositions,* and (b) legal theories in support of these *facts* pleaded or could be pleaded in section II through X to support Appellants-Plaintiffs' claims for relief under *Haines* standard.

Therefore, reverse and remand is necessary on this ground because the district court "misapplied the pleading standard of Rule 8," *Braden ld.*, at 598 for *pro se* litigants.

II. PLAINTIFF HAVE A FOURTH AMENDMENT CLAIM REGARDING A SEARCH AND SEIZURE OF THEIR MINOR CHILDREN.

In light of the standard of review delineated in section I, this issue was raised before the magistrate and district court, see ECF No. 99 at 20 – 21, and ECF No. 155 at 3-6; Pet. App. Transcript at 74 - 121. See Pet. App. 307 - 310 (in re SSIS 574330451 and 27-JV-185208).

First, for purpose of this argument, this court should assume that a search and seizure of a minor child occurred. See Pet. App. 74 to 121, ECF No. 99 at 21 – 37 (collecting cases and arguments), ECF No. 102 at 23 – 36, ECF No. 118 at 5 – 38, and ECF No. 101 at 7 – 27. The district court clearly erred in ECF Nos. 143 at 12 (Pet. App. 26), 163 at 1-3 (Pet. App. 6 – 8), because Appellants did alleged a separate Fourth Amendment injury related to the searches and seizures. *J.B. v. Washington County*, 127 F.3d 919, 928 (10th Cir. 1997).

The lower courts clearly erred in using the "generalized notion of substantive due process" to analyze these claims, instead of the "Fourth Amendment" standard under the reasoning of *Albright v. Oliver*, 510 US 266, 273 (1994); *Doe v. Heck* (same). The lower courts also erred, see ECF No. 143 at 13, 29, 32 (Pet. App. 27, 43, 46) in applying the "*shock-the-conscience*" test to Appellants substantive due process claim under the reasoning of *Burgess v. Houseman*, 268 Fed. Appx. 780 (10th Cir. 2008), that the "*shock-the-conscience*" test only applies to "actions that does not implicate a fundamental right. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 – 47 [...] (1998); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003)." The actions alleged implicate Appellants' fundamental rights to *unreasonable search and seizures* and *unreasonable interference with familial relations*.

Second, the lower courts erred in failing to address the children claims before reaching dismissal with or without prejudice. In light of *J.B. v. Washington County* and *Phillips v. County of Orange, ld* at 367-68, the Udohs have alleged distinct and separate injuries ¶¶57 –

230 resulting from the search and seizure of their children - that the interviews, removals, disclosure of confidential and stigmatizing information, entering of maltreatment findings precluding employment and licensing, physical and medical examinations and the malicious prosecution injury from material omission and/or misrepresentation used to procure the same *seizure order*, violated their right to privacy, Privacy Act of 1974 (5 U.S.C. 552a) and legitimate expectation of privacy in intimate and family matter. These alleged injuries are all protected by the Fourth Amendment in a common "zone of privacy" interest. See ECF No. 58 at 23 n.16 (supporting these alleged invasions of privacy injuries).

Therefore, the applicable standard for qualified immunity requires *exigent circumstances or probable cause* to suspect immediate danger or abuse. Even if this court applies the *reasonable suspicion* standard to the parent's Fourth Amendment claims, Defendants are not entitled to qualified immunity, see sections III, V and X.

III. THE "REASONABLE SUSPICION OF CHILD ABUSE" STANDARD DOES NOT APPLY TO §1983 FOURTH AMENDMENT AND RIGHT TO PRIVACY CLAIMS; FOURTEENTH AMENDMENT STIGMA-PLUS; AND CONSPIRACY CLAIMS.

In light of the standard of review discussed in sections I through II, the circuit court reviews the "clearly established" prong *de novo*. See *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009).

First, this court has never applied the "reasonable suspicion" standard to a Plaintiff's Fourth Amendment claim on warrantless, coerced and nonconsensual entry into their private home by a Government officer to conduct inspection and physical examination of children. The district court clearly erred in failure to address this clearly established prohibited conduct in the amended complaint ¶¶84-230 under the Fourth Amendment law in light of *Coates v. Powell*, 639 F.3d 471 (8th Cir. 2011) (unreasonable search and seizure in entering a private home); *Calabretta v. Floyd* (9th Cir. 1999) (same); *Good v. Dauphin County*, 891 F.2d 1087 (3rd Cir. 1989) (same). Therefore, the applicable standard for qualified immunity under *Coates* and *Nelson's* wisdom in light of *Good* and *Calabretta* requires exigent circumstances or immediate

danger of serious bodily injury to the children. Even if the *reasonable suspicion* standard applies, Bartley is not entitled to qualified immunity, see section X.

Second, this court has never applied the "reasonable suspicion" standard to a Plaintiff's Fourth and Fourteenth Amendment right to individual and familial privacy. The district court clearly erred in failure to address this aspect of Plaintiffs' claims in light of *Griswold v. Connecticut*, 381 US 479 (1965) (right to privacy). The familial relation comprises of the "liberty interest in familial privacy and [familial] integrity." See *Doe v. Heck*, *ld* at 520 and *Bohn* (familial privacy in the context of parent identified as suspected child abuse); *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994) (same); *R.S. v. State*, 459 N.W.2d 680 (Minn. 1990) (same).

For individual privacy, clearly established law in *Ferguson v. Charleston*, 532 U.S. 67 (2001) (held reasonable expectation of privacy and unauthorized disclosures without an informed consent under *Miranda v. Arizona*, 384 US 436 (1966)); and *Cooksey v. Boyer*, 289 F.3d 513 (8th Cir. 2002) held standards for right to privacy. It is clear under the reasoning of *Bohn ld* at 1436 n.4; and *Winegar ld* at 899, that allegations of child abuse are *sufficiently stigmatizing* or shocking degradation or egregious humiliation to implicate liberty interest. The disclosure of these allegations and confidential information to Defendants was done to further some specific state interest. See *Whisman, ld* at 1310 (state's specific interest in protecting the child). Therefore, Defendants are not entitled to qualified immunity. Even if the "reasonable suspicion" standard applies, Defendants are *still not* entitled to qualified immunity on this ground, see section X.

Third, this court has never applied the "reasonable suspicion" standard to a Plaintiff's Fourteenth Amendment substantive and procedural due process right against damage to reputation, good name, honor, integrity, and stigma-plus preclusion to seek licensing and/or employments. The district court clearly erred in failure to address this aspect of Plaintiffs' claims ¶¶113-230, supported by Defendants briefs in ECF No. 67 at 23-24, 28 n.9. Clearly established law in *Bohn*; *Dupuy v. Samuels*, 397 F. 3d 493, 503-04, 509-11 (7th Cir. 2005);

Humphries; *Valmonte v. Bane*; *Stodghill v. Wellston Sch. Dist.*, 512 F.3d 472, 476 (8th Cir. 2008) (right to hearing) requires adequate notice and prompt post-deprivation hearing. Even if the "reasonable suspicion" standard applies, Defendants are not entitled to qualified immunity on this ground, see section X. See Pet. App. 307 - 310 (in re SSIS 574330451 and 27-JV-185208).

Fourth, this court has never applied the "reasonable suspicion" standard to a Plaintiff's §1983 and §1985(3) conspiracy claims. The district court clearly erred in failure to address the Appellants' conspiracy claim ¶¶195 – 207 under §1983. See *K.D. ex rel. Duncan*, 921 F. Supp. 2d at 210 (comparing legal standards for §1983 and §1985(3) conspiracy claims). In light of *Murray v. Lene*, 595 F.3d 868 (8th Cir. 2010), the factual allegations in the (original and amended) complaint suggest such a "meeting of the minds" between Defendants to adequately survive Defendants' motions in light of the (a) Exhibits *forms* (Compl. Exs. E at 9, D) suggesting a "mutual understanding" between Hennepin County Defendants: Bartley, Norton; School District Defendants: Wegerson, Mock, and City Defendants: Lynch, and (b) "specific facts" (Compl. Exs. E at 5, A - N) demonstrating "meeting of minds" among Defendants under the reasoning of *Brown v. Medtronic* (held courts to consider documents attached to the complaint). See *Phillips v. County of Orange*, *ld* at 381 – 384 (finding similar allegations in ¶¶195 – 207). The record supports a reasonable inference of conspiracy between Defendants. See ECF No. 99 at 36 (collecting five prior cases) on CornerHouse conspiracy with law enforcement and Hennepin County in using these evidences to charge and prosecute parent.

IV. GOVERNMENT ENTITIES ARE NOT ENTITLED TO JUDGMENT ON QUALIFIED IMMUNITY.

In light of the standard of review discussed in section I through III, the district court in ECF No. 163 at 5 (Pet. App. 10) held that "Defendants' ... are clearly protected by qualified immunity" but the circuit court under the reasoning of *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2004); *Owen v. City of Independence*, 445 US 622, 638 (1980); *Doe v. Washington County*, 150 F.3d 920 (8th Cir, 1998) have never granted qualified immunity to Government

entities. Even if the district court in adopting the R&R in ECF No. 143 at 17 (Pet. App. 31), the (original and amended) complaint with supporting Exhibits (A–N) adequately stated a *Monell* claim to survive Defendants' motions. The arguments presented below were raised in ECF No. 99 at 5 – 11 (on dismissal on entirety fails because Plaintiffs' complaint stated claims upon which relief can be granted), ECF No. 103 at 3 – 4, ECF No. 102 at 5 – 14, ECF No. 118 at 3, Pet. App. Transcript at 74 - 121, ECF No. 155 at 7 – 13 at the magistrate and district court.

First, there is an extensive debate in the federal circuit regarding whether State Defendants are liable for prospective relief. Compare ECF No. 101 at 5 (collecting cases); *Amundson ex rel. Amundson v Wis. Dep't of Human Servs.*, 721 F,3d 871 (7th Cir. 2013)(prospective injunctive relief requiring state agency to comply with federal law); *Am Express*, 755 F. Supp 2d 556 (D. N. J. 2010) (same) with *Monroe v. Arkansas State University*, 495 F.3d 591, 594 (8th Cir. 2007) (state agency cannot be sued for prospective injunctive relief). Since Appellants are not requesting monetary relief from DHS, *Amundson* applies.

Second, the magistrate and district court clearly erred by using the *summary judgment standard* in reviewing Municipal liability because the specific cases relied on were addressing summary judgment on *Monell* under the reasoning of *Oglala Sioux Tribe v. Hunnik*, 1031 - 32, that *Slaven* is distinguishable from the facts alleged in Plaintiffs complaint. First, *Slaven* was decided under the summary judgment standard and involved a case attempting to hold County officers liable for the *non-discretionary duty* to enforcing state law. Second, *ld.*, 1032, the "Slaven's complaint alleges that *Minnesota law*, and State Court judge's application of that law – not an independent [Defendant] policy [or custom] – caused the procedural due process violations." *ld. Oglala Sioux Tribe.* Since the lower court did not give Plaintiffs any opportunity for discovery and to offer prove on *Monell* under *Haines* standard, reverse and remand is required on this ground. Pet. App. 307 - 310 (evidence to supporting *Monell* policy and custom).

Third, the (original and amended) complaint ¶¶123-187 with Exhibits (A-N) adequately stated a *Monell* claim under *multiple instances or incidents by multiple employees.* The record is

supported by *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 – 1157 (1st Cir. 1989) which held that a particular incident involving the *concerted action* of a *large contingent of municipal employees* may support the inference of an underlying policy or custom. The First Circuit considered "other" evidence establishing a policy or custom to include (a) testimony from Bartley, Ray, and Thompson, see Exhibits (J – M) on prior incidents; and (b) specific facts in the Exhibits *forms* in light of *Brown v. Medtronic ld* at 460, see (Compl. Exs. E at 9, A - I), showing specific Hennepin County Policies: HC 13300 (Interview) and HC 12434 (Hold and Placement) is supported by the reasoning of *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir, 2003) that the Exhibits "*forms*" does "certainty constitutes evidence sufficient to demonstrate ... the policy and practice of" Hennepin County, School District, and City Defendants. See Pet. App. 307 – 310 (new forms).

Therefore, in light of *Bordanaro*; *Dubbs* and the *Fifth* Circuit in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) finding an isolated incident resulted from a policy or custom because six officers were involved in the alleged conduct, Appellants have adequately stated a *Monell* claim.

The record is arguably supported by evidence of improper investigative methods or cognizable pattern of past misconduct alleged by facts in:

> *R.S. v. State*, 459 N.W.2d 680 (Minn. 1990)(against *State, Hennepin County*, and *School District Defendants* in removing and interrogating minor children in school without parental consent and failure to comply with §626.556); See also ECF No. 67 at 19-20; *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987)(prior notice or complaint to *State Defendants* regarding §260C.165(1)(c)(2)); *Doe v. Hennepin County*, 858 F. 2d 1325 (8th Cir. 1988)(prior misconduct, notice or complaint against *State* and *Hennepin County Defendants* for failure to comply with §626.556); *Doe v. Tsai*, 2010 U.S. Dist. LEXIS 61746 (D. Minn. 2010), *affirmed* in 648 F.3d 584 (8th Cir. 2011)(prior misconduct or complaint against *Hennepin County Defendants* in conducting physical and medical examination of children without parental consent or court order); *Slaven v. Engstrom*, 710 F. 3d 772 (8th Cir. 2013)(prior misconduct or complaint against Lynch, *City Defendants*, Bartley, *Hennepin County Defendants* in removing and interrogating children and for failure to accord adequate notice and hearing to parent),

to a finding of a municipal policy and/or custom under *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1987) (affirming existence of a municipal custom based on notice of three prior

complaint or incidents); *Ware v. Jackson County*, 150 F.3d 873 (8th Cir. 1998) (same); *Wever v. Lincoln County*, 388 F.3d 601 (8th Cir. 2004) (same); *Starstead v. City of Superior*, 533 F. Supp. 1365, 1365 – 70 (W.D. Wis. 1982)(same); *R.S ex rel. S.S. v. Minnewaska Area Sch. Dist.*, 894 F. Supp. 2d 1128 (D. Minn. 2012) (same), sufficient to withstand a dismissal motion.

The (original and amended) complaint ¶¶123 – 187 with Exhibits (A - N) stated a *Monell* claim under *supervisory liability* and *failure to train or supervise* by alleging Defendants Johnson, Engstrom, Harmon, Norton as supervisors and placed on notice by prior incidents. The magistrate and district court clearly erred on dismissal in light of *Wever* where the circuit court found, it is undisputed that *Carmen* took no personal involvement in the alleged conduct but denied *Carmen's* motion because he did not present any evidence showing what training procedures or steps in place to address two prior incidents of conducts. These Defendants were *final policymaker* in light of *Pembaur v. Cincinnati*, 475 US 469 (1986); *J.B. v. Washington County*, and actions taken by Wegerson, Mock, Lynch, Bartley, Ray, Koncar, Thompson, Blair, Norton, and Grace Song, a Hennepin County Prosecutor constitutes a policy, procedure or custom of their respective agencies. Remand is necessary because whether these Defendants are an authorized policymaker is a question of state law, and the district court did not address that issue. *Id.*, *Wever* .

CornerHouse is a private entity and subject to liability in light of *Dubbs* and under the reasoning of *Pierce v. Pemiscot Mem'l Health Sys.*, 25 F. Supp. 3d 1198 (E. Dist. Mo. 2014) because the "joint participation" test is called into question by *Domina* in which the Eighth Circuit adopted *Richardson's* focus on the "policy consideration" and "historical availability" of the defense. The (original and amended) complaint with attached Exhibits (A-N) stated a *Monell* claim against Defendants agencies in light of the arguments presented in section V for failure to comply with state and federal statutory provisions, sections VII, VIII for unconstitutionally enforcing state statutes. The entering of maltreatment findings on two (2) Plaintiffs in this case is a custom and practice of Hennepin County.

Fourth, Appellant ask this court for a declaration that the Fourth Amendment applies to child abuse investigation. See *Jones v. Hunt*, 410 F.3d 1221, 1225 (10th Cir. 2005) (held that the Fourth Amendment subject social workers to its requirements); *Gates* (same, in the *Fifth* Circuit); *Michael C v. Gresbach*, (same, in the *Seventh* Circuit). The district court erred when it dismissed Appellants claims for declaratory and injunctive reliefs to prevent Defendants from the unconstitutional conducts.

Fifth, genuine issues of material facts exist. This arguments was raised in ECF No. 99 at 37 (on dismissal qn entirety fails because genuine issue of material fact regarding official policy or custom to preclude Defendants motions), ECF No. 101 at 27 – 28, ECF No. 102 at 37, ECF No. 118 at 38 – 39, ECF No. 155 at 1 – 13 in the magistrate and district court. Based on the denial of summary judgment in this case, and because Plaintiffs' case involved "multiple incidents" by "multiple actors," therefore, under *Bordanaro*, triable issues as to policy or custom exist.

Sixth, under the reasoning of *Philips v. County of Orange*, *ld* at n.41; *Garner v. Memphis*, 8 F.3d 358 (6th Cir. 1993), Defendants while not denying that they had a policy in place, see policy and procedure 414: sections III. B. 2 (Reporting Process), V, VI (Investigation) in Westin Decl. in ECF No. 70 at 9-10, 24, 25-27, that allowed for Police and CPS to remove and interview children suspected of abuse in its school, argues that they were enforcing state statute. The magistrate and district court clearly erred in ECF No. 143 at 17, Pet. App. 31 (failure to plead "why," "how" or "specific policy") because (a) the Eight Circuit in *Kohl v. Casson*, 5 F.3d 1141, 1148 (8th Cir. 1993); *Jordan ld* at 339 applies no standard of "heightened specificity" or "multiple incident;" (b) in light of *Braden*, *ld* at 595 in ignoring reasonable inferences supported by the magistrate findings of facts in ECF No. 143 at 24-25, 31-32, 34 (Pet. App. 38-39, 45-46, 48) that Defendants "violated" Appellants "substantive due process." These policies were the *moving force* behind Plaintiffs' injuries for *Monell*; (c) *Doe ex rel. Thomas v. Tsai* alleges a prima facie showing of Hennepin County policy for physical and medical

examinations to detect sign of abuse for *Monell* liability, and under *Szabla v. City of Brooklyn Park*, 437 F.3d 1289 (8th Cir, 2006) on whether School District and Hennepin County policies are unlawful on its face.

V. DEFENDANTS VIOLATED PLAINTIFFS' CLEARLY ESTABLISHED RIGHTS.

In light of the standard of review discussed in section I through IV, the circuit court reviews the "clearly established" prong *de novo*. See *Nelson v. Correctional Medical Services*. The arguments presented below were raised in ECF No. 99 at 21 – 37 (on dismissal on entirety fails because ... Defendants are not entitled to qualified immunity), ECF No. 102 at 23 – 36, ECF No. 118 at 5 – 38, ECF No. 101 at 7-2, Pet. App. Transcript at 74 - 121, ECF No. 155 at 7 – 13 at the magistrate and district court.

First, for unreasonable search and seizure, and unreasonable interference with familial relationship (privacy and integrity) in the context of custodial interrogations and removals of a child, the circuit court in *Myers v. Morris* have recognized the parent and children fundamental rights. See *Doe v. Heck*, 499; *Gates, ld* at 432-38; *Greene, ld* at 1027; *K. D. Ex Rel. Duncan v. White Plains School Dist.*, 921 F. Supp. 2d 197, 211-216 (S. D. N. Y. 2013); *Philips v. County of Orange*, 372-381, 385 – 388; *Swipes v. Kofka*, 419 F. 3d 709 (8th Cir. 2005); *K.D v. County of Crown Wing*; *J.B. v. Washington County, ld* at 924-25, 928-29 (requiring procedural due process); *Heartland Acad. Cmty. Church v. Waddle*, 595 F.3d 798 (8th Cir. 2010)(unreasonable seizures and familial integrity); *Troxel v. Granville*, 530 U.S. 57 (2000); *Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306 (10th Cir. 1999); *Whisman, ld* at 1310.

Second, for unreasonable search and seizure, and unreasonable interference with familial relationship (privacy and integrity) during physical and medical examination of a minor child without parental consent or judicial authorization at home, school and at CornerHouse, this circuit has never held or extended the reasonable suspicion of abuse standard for qualified immunity defense to apply. Clearly established law on medical and physical examination of a child in light of *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003) (parent fundamental

right to consent for medical treatment); *Safford Unified Sch. Dist. v. Redding* (violates the child's Fourth Amendment); *Michael C v. Gresbach*, 526 F.3d 1008, 1014-15 (7th Cir. 2008)(same); *Roe v. Tex. Dep't of Protective & Regulatory Service*, 299 F.3d 395 (5th Cir. 2002) (same); *Greene* (same); *Tenenbaum ld at* 593 (same); *Doe v. Tsai*, (same). So it was clearly established, as at February 2013 in this circuit and in light of the binding decisions from other federal circuit under *Nelson*, regarding these interrogations, removals and examinations.

The district court misapplied *Greene, ld* at 1036 – 37 to include a "force" element as a prerequisite to implicate a parent and child's Fourteenth Amendment right to care. But an "order" is not legally equivalent to "force", see *Black Law Dictionary* comparing definitions. The Ninth circuit clarified using a previously held case in *Wallis*, 202 F.3d at 1142 that excluding a parent absent *parental consent or emergency requiring immediate medical attention* violates the child and mother's Fourteenth Amendment due process rights. The district court conclusion cannot be reconciled with the wealth of scientific body of research and body of clearly established laws in the federal circuits, all requiring *parental consent or emergency circumstances* before any examination of a minor child.

The Second circuit explained, in *N. G. Ex. Rel. S.C v. Connecticut*, 382 F.3d 225, 237 (2nd Cir. 2004), on those ruling concerned with intrusion that "serve primarily an investigative function," *Tenenbaum ld.* at 867, that the "detecting-abuse factor" also encounters the ruling we have made that protects parents' rights to control the care and custody of their children by assuring that intrusive examinations of their children for evidence of abuse will not be undertaken without *parental consent or judicial authorization.* Furthermore, under the reasoning of *Hearing v. Sliwowski*, 712 F.3d 275, 278, 282 – 283 (6th Cir. 2013) elaborating more on the "detecting-abuse factor," Defendants actions in the examinations of the Udohs' children were clearly prohibited.

Even if this court agrees with the district court on the Fourth Amendment analysis under *Michael C v. Gresbach*, however, some state statutes and courts have construed such

examinations without parental consent or court order to be equivalent to "sexual abuse," see ECF No. 143 at 29 n. 22 ((Pet. App. 43 n.22). Therefore, under the *totality of circumstances* standard, Defendants examinations for finding of no signs of sexual abuse is a relevant and "inextricably intertwined" factor to the reasonable suspicion *de novo* review on the parent's familial integrity claims in light of *Croft, ld* at 1127; *Ripson, ld* at 808; *Michael C v. Gresbach, ld* at 1013 – 18; *Doe v. Heck, ld* at 509 – 28, see section X. For these reasons, we ask this court not to apply the reasonable suspicion of abuse standard to these examinations.

Third, courts have been confronted with circumstances in which a child was a party to a conversation involving an audio-and-video recording and these courts have uniformly held that the Fourth Amendment strictures, parental consent or judicial authorization applies. See *Berger v. N.Y.*, 388 U.S. 41, 63 (1967); *Katz v. U.S.*, 389 U.S. 347, 353 (1967); *U.S. v. Jones*, 132 S .Ct. 945 (2012); 18 U.S.C. §2510-20; *Pollock v. Pollock*, 607 – 10; *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah. 1993); *Campbell v Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *Wagner v. Wagner*, 64 F. Supp. 2d 895 (D. Minn. 1999); *Tapley v. Collins*, 41 F. Supp. 2d 1366 n.4 (D. Ga. 1999) (collecting cases for 18 U.S.C. §2511(2)(d)), 211 F.3d 1210 (11th Cir. 2000); *People v. Badalamenti*, 124 A. D. 3d 672 (N. Y. App. Div. 2015)(same); *Babb v. Eagleton*, 616 F. Supp. 2d 1195 (Okla. N.D. 2007) (same); *Milke v. Milke*, 2004 WL 2801585 (D. Minn. 2004); *Malik* (citing to Colo. Rev. Stat. §19-3-308.5).

For malicious prosecution or judicial deception, clearly established law, argued in ECF No. 99 at 12 – 13, ECF No. 155 at 7 – 13 before the magistrate and district court in light of *Heartland Academy v. Waddle*, 317 F. Supp. 2d 984, 1093 (D. Mo. 2004), *aff'd* 427 F.3d 525 (8th Cir. 2005); *Malik, ld* at 1316 (10th Cir. 1999); *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2001)); *Jones v. Hunt, ld*, at 1230; *Snell*, 720 F.2d at 697-78; *Greene, ld* at 1034; *Myers v. Morris, ld* at 1457-58 implicates Defendant Bartley. So it was clearly established, as at February 2013 in this circuit and other federal circuits under *Nelson's* wisdom against *malicious prosecution* or

judicial deception and on the *audio-and-video recording of minor children.* Defendants are not entitled to qualified immunity on this ground, see section X.

Fourth, for failure to give Tennessen, Privacy-Act-of-1974 (5 U.S.C. 552a) and/or Miranda warning, it was clearly established in Minn. Stats. §13.02; §626.556, §260C.175; *Miranda v. Arizona*; *Stansbury v. California*; *J.D.B v. North Carolina,* 564 US 261 (2011). Defendants failure to comply with the strictures of these statutes violated state and federal laws and caused the deprivation of Appellants' right against:

> unreasonable search and seizure, unreasonable interference with familial relations (privacy and integrity), invasion of right to privacy and in light of *Hemmah v. City of Red Wing,* 592 F.Supp.2d 1134 (D. Minn. 2008) on disclosure of stigmatization information under MGDPA implicates Appellants' liberty interest against damage to: reputation, good name, honor and stigma-plus

in light of *Maine v. Thiboutot,* 448 U.S. 1 (1980); *Harden v. Pataki,* 320 F.3d 1289, 1293 (11th Cir. 2003) where the violation of state law causes the deprivation of rights protected by the constitution and statutes of the United States. *cf. Brown v. Nutsch,* 619 F.3d 758, 764 n.8 (8th Cir. 1980); *Wirth v. Surles,* 562 F.2d 319 (4th Cir. 1977)(same). Compare *Brown*; *Leonard v. McDaniel,* 2008 U.S. Dist. LEXIS 114181, Civ No. 3:06-cv-00559 (D. Nev. 2008)(*Brown* and *Harden* court standard) with *Collins v. Bellinghausen,* 153 F.3d 591, 596 (8th Cir. 1998). So it was clearly established, as at February 2013 in this circuit and under *Nelson's* enbanc decision on failure to comply with state and federal law. Defendants are not entitled to qualified immunity, see section X.

Fifth, in light of the foregoing arguments in sections I through X, the district court clearly erred in dismissing Appellants' claims under the Minnesota Constitution, Article I, section 7 (unreasonable search and seizure) and section 10 (due process right to familial relations), which directly corresponds to the Fourth and Fourteenth Amendments of the Constitution, respectively.

VI. DEFENDANTS FALSELY ARRESTED AND IMPRISONED PLAINTIFFS AND CAUSED INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ON ALL APPELLANTS.

In light of the standard of review and arguments presented in section I through X, Defendants falsely arrested, imprisoned and caused Appellants and their children to suffer severe emotional distress under *Ripson* and *Cortez* (finding no probable case or arguable probable cause, reasonable suspicion or arguable reasonable suspicion based on *an uncorroborated child state alone*) for their unconstitutional conducts.

VII. DEFENDANTS POLICY, CUSTOM, MINN. STATS. §626.556 AND §260.165 NOW §260C.175 ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO PLAINTIFFS-PETITIONERS.

In light of the standard of review discussed in section I through VI, the arguments presented below was raised in ECF No. 101 at 7 – 27 (on M.S.A. §626.556, Subd. 10 and M.S.A. §260C.175, Subd. 1(2)(ii) are unconstitutional facially and as applied), Pet. App. Transcript at 74 - 121, ECF No. 155 at 7 – 13 before the magistrate and district court.

First, Defendants policy, custom ¶¶123-187 and §626.556, subd. 10, 11 is facially overbroad and as applied unconstitutional under *Troxel* where (a) "it gave no special weight at all to [the parent] determination of [their children's] best interests" before authorizing removing their children, or "any [person or] child" from their classroom and school for interrogation purpose with audio-and-video recording at "any [time or] place" where no court has found that Appellants was an unfit parent; and (b) under *Troxel*; *Chicago v. Morales*; *B.S v. Indiana Dep't of Child Servs.* (In re F.S), 53 N. E. 3d 582 (Ind. App. 2016); *Ind. Code.* 31-33-8-7; *Ind. Code.* 31-32-12; for not contemplating obtaining parental consent, judicial authorization, warrant and probable cause, reasonable suspicion of abuse, any child's best interest or trauma determination, parental refusal to consent or if parental consent cannot be obtained first, before authoring such actions under the reasoning of *Doe v. Heck*; *Michael C v. Gresbach*; *Malik, ld* at 1313 (citing to Colo. Rev. Stats. 19-3-308.5).

The overbroad policy, custom and §626.556 violates clearly established law because it allows local welfare agency in collaboration with law enforcement to take children into custody for custodial interrogation without (a) Fifth Amendment *Miranda* warning in light of *Miranda v. Arizona*; *Stansbury v. California*; *J.D.B v. North Carolina*; (b) *Tennessen* warning for children below 10 years in violation of 5 U.S.C. 552a (Privacy-Act-of-1974) right to privacy; (c) parental consent in audio-and-video recording violates 18 U.S.C. §2510-20; (d) "emergency" under the reasoning of *Bobadilla, ld* at 790-791 n.5; §260C.175; *Cortez, ld* at 992 n.13 (held investigative actions under child abuse statutes are not "*inherently exigent*"); *Heartland Acad. Cmty. Church v. Waddle*, in removing and interrogating *all* children is *ipso facto* unconstitutional as applied to Appellants. See Pet. App. 307 - 310 (recurring again in 2018/2019).

Second, §626.556, Subd. 10(j), Bartley and Hennepin County policy and custom of entering maltreatment findings is facially and as applied unconstitutional in light of the arguments presented in ECF No. 118 at 27 – 28 (collecting cases and arguments) where (a) at the time of entering, the child-abuse investigation was done and there was no compelling government interest; (b) no adequate notice and *Appellant have not been given any hearing to satisfy* the prompt pre-or-post deprivation hearing; (c) the burden of *initiating a hearing or judicial review* is *shouldered on parents instead of state* in light of *Whisman, ld* at 1311; (d) once findings are entered, parent start to face the *stigma-plus* (licensing and employment) consequences immediately before any hearing is held in light of *Humphries*; *D.C. v. Dep't of Hum. Servs.*; *Bohn*; *Winegar, ld* at 899 n.3; and (e) *the children were taken from their parent* and *the parent was prosecuted and convicted.* See Pet. App. 307 - 310 (recurring again in 2018/2019).

The statute is unconstitutional because maltreatment findings are entered without the required evidentiary standard in light of (a) *Santosky v. Kramer*, 455 U.S. 745, 758 – 58 (1982) (due process clause mandates the "clear and convincing evidence" standard when it involves a significant deprivation of liberty or "stigma"); *Valmonte v. Bane* in reversing *Valmonte v. Bane,* 812 F.Supp. 423 (S.D.N.Y. 1993) based on *Bohn* holding; and (b) *Cooksey v. Boyers* because the

confidential or stigmatizing information and maltreatment findings during and after investigation are disclosed to other agencies in violation of Appellants' right to familial and individual privacy.

Third, both statutes, policy and custom do not contemplate reasonable time to obtain judicial authorization consistent with the child's safety before interrogation, removal and recording of children, and are unconstitutional in light of *Jordan*; *Tenenbaum* holding. In this case, Defendants had reasonable time to obtain judicial authorization but instead, intentionally used that opportunity to gather evidence against the parent for prosecution and removal. There was no "emergency" in light of *K.D. v. County of Crow Wing*, *ld* at 1056; *Bobadilla*, *ld* at 790-91 n.5; *Lopez v. City of Chicago*, 464 F.3d 711, 712 (7th Cir. 2006) because Defendants were investigating case and gathering evidence.

The extent to which §260C.175 authorizes five (5) days delay *over the weekend* is unconstitutional under the decision of *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLauglin*, 500 U.S. 44, 56 (1991) (requiring two (2) days delay and *an intervening weekend* is not considered an "emergency" or "extraordinary" circumstances) to a parent after removal was effected on *Thursday* and hearing was not scheduled until *Tuesday*. See *Jordan, ld* at 351 that 65 hours *over a weekend* is "near, if not at, the outer limit of permissible delay ... and most certainly would be difficult to justify ... where a removal is effected [on Thursday]" and hearing was not scheduled the next business day or the child "was [not] returned ... before the need for such a hearing arose." *K.D. v. County of Crow Wing*, *ld* at 1056 n.6; and *Whisman*.

Fourth, the *reasonable belief* standard of §260C.175 is "very intrusive" *Myers v. Morris*, *ld* at 1463 and is contrary to the "clear and convincing" standard held in *Santosky* for deprivation of liberty interest in familial relations.

Fifth, on these grounds, coupled to Defendants failure to comply with the strictures of §626.556, §260C.175 and §13.02 (MGDPA), under the reasoning of *D.C. v. Dep't Hum. Servs.*, it *shocks-the-conscience*. The magistrate and district court conclusion in ECF No. 143 at 15, 18

(Pet. App. 29, 32) on "why" or "how a statute is unconstitutional" was a clear error under *Braden*, *ld* at 595 because such conclusion violates the application of Rule 8 standard in light of the facts pleaded, and even where the lower court found *violations* of Appellants rights. Both courts further erred in ECF No. 143 at 19 (Pet. App. 33) under the reasoning of *Jordan* and *Whisman* (on federal court interpretation on the days delayed includes counting the *intervening weekends*).

VIII. UNDER THE CIRCUMSTANCES OF THIS CASE, A MUNICIPALITY CAN BE HELD LIABLE UNDER *MONELL* FOR ENFORCING STATE STATUTE.

In light of the standard of review discussed in section I through VII, Defendants-Appellees here argued that they were at all times in adherence to Minn. Stats. §260C.175, §13.01-.88, and §626.556. The magistrate and district court, see ECF No. 143 at 16 (Pet. App. 30), clearly erred because in light of the foregoing arguments presented in sections III, IV, V, VII, X, Pet. App. Transcript at 74 - 121, and below, Plaintiffs-Petitioners have stated a *Monell* policy and/or custom against government entities for enforcing state statute they also violated.

First, Defendants made a deliberate or conscious choice to enforce §626.556 and §260C.175 because (a) the statute itself *only approve or authorize* but do not *mandate* the unconstitutional actions in light of *Slaven v. Engstrom*, 781 n.4; *Vives v. City of New York*, 524 F. 3d 346, 353 (2nd Cir. 2008); *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. 2014) held municipal liability, *ld* at 352 – 53; and reasoning with *Vives*, 524 F.3d at 353 holding; and (b) Defendants violated and failed to comply with the same state statute they claim to enforce, argued in ECF No. 118 at 3 – 4 (on dismissal with prejudice fails because Defendants failed to comply with state law and violated all Plaintiffs' federally protected rights), ECF No. 102 at 14 – 18, ECF 99 at 30-37 (section VIII. D - F), ECF No. 155 at 7 – 13 before the magistrate and district court. Pet. App. 307 - 310 (in re SSIS 574330451 and 27-JV-185208) is evidence showing the same Defendants-Respondents have instituted another maltreatment finding and a proceeding to terminate the rights of the parents based solely on prior findings.

Furthermore, Defendants application of these facially unconstitutional statute to violate Appellants' federal rights in light of the arguments presented in section VII, subjects them to *Monell* liability.

Second, the circuit court has previously held that §626.556 do not confer a state created liberty interest, See *Doe v. Hennepin County, ld* at 1328. That reasoning and findings supports the argument that §626.556 and §260C.175 statutes only *authorizes* but *does not mandate* Defendants actions to enforce these state statutes. The lower courts erred when it dismissed Appellants claims for prospective reliefs under *Slaven's* summary judgment standard.

IX. COMPETENT PARENT (NON-ATTORNEY) SHOULD PROCEED PRO SE ON BEHALF OF THEIR MINOR CHILDREN IN A FEDERAL CIVIL COURT.

In light of the standard of review discussed in section I through VIII, the arguments presented below was raised in ECF No. 101 at 4, ECF No. 155 at 7 – 13 before the magistrate and district court. Pet. App. Transcript at 74 - 121. The district court erred in ECF No. 163 at 3-6 (Pet. App. 8 – 11) by holding that because Appellants are not attorneys, they may not litigate the claims of their minor children. See Pet. App. 302 – 306 (to no avail in securing a counsel).

First, since the magistrate and district court subjected "*pro se litigants*" to "*counseled litigants*" standards, such as *Twombly* and *Iqbal*, then by those standards, *competent pro se parents* should be allowed to proceed on behalf of their children in the same court. This rule or statute is not an ironclad under the reasoning of *Adams ex rel. D.J.W. v. Astrue* (collecting cases). Not allowing §1983 or §1985 *pro se* parent, who meet the *competence* standards set forth in *Adams ex rel*, where courts have already open doors to SSI and IDEA lawsuit *pro se* parents would be in violation of the equal protection of law.

Now, considering the following factors present in this case (i) the children cannot afford a lawyer; (ii) the law or constitution does not afford the children a lawyer in civil actions; (iii) the district court did not appoint the children a lawyer nor review the merit of their claims; (iv) *dismissing without prejudice while the six-year statute of limitation does not tolled* bars the

children's claims forever if they waits until adult age to litigate as *proper person*; and (vi) clearly established law in *Strickland v. Washington* 466 U.S. 668, 684-87 (1984) has held Attorneys ineffective in representing minors in federal courts, does support Appellants position in proceeding *pro se* on behalf of their children.

Second, non-attorney parent representation has been permitted frequently in light of *State v. Richie*, 757 P. 2d 1247 (Idaho Ct. App. 1988) where the lower court recognized the *not-ironclad* rule but nonetheless permitted the Defendant's non-attorney father to represent him reasoning, we see no cogent reason for imposing a blanket prohibition against such assistance. In fact we surmise that many judges have allowed it. *Id.* at 1250. The *tort cases* relied on by the magistrate and district courts, see *Cheung v. Youth Orchestra Found of Buffalo, Inc.*, 906 F.2d 59, 61-62 (2nd Cir. 109) are factually and materially distinguishable to Appellants' case, because the children here made that "true choice" to proceed individually and to allow their parent to proceed on their behalf. Also, the relied on criminal cases are not controlling under the reasoning of *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525 (8th Cir. 2005) that precedent in criminal cases are not persuasive or controlling authority in §1983 cases; and unlike *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986), there has been no involuntary transfer of custody to state.

Third, none of those *tort and criminal cases* concerns are present in this case where (a) the parent and children interest are identical and protected by the Constitution, see *Machadio v. Apfel*, 276 F.3d 103 at 106 (2nd Cir. 2002); (b) parents have a stake in the issue because of the monetary and prospective reliefs requested will prevent future injuries, *Harris v. Apfel*, 209 F.3d 413 at 416-17 (5th Cir. 2000); (c) already, attorney-parents often do represent their children in state and federal court *pro se*; see *Elk Grove v. Newdow*, 542 US 1 (2004). Now, excluding non-attorney parent from representation will be a violation of the equal protection of law; (d) the case at hand involves only record review with little or no new fact-finding under the motion-to-dismiss or judgment-on-pleading standard, *Harris*, 209 F.3d at 416; (e) parent are often

unable to find counsel in civil cases, *Machadio*, 55 F. Supp. 2d at 305; (f) a ban on parental representation would jeopardize the child statutory right to judicial review (*ld.* at 417); and must be timely requested before the statute of limitation expires (*ld* at 416 (citing *Machadio*, 55 F. Supp. 2d 296 at 305 (S.D.N.Y. 1999)).

X. INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO JUDGMENT ON QUALIFIED IMMUNITY GROUNDS ON ALL PLAINTIFFS CLAIMS.

In light of the standard of review discussed in section I through IX, this court review *de novo* a district court's conclusion of law on qualified immunity. The arguments presented below was raised in ECF No. 99 at 21 – 37, ECF No. 102 at 23 – 36, ECF No. 118 at 5 – 38; ECF No. 101 at 4 - 5, 6 – 27, Pet. App. Transcript at 74 - 121, ECF No. 155 at 7 – 13 at the magistrate and district court. The district court did not provide a *thorough determination* on qualified immunity in light of *Jones v. McNeese*, 675 F.3d 1158, 1162 (8th Cir. 2012) with regards to reasonable suspicion under the reasoning of *Ala. v. White*, 496 U.S. 325 (1990) holding that *reasonable suspicion* should be based on the totality of circumstances standard and the appellate review of *reasonable suspicion* is *de novo*. See *United States v. Arvizu*, 534 U.S. 266 (2002).

First, the district court clearly erred in ignoring reasonable inferences to be resolved in Appellants' favor on reasonable suspicion determination that Defendants knew the following set forth in ¶151 before interrogations, removals, entering of maltreatment findings and examinations under the reasoning of *Braden,* that each of these errors violates the familiar axiom on judging a motion to dismiss or judgment on pleading which *Twombly* and *Iqbal* did not change that fundamental rule. *ld* at 595.

The district court clearly erred under the *totality of circumstances standard*, see *Cortez, ld* at 992; *Gates, ld.*, at 433, and based reasonable suspicion of abuse solely on the uncorroborated statement of an unreliable child suffering from developmental disability ¶¶54-55 where the (original and amended) complaint allege the following set forth in ¶¶57-230:

> Defendants had preconceived idea of what the child would say, the child statements were in response to leading, improper or suggestive manner and

questions, the child was given no *Miranda and/or Tennessen warning* as required by law is evidence of coercion to get false information.

Defendants knew there was no indication of any sexual abuse, threat, or danger, *Whisman, ld* at 1310 and the child statements are the type of statement one would expect from any 13 years old to make. The relied on child statement did not contain enough details and specifics about what abuse, when the abuse occurred, why the abuse happen, the location where the abuse happen, no physical evidence for corroboration, and this court as well as other federal courts have never held reasonable suspicion based solely on the uncorroborated statement of a child under the reasoning of *Stoot v. City of Everett,* 582 F.3d 910 (9th Cir. 2009) (child statement alone cannot stand for probable cause or reasonable suspicion); *Cortez, ld* at 1119 (same); *Simuro ex rel. K.S. v. Shedd,* 176 F. Supp. 3d 358, 378 (Dist. Ver. 2016) recently acknowledged, "it appears that no federal court of appeals has ever found probable cause [or even reasonable suspicion] based on a child allegations absent some other evidence to corroborate the child story," *Wesley v. Campbell,* 779 F.3d 421, 430 (6th Cir, 2015); *United States v. Shaw,* 464 F.3d 615 (6th Cir. 2006) (same).

The risk that a child is lying need not be wholly eliminated. Rather, what is needed is that the probability of a lying or untrustworthy child has been sufficiently reduced by corroborative facts and physical observations. The district court clearly erred and failed to discuss the significant reasoning of *Croft* in light of *Ripson v. Alles* because for any statement given by an informant or child, be it anonymous or direct hearsay, the statement given must meet an *independent articulable indicia of reliability for reasonable suspicion to stand* where (a) evidence of *false allegations and reputation of dishonesty* exist; (b) "further investigation" *Croft, ld* at 1127 or "keep investigating" *Ripson, ld* at 808 was required to confirm whether or not abuse occurred in light of *Bobadilla, ld* at 791; (c) no physical or medical evidence to corroborate abuse or to base an opinion, *Croft, ld* at 1127; *Ripson, ld* at 808; (d) the child statement alleged no wrong doing as to the mother, *Whisman, ld* at 1310, and did not indicate a likelihood that the

child would destroy material evidence, even after Bartley's examination, Cortez *ld* at 993; *Cortez*, 478 F.3d at 1119 and (e) *Heartland, ld* at 810 -11 in rejecting the "sibling rule" argument that one child statement merits *removal, interrogations, and/or examinations* of <u>all</u> other children (K.C.W., C.U., C.U.) who did not disclose any form of abuse. All these factors signifies that the information or child source was not reliable when all "reasonably trustworthy information" available to Defendants were to the contrary. *Cortez*, 478 *ld* at 1119. **This is also supported by Pet. App. 122 to 301.**

Second, under *Anderson v. Creighton*, 483 US 635, 641 (1987) reasoning that where Appellants can point to *specific facts* of Defendants *improper motivation*, qualified immunity is inappropriate. The record supports allegations and evidence of improper motive with specific facts in the complaint and supporting Exhibits (A-N) showing:

> to aid law enforcement *motive or purposes*, no compelling government interest to protect the children, Defendants violation of state and federal statutory law; Defendants knew of presentation of false statement to other state actors and court; Defendants *motives or actions* in gathering evidence during hold used to secure a removal order, to prosecute the parent in family court and to charge and convict the parent in criminal court.

Under the reasoning of *Gomes v. Wood*, 451 F.3d 1122, 1131 (10th Cir. 2006)(considering the question of whether state officials had time to seek and obtain judicial authorization and for the failure to established that judicial authorization was impracticable to undermine "emergency circumstance" is a factor relevant to the reasonable suspicion determination), Defendants are not entitled to qualified immunity under *Nelson's* wisdom because Defendants had tremendous amount of reasonable time to obtain parental consent or judicial authorization before causing irreparable injury to Appellants and their children. These actions during hold detract from the finding of immediate danger, emergency, probable cause or reasonable suspicion. See *Doe v. Hennepin County* (evidence of improper motive); *Lux by Lux v. Hansen*, 886 F.2d 1064, 1067 (8th Cir. 1989); *Myers v. Morris*; *Tenenbaum*; *Bobadilla ld* at 791 ("the [motive or] purpose of the interview was to confirm a past allegations of abuse *rather than to assess immediate threats to*

the [child's] health and welfare. Because of these circumstances, this interview was ... for the *purpose* of gathering evidence [during or for] a criminal investigation); *Ferguson* (same).

In light of *Doe ex. Rel. Doe v. Little Rock Sch. Dist., ld* at 355 the fruits of the searches at issue here were apparently turned over to law enforcement to be used in prosecuting parents. This evidence of improper motive, including *violating state and federal law* and/or "goals of ferretting out crime" is a relevant factor used to determine the "objective legal reasonableness" for qualified immunity since the circuit court has held it is nearly impossible to separate the *clearly established analysis from the violation of Appellants constitutional rights* in child abuse cases. *Heartland, ld* at 808. The district court clearly erred in failing to resolve these evidence of improper motives under the reasoning of *Braden, ld* at 595 in Appellants' favor.

Third, Defendants would argue, they were enforcing state statute but Defendants are not entitled to qualified immunity under the reasoning of Justice *Shepard* in *Coates v. Powell, ld* at 478 – 79; *Roska*, 328 F.3d at 1252; *Grossman v. City of Portland*, 33 F.3d 1200, 1209 – 10 (9th Cir. 1994); *Denton v. Rievley*, 353 Fed. Appx. 1, 6 (6th Cir. 2009) that the existence of an authorizing statute, however, does not make an official's action *per se* reasonable. Most problematic as seen in this case is where (a) Defendants clearly violated the same authorizing statute they are relying on; (b) under the reasoning of *Good* and *Calabretta* in denying qualified immunity to government officials when they failed to act in accordance with state guidelines; and (c) the fact that both statutes had been challenged before puts Defendants in fair notice.

Regarding Appellants' right to familial privacy, *R.S v. State* is inapposite because it was decided under the summary judgment standard. Even if it applies, Defendants are not entitled to qualified immunity because unlike *R.S*, where the child was under 7 years old and the statute §626.556 does not require *Tennessen warning*, this case required that warning and Defendants failed to comply. The magistrate and district court clearly erred under the reasoning of *Collins, ld* at 596 that for violation of state law, the circuit court held "[r]ather, our inquiry 'generally turns on the 'objective legal reasonableness' of the [Defendants'] action" is

indeed a required factor for accessing qualified immunity and the lower courts failed to access that relevant factor.

Without *Miranda and/or Tennessen warning*, Defendants coerced the children into interrogations, removals, recordings and examinations in light of *J.D.B v. North Carolina, ld* at 269 – 281 (failure to give *Miranda* is a coercive aspect, not the children free choice and are involuntary statements), and that detracts from any findings of probable cause or reasonable suspicion because it was unlawful.

Even if this court were to rely solely on an uncorroborated child statement, the child statement and child source in this case is very problematic under the reasoning and in light of *Safford Unified Sch. Dist. v. Redding*, 370-71 that the *reasonable suspicion standard* depends on (a) specificity of the information received, even where courts have held that a child statement alone are testimonial in nature, see *Bobadilla* and presumptively unreliable, and (b) the reliability of its source which was reasonably in question by reasonable Defendants evidence on *false allegations* and *reputation of dishonesty*. The district court clearly erred in failing to access the child's reliability as a relevant factor to reasonable suspicion determination.

Fourth, on the issue of hearing for procedural due process on removal, the district court clearly erred in adopting the magistrate court in ECF No. 143 at 19 (Pet. App. 33) that Appellants attended the hearing to satisfy due process under clearly established law in *Doe v. Hennepin County, ld* at 1329 (held adequate post deprivation hearing requires representation by counsel, being able to offer testimony on their own behalf and to cross-examine witnesses against them). The district court clearly erred under the reasoning of *Winegar* because Appellants "was never given any opportunity to cross-examine those witnesses [such as the children, Wallen, Parker, Lynch, Ray, Koncar, Song, Bartley, see ECF No. 59-2 at 2 at the February 26 hearing] or to present witnesses on his behalf"). Furthermore, under the reasoning of *Green, ld* at 1035 n.21, because the record does not contain any evidence or transcripts from the juvenile court hearing, so it is impossible to know whether the hearing was adequate to

meet the due process requirement. Appellants have not been given the opportunity for discovery or to offer proof under *Haines* standard. Also, Appellants was offered no adequate pre- or post-deprivation hearing regarding the physical and medical examination of their children and entering of maltreatment record.

For physical and medical examination, Defendants are not entitled to qualified immunity in light of *Tenenbaum* holding, that at the time of examination, the children were already removed from their home and there was *no emergency*, meaning there was no legitimate compelling government interest at that time, *Whisman, ld* at 1310. Defendants conducts were plainly unreasonable under the reasoning of *Jones v. Hunts*, 410 F.3d 1221, 1229 (10th Cir. 2005) (where no legitimate bases exist for detaining a child, a seizure is plainly unreasonable). Unlike *Doe v. Tsai*, there was *emergency* at the time of examination. The children in this case here were not in the parent's custody, were not under any 72-hours hold and Defendants failed to act within the confines of their legal authority because as alleged in the complaint ¶¶57-230, no state statute, parental consent, emergency or exigent circumstances, court order compelled their conducts. By stepping beyond their boundary in the medical and physical examination, and because they crossed a bright line, there can be no findings supporting any state compelling interest, and the reasonable suspicion of abuse standard does not apply.

Fifth, regarding malice or willfulness, in light of *Heartland v. Waddle*, holding, malice and/or willfulness can be inferred under the reasoning of *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990). The complaint alleged the following against Bartley ¶¶57-230:

> physical examination of Appellants children, presentation of false information to court and other state actors, transportation of the children to CornerHouse and being told on what to say during the CornerHouse interview, failure to give *Miranda and/or Tennessen* warning to secure a removal order based on these information,

do preclude any qualified immunity defense on Bartley. Appellant should be offered the opportunity to show proof under the reasoning of *Greene* (evidence offer of proof) and *Haines* standard.

These facts alleged in the complaint would suggest Bartley acted intentionally, deliberately, willfully or with malice which can be readily inferred from the *transcript recordings* and *Bartley's reports*, see Exhibits A-N, juvenile *sworn court affidavit* by Bartley, see ECF No. 59-1 at 5, K.K.W. and K.C.W. affidavits, see ECF No. 119 (restricted), all critical to the removal order from the mother's custody and entering of maltreatment findings without *Tennessen* warning. See *Murray v. Lene*, 595 F.3d 868, 872 (8th Cir. 2010). Courts have found such actions by Bartley to defeat qualified immunity defense or cannot be a basis for dismissing this claim under the reasoning of *Berman v. Young*, 37 F. Supp. 2d 1035, 1047 (N.D. Ill. 1998) (that [Bartley] conducted incompetent manner investigation and knowingly relied on false information was sufficient to survive Defendants motion to dismiss the claim). The district court clearly erred in relying on *Doe v. Hennepin County* which is inapposite because it was decided under the summary judgment standard, and the district court failed to give Plaintiffs any reasonable opportunity to offer proof of malice or improper motive under *Haines* standard. *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010) (malice is a subjective standard, in contrast to the objective qualified immunity standard).

For maltreatment findings claims, in light of *Bohn*; *D.C. v. Dep't of Human Servs.*, (Pa. 2016); *Valmonte*; *Humphries*; *Dupuy v. Samuels*, 397 F. 3d 493, 503-04, 509-11 (7th Cir. 2005), Plaintiffs are effectively barred from future employment in the child care field because Bartley's findings is disclosed to, and used by licensing agencies. Defendants are not entitled to qualified immunity because they violated Appellants' protected liberty interest that is squarely implicated under *Paul v. Davis*, 424 U.S. 693 (1976).

Fifth, under the *Haines*, liberal construction or notice pleading standards, triable or genuine issues of material facts exists as to whether malice, probable cause, reasonable suspicion of abuse or exigent circumstances existed, argued in ECF No. 99 at 37, ECF No. 101 at 27 - 28, ECF No. 102 at 37, ECF No. 118 at 38 – 39, ECF No. 155 at 7 – 13 at the magistrate and district court. *Greene, ld* at 1035. See *Akey v. Placer*, 2015 US Dist. LEXIS 35306 (Mar. 20,

2015) (qualified immunity cannot be decided "based solely on the allegations in the complaint." Whether reasonable [suspicion or] cause to believe [abuse or] exigent circumstances existed is generally a question of fact for the jury." See *Mabe*, 237 F.3d at 1108. Also, based on the denial of City Defendants summary judgment motion is a prima facie showing that precludes Defendants motion to dismiss and judgment on pleading on qualified immunity grounds.

Sixth, the district court "consistent" findings and "placement with their biological father" is inconsistent with the allegations in complaint under the reasoning of *Braden ld* at 595. The children had been in out-of-home since February 21, 2013, and any placement with their biological father did not happen until May 9, 2013, see ECF No. 59-13 at 3-4 which Appellants object to under *Haines* standard. Defendants actions alleged in the (original and amended) complaint and arguments presented in section I through X were disproportionate to the circumstances, coupled to the fact that the *girls* were removed but Defendants left the other children *boys* at home defeats any reasonable suspicion or immediate danger of abuse. Defendants' action here were based solely on *speculation* or *uncertainty* of a child before interrogations, removals, recordings, examinations and supports *conspiracy* to violate Appellants' constitutional rights, and was disproportionate to the circumstances.

Finally, Appellants move this court in light of *Whitson v. Stone County Jail*, to reverse and remand because there remains a question of facts on a determinative issue in this case, such as the child's source reliability and because the district court applied the *wrong legal standard* to a *pro se* claims. Also considering the evidence in Pet. App. 307 – 310 showing that the same Defendants-Respondents have initiated another maltreatment finding and a proceeding to terminate the rights of the parents in 2018/2019 based solely on prior false determinations in 2013/2014, and the supporting evidence in Pet. App. 302 – 306 showing that this is a case where the parent tried to secure a lawyer following dismissal from the circuit court but was unsuccessfully, this further underscores the importance of granting review in this case.

CONCLUSION

Wherefore, Petitioners pray the court issues a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Date: January 11, 2019

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