No. 20-

IN THE

Supreme Court of the United States

E.M.M., *et al.*,

Petitioners,

v.

DOUGLAS COUNTY, COLORADO, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a "bright line" rule requires post-deprivation notice and hearing for *ex parte* child seizures, as the FIFTH Circuit holds, or whether the right to notice and hearing is not clearly established, as the TENTH Circuit holds.

2. Whether subject matter jurisdiction exists for a federal claim using a plaintiff's initials, as is held by the FIFTH Circuit and several federal district courts, or whether subject matter jurisdiction is lacking, as the TENTH Circuit holds.

3. Whether the right to appeal under 28 U.S. C. §1291 is contingent upon the filing of a Rule 59(e) motion in the district court, as the TENTH Circuit holds, or whether the opposite is correct, as the FIFTH Circuit holds.

4. Whether *sua sponte* dismissal requires no prior notice to the parties, as the TENTH Circuit holds, or whether notice is required prior to dismissal, as the FIRST, SECOND, THIRD, FIFTH, SIXTH, SEVENTH, ELEVENTH and D.C. Circuits hold.

PARTIES TO THE PROCEEDINGS

Petitioners sued, after turning 18, for a seizure when they were minors.

The Colorado Respondents are two individuals, social worker Lesa Adame and sheriff's deputy Carl Garza regarding the issue of qualified immunity. Claims against Douglas County are not directly at issue in this Petition.

The Kansas Respondents are three individuals, Monica Gildner, Angela Webb and Tina Abney.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

RELATED PROCEEDINGS

1. Prior to the two suits by Petitioners in the cases at bar, two of their older siblings sued in the district of Colorado after turning 18, N.E.L. and M.M.A. In that action, the Colorado district court divided the suit into two cases. Claims against Kansas defendants were transferred to Kansas. Claims against Colorado defendants were dismissed under Rule 12(b)(6).

N.E.L. and M.M.A. v. Douglas County, Colorado, Monica Gildner, Angela Webb, Tina Abney, Lesa Adame and Carl Garza in their individual capacities, in the United States District Court for the District of Colorado, Case No. 15-CV-02847-REB-CBS.

January 27, 2017 - Magistrate Judge's Recommendations on Pending Motions to Dismiss. **App I.**

March 17, 2017 - Order, as amended, Overruling Objections to and Adopting Recommendation of United States Magistrate Judge. **App H.**

2. *N.E.L and M.M.A. v. Douglas County, Colorado, Lesa Adame, Carl Garza, Monica Gildner, Angela Webb and Tina Abney*, in the United States Court of Appeals for the Tenth Circuit, Case No. 17-1120

July 3, 2018 - Order and Judgment. **App F**.

3. *N.E.L., M.M.A., E.M.M. v. Monica Gildner, Angela Webb, Tina Abney*, in the United States District Court for the District of Kansas, Case No. 2:17-CV-02155-CM-JPO

March 1 & 7, 2018 – Memoranda and Orders. **App G**.

4. *N.E.L. and M.M.A., Petitioners v. Douglas County, Colorado, Lesa Adame, in her individual capacity, and Carl Garza, in his individual capacity, Respondents; and N.E.L., M.M.A. and E.M.M. v. Monica Gildner, Angela Webb and Tina Abney, in their individual capacities, Respondents*, in the United States Supreme Court, Case No. 18-503

March 18, 2019 - Cert. denied ("N.E.L. I")

5. *N.E.L., M.M.A., E.M.M. v. Monica Gildner, Angela Webb, Tina Abney*, in the United States Court of Appeals for the Tenth Circuit, Case No. 18-3059 ("N.E.L. II")

June 25, 2019 - Order and Judgment. **App E**.

August 20, 2019 - Rehearing denied

6. *N.E.L., M.M.A. and E.M.M. v. Monica Gildner, Angela Webb, Tina Abney, Respondents*, in the United States Supreme Court, Case No. 19-649.

January 21, 2020 - Cert. denied ("N.E.L. II")

7. *E.M.M., N.M.M. and G.J.M. v. Douglas County, Colorado, Lesa Adame and Carl Garza, individually,* In the United States District Court for the District of Colorado, Case No. 1:18-CV-02616-RBJ

The district court dismissed under Rule 12(b)(6) based on *res judicata.*

September 27, 2019 - Order Granting Motion to Dismiss. **App D**.

8. *M.A.C. v. Monica Gildner, Angela Webb and Tina Abney,* in the United States District Court for the District of Kansas, Case No. 2:20-cv-02226-HLT-KGG

May 6, 2020 - Order Dismissing. **App C.**

9. *E.M.M., N.M.M. and G.J.M. v. Douglas County, Colorado, Lesa Adame and Carl Garza, individually,* in the United States Court of Appeals for the Tenth Circuit, Case No. 19-1391

January 5, 2021 - Order upholding dismissal. **App B**.

10. *M.A.C. v. Monica Gilder, Angela Webb and Tina Abney*, in the United States Court of Appeals for the Tenth Circuit, Case No. 20-3105

March 17, 2021 - Order entered. **App A**.

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The Tenth Circuit's opinion, entered March 17, 2021, **App A**, is available at *M.A.C. v. Gildner*, 2021 WL 1016422, not selected for publication.

The Tenth Circuit's opinion, entered January 5, 2021, **App B**, is available at *E.M.M. v. Douglas County, Colorado*, 840 Fed. Appx. 349 (10th Cir. 2021), not selected for publication.

The Kansas district court's opinion, entered May 6, 2020, is provided at **App C**.

The Colorado district court's opinion, entered September 27, 2019, **App D**, is available at 2019 WL 4736457, not reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Tenth Circuit's orders were entered January 5, 2021 (regarding the Colorado case), and March 17, 2021 (regarding the Kansas case). Pursuant to this Court's Order dated March 19, 2020, this Petition is filed within 150 days after January 5, 2021, the earlier-issued opinion.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

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

The salient part of the Fourteenth Amendment to the United States Constitution provides in Section 1:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

FEDERAL STATUTES INVOLVED

The federal statutes involved are 28 U.S.C. §1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States.

and 42 U.S.C. §1983:

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

INTRODUCTION

This Petition arises from dismissals of suits alleging that an *ex parte* seizure of ten children was conducted without post-seizure notice and hearing.

1. One appellate panel held that notice and hearing is not a clearly established right, affirming the Colorado district court's dismissal on other grounds.

2. Another appellate panel held that a district court lacks subject matter jurisdiction over a complaint using initials for privacy reasons, affirming a *sua sponte* dismissal three days after suit was filed.

STATEMENT OF THE CASE

A. Factual Background

Petitioners[1] E.M.M, N.M.M., G.J.M. and M.A.C. are part of a family of ten siblings. All of the siblings were subjected to a Fourth Amendment seizure in Colorado.[2]

The Colorado complaint was filed by three of the four Petitioners herein. It alleges that their seizure was without pre-seizure or post-seizure notice and hearing in Colorado.[3] Government agents demanded entry into a residence, falsely claiming that an out-of-state *ex parte* order[4] gave them authority. The order was invalid in two ways. First, on its face, its content did not authorize any actions whatsoever. Second, this Court's decisions and Colorado law prohibited enforcement of foreign *ex*

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[1] Petitioners' complaint, among other claims, asserts Fourth and Fourteenth Amendment claims for the lack of notice and hearing, ¶¶196-198 (First Claim for Relief), and ¶¶199-201 (Second Claim for Relief). Paragraph numbers referenced herein are to the complaint.
[2] ¶¶1, 123-124, 132-133, 143-149.
[3] ¶¶1, 146, 161, 177, 180-184, 187, 220.
[4] ¶¶134-136.

parte orders, as the County's policy manual also stated. Nevertheless, to gain entry over objection, one agent became belligerent and threatened arrest or contempt.[5]

Inside, the Colorado agents saw for themselves that the children were safe and in no danger of imminent harm.[6] Despite this fact, the agents ordered all ten children into immediate custody of Kansas officials, who were not in Colorado, but who would supposedly be arriving.[7] The order was issued on Colorado letterhead, and declared: "The children are currently in the custody of Kansas State Social Services."[8]

The order required Petitioners' mother to vacate the residence immediately.[9] It ordered both parents to have no contact with the children,[10] although the father was not present at the time of the seizure.[11] Obedience to Respondents' orders was not voluntary "by virtue of the Colorado Agents' threats of force, intimidation and false claims of legal authority."[12]

Pursuant to Respondents' orders, the children's physical custody was delivered to Kansas officials,[13] who kept the ten siblings in foster care for at least five

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[5] ¶¶138-140.
[6] ¶141.
[7] ¶161.
[8] ¶¶143, 149.
[9] ¶142.
[10] ¶¶152-153.
[11] ¶123.
[12] ¶¶146, 181.
[13] ¶¶164-168.

days before a Kansas judge ordered them released based on the seizure's lack of probable cause.[14]

B. Procedural Background

1. The Colorado dismissal

The Colorado district court dismissed the complaint by E.M.M., N.M.M and G.J.M. based on a rationale of *res judicata.*[15] On appeal, the panel chose not to affirm the district court's rationale, but affirmed on the grounds that "unusual facts" required qualified immunity.[16] A split of authority arises with various circuits but is heightened by the Fifth Circuit's description of its "bright line" rule[17] to deny qualified immunity where a complaint alleges the lack of notice and hearing for an *ex parte* child seizure.

2. The Kansas dismissal

The Kansas district court *sua sponte* dismissed M.A.C.'s complaint three days after it was filed. In the interim, M.A.C. turned 19, triggering an arguable defense under the one year statute of limitations. On appeal, the panel affirmed dismissal for lack of subject matter jurisdiction[18] and for failure to file a post-judgment motion

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[14] ¶187a.
[15] App D, Colo. order dtd 9-27-19.
[16] App B, order dtd 1-5-21, at 8.
[17] *Romero v. Brown*, 937 F.3d 514, 521 (2019).
[18] 2021 WL 1016422 *3.

under Rule 59(e).[19] The panel opinion in the case at bar is a split from the Fifth Circuit regarding a required Rule 59(e) motion of a condition of appeal, as well as from various district courts, insofar as the panel opinion's rationale conflates different meanings of the word "jurisdiction" and the concept of "failure to state a claim." In *Arbaugh v. Y&H Corporation*,[20] this Court coined the term "drive-by jurisdictional rulings" which "have no precedential value." The confusion of terminology in the panel's opinion and cited precedent, not only conflicts with *Arbaugh* and other circuits, but also implicates the meaning of 28 U.S.C. §1331 and whether the Federal Rules of Civil Procedure can alter the statute's plain language.

REASONS FOR GRANTING THE WRITS

I The TENTH Circuit's decision conflicts with various other circuits and in particular with the FIFTH Circuit's decision that, for *ex parte* child seizure cases, a "bright line" rule requires post-seizure notice and hearing and also requires denial of qualified immunity at the pleading stage.

By definition, a child seizure arising from an *ex parte* order means that prior notice and hearing did not occur and that a post-seizure hearing is required. Petitioners received no post-seizure hearing in Colorado after being seized by Colorado agents in Colorado using invalid *ex parte* orders (from Kansas). The complaint alleges both Fourth and Fourteenth Amendment violations for lack of a post-seizure

[19] *Id.*, at *4.
[20] 546 U.S. 500, 511 (2006).

hearing in Colorado.[21] That seizures based on *ex parte* orders require post-seizure hearings should seem obvious.[22]

Petitioners have a right to their parents' care and protection, a right not disputed here.[23] Children's right to their parents' care corresponds to parents' fundamental liberty right to care, custody, and control of their children.[24]

The instant case involves an utter lack of notice and hearing in Colorado,[25] either post-seizure or pre-seizure, whereas the Fifth Circuit case involved only the pre-seizure deprivation of notice and hearing.[26] The split of authority,[27] and the Tenth Circuit's three rulings denying this family's right to notice and hearing, pose a disturbing realization that government has wide latitude to skip notice and hearing by characterizing a seizure as involving "unusual facts." Such a tool will be invaluable, inasmuch as hotly disputed child seizures may arise from many witness

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[21] ¶197 (Fourth Amendment), ¶201 (Fourteenth Amendment).

[22] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (officials may not violate rights of which a reasonable person would know).

[23] *See J.B. v. Washington County*, 127 F.3d 919, 928-29 (10th Cir. 1997); *Gates v. Tex. Dep't of Protective & Regulatory Servs.,* 537 F.3d 404, 427 (5th Cir. 2008).

[24] *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982).

[25] The complaint takes pains to negate the existence of any exigency, consent or valid order/warrant. But even if such things would have excused a pre-seizure hearing, a post-seizure hearing was required by long-held understandings of Fourth and Fourteenth Amendment deprivations of liberty. *See infra.*

[26] At a post-seizure hearing the child was released.

[27] The word "authority" is used loosely because, in visits to the Tenth Circuit, three panels have not granted Petitioners' family a binding opinion on the issue of qualified immunity. See Related Cases, *supra*. Insofar as binding opinions are necessary to become established law, non-binding opinions nearly prevent legal review by establishing no law whatsoever. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J. and Scalia, J., dissenting).

testimonies and often warrantless home invasions. The deprivation of notice and hearing heightens a terrorizing uncertainty as to any parent-child reunification. In addition, lack of prompt post-deprivation hearing means that government wrongs entirely escape prompt judicial oversight. The power vested in government officials, the frequency of *ex parte* child seizures and an apparent split of authority over the right to post-seizure notice and hearing are reasons enough for this Court to settle the issue here: **was it clearly established in May 2009[28] that post-seizure notice and hearing was a right beyond debate in the context of *ex parte* child seizures?**

A. Fifth Circuit

The Fifth Circuit's recent holding looked back to a 2008 holding where a prompt post-seizure hearing was granted in accord with Texas law.[29] *Romero* required only a simple pleading framework upon which to deny qualified immunity: "Because the complaint plausibly alleges [the children were removed without a court order or exigent circumstances, the claim for lack of procedural due process] will proceed past the pleading stage."[30]

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[28] "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *accord Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

[29] *Romer*o, 937 F.3d at at 522, *citing Gates v. Dep't of Prot.* & *Reg'y Servs.,* 537 F.3d 404 (5th Cir. 2008).

[30] 937 F.3d at 523.

The Fifth Circuit, in *Romero*, and the Tenth Circuit, in the instant case, however, arrived at polar opposite results, even though the cases involve very similar allegations.[31] Specifically: neither case alleged physical harm by the parents;[32] both cases involved large families of older siblings and an infant;[33] neither case involved imminent physical danger of abuse to the children;[34] in both cases, the seizure lacked a valid court order;[35] in both cases, government agents threatened arrest to obtain signatures on documentation;[36] in both cases, state courts, prior to the federal suits, found that the seizures lacked probable cause;[37] and in both cases, the government urged qualified immunity based on excuses previously rejected by prior courts.[38] One factual difference is that the Fifth Circuit denied qualified immunity based on a far shorter separation of 24 hours. In contrast, Petitioners received no hearing whatsoever in Colorado and their seizure lasted nearly a week. They were transported to Kansas and detained in foster care until a Kansas court eventually released them.[39]

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[31] The Fifth Circuit, for a seizure in March 2016, 937 F. 3d at 518 (ruled upon in 2019), found that clearly established law existed as of its own 2008 decision in *Gates*.
[32] 937 F.3d at 521.
[33] *Id.,* at 518.
[34] *Id.*, at 522.
[35] *Id.*
[36] *Id.,* at 518.
[37] *Id.*, at 522.
[38] *Id.*
[39] ¶187a.

B. Fourth Circuit

More than thirty years ago, the Fourth Circuit, in *Weller v. Dep't of Soc. Servs. for City of Baltimore*,[40] held that "an utter lack of judicial action ratifying the deprivation of custody for four months is clearly not the prompt due process that the Constitution requires."[41] *Weller* reached back in time for legal authority to 1977, the year of the Second Circuit's opinion in *Duschene v. Sugarman*,[42] and to 1985, the year of the Sixth Circuit opinion in *Hooks v. Hooks*.[43]

Procedural due process was a clearly established, post-deprivation right, decades before Petitioners' seizure. They alleged not just a delay, but the complete lack of notice and hearing in Colorado,[44] required by Colorado law as well as by the United States Constitution.

C. Third Circuit

The Third Circuit cautioned against granting qualified immunity based on a complaint alone. "[Q]ualified immunity 'will be upheld on a 12(b)(6) motion **only when the immunity is established on the face** of the complaint itself.'"[45] Four years

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[40] 901 F.2d 387, 394 (4th Cir. 1990).
[41] *Id.*, at 396.
[42] 566 F.2d 817 (2nd Cir. 1977).
[43] 771 F.2d 935 (6th Cir. 1985).
[44] ¶¶1, 146, 161, 177, 180-184, 187, 220. Inasmuch as the date of Petitioners' seizure was May 6, 2009, the state of "clearly established law" is determined as of that date.
[45] *Leveto v. Lapina*, 258 F.3d 156, 161 (3rd Cir. 2001) (emphasis added); *see also Thomas v. Texas Dept. of Fam. and Prot. Serv.*, 427 Fed. Appx. 309 (5th Cir. 2011) (unpublished) (finding error in dismissal for qualified immunity based on the face of the complaint alone)

prior to Petitioners' seizure, the Third Circuit, citing *Leveto*, reversed an order granting qualified immunity under Rule 12(b)(6) in *Brown v. Daniels*[46] *Brown* decided the "clearly established law" for a seizure in May 2003. As in the case at bar, a social worker ordered parents to "stay away" from their son without prior notice and hearing. Simultaneously, the parents were told that the child's grandmother had legal custody. A post-seizure hearing was delayed until July. The parents sued, in part, for the delay in procedural due process and violation of state hearing requirements. The Third Circuit held: "Accepting the allegations as true and drawing all inferences in the Browns' favor, **a reasonable [social worker] could not have believed that a post-deprivation hearing conducted seven weeks after the removal** of a child from his parents' home complied with due process."[47]

Brown's facts are much like the case at bar except that Petitioners received **no** hearing at all in Colorado. Their parents, without prior notice and hearing, were ordered to have no contact with the ten children and, simultaneously, Colorado officials pronounced that Petitioners and their siblings were already in legal custody of Kansas officials. The favorable inference under 12(b)(6) is that such a hearing[48] would have prevented Petitioners' detention, which lasted for at least five days in

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[46] 128 Fed. Appx. 910 (3d Cir. 2005) (*per curiam*) (not selected for publication), a decision rendered by Justices Alito, Smith and Becker as circuit justices.
[47] *Id.*, at 916.
[48] Colorado law required a hearing on the next judicial day. C.R.S. §14-13-311(2).

Kansas foster care. Such an inference is affirmed by the finding in the Kansas court of "no probable cause" for the Colorado seizure.

D. Seventh Circuit

The Seventh Circuit rejected qualified immunity at the pleading stage many years prior to Petitioners' seizure where a complaint involved a 1983 child seizure without a court order. As an adult, the victim sued for deprivation of procedural due process. In *Brokaw v. Mercer County*,[49] the court recited the complaint's factual allegations before deciding the issue of qualified immunity under Rule 12(b)(6). "We cannot conclude that the individual defendants are entitled to qualified immunity because the facts once uncovered may turn out to be so severe and obviously wrong that the defendants should have known they were violating [the plaintiff's] constitutional rights."[50]

E. Prior Tenth Circuit holdings

In fact, the Tenth Circuit's ruling in the case at bar conflicts with its own decisional law. For nearly 30 years in the Tenth Circuit, a parent's deprivation of the care and custody of a child, without notice and hearing, has violated clearly established law. In *Malik v. Arapahoe County Dep't of Soc. Servs.*,[51] the Tenth Circuit it-

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[49] 235 F.3d 1000 (7th Circuit 2000).
[50] *Id.*, at 1023, *citing Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087 (3d Cir. 1989).
[51] 191 F. 3d 1306, n.4 (10th Cir. 1999).

self stated: "[W]e held in *Hollingsworth v. Hill*, 110 F.3d 733, 739-40 (10th Cir. 1997), that deprivation of a parent's interest in care and custody of a child without notice and hearing, in violation of state custody law, violated law clearly established in January 1993."

Malik was decided 6 years before Petitioners' seizure. *Hollingsworth's* events in 1993 were 16 years prior to Petitioners' seizure. Just as Respondents, in the case at bar, relied on *ex parte* orders containing no judicial authorization to seize Petitioners,[52] the officer in *Hollingsworth* relied on an order containing no judicial authorization to seize the child.[53] In *Hollingsworth,* the Tenth Circuit held: "Ms. Hollingsworth's right to notice and an opportunity to be heard prior to the deprivation of her liberty interest in the care, custody, and management of her children **was clearly established in January 1993**, despite Deputy Hill's argument to the contrary."[54] Accordingly, as of 1993, *Hollingworth* was clearly established law requiring notice and hearing where a defective court order was the basis for a seizure without notice and hearing.

F. Sixth Circuit

Notably, Rule 12(b)(6) requires that a complaint's allegations be taken as true. On such basis, the Sixth Circuit rejected qualified immunity where defendants

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[52] App H, n. 2, order dtd 3-17-17.
[53] 110 F. 3d at 739.
[54] *Id.* at 740 (emphasis added) (cites omitted).

argued that parents had "consented" to their child's removal. The court ruled that, "reading the complaint's facts in the light favorable to the [plaintiffs], we can draw a reasonable inference that [they] did not consent, given the number of times they allege they demanded that [their child] be discharged."[55] This ruling is not dependent on the date of the seizure, but rather, on proper deference to the facts alleged in a complaint under Rule 12(b)(6).

Likewise, in the case at bar, Petitioners' complaint expressly negates any inference that their parents gave "consent" to the seizure, considering that Petitioners' father was not present at all, and that Respondents threatened arrest or contempt when they encountered objection to their pronouncement that they had come to seize the children without a warrant.

II. The TENTH Circuit's ruling departs from this Court's rejection in *Arbaugh*[56] of "drive-by jurisdictional rulings" and splits from the FIFTH Circuit and various district courts concerning a district court's subject matter jurisdiction over a complaint using initials.

Federal courts have subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[57] However, in M.A.C.'s case, the panel opinion incorrectly held that a judge's permission, not the

[55] *Siefert v. Hamilton County*, 951 F.3d 753, 763-64 (6th Cir. 2020).
[56] *Supra*, fn 20.
[57] 28 U.S.C. §1331.

federal basis for the claims, is the key to the district court's subject matter jurisdiction:

> Because *NCBA* is still the law of the circuit, the district court correctly identified a **defect in its subject-matter jurisdiction**, namely, plaintiff's failure to provide her full name or **seek permission** to do otherwise.[58]

Notably, the local rules of the Kansas district court did not require a complaint to be accompanied by a contemporaneously-filed motion to proceed anonymously. Nor was Petitioner in violation of a court order to show cause or to meet other deadlines. In fact, during the three days between filing of the complaint and the order of dismissal, the court was operating at reduced capacity due to COVID-19. Moreover, counsel was seeking assistance from the clerk's office for technology difficulties and had advised by email of an intent to file a motion to proceed anonymously.

In M.A.C.'s case, besides relying on *National Commodity*, the panel opinion also upheld dismissal based on a prisoner case dismissed under 28 U.S.C. §1915(e)(2).[59] Notably, however, M.A.C.'s case is not brought under the "screening" provisions for *in forma pauperis* complaints. Moreover, M.A.C.'s dismissal was upheld for lack of subject matter jurisdiction under 28 U.S.C. §1331, not for failure to state a claim under Rule 12(b)(6).

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[58] *M.A.C. v. Gildner*, 2021 WL 1016422 *3 (emphasis added), *citing National Commodity & Barter Association v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989).
[59] *M.A.C. at* * 4, *citing Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001).

The Fifth Circuit case of *Doe v. Steagall*,[60] was incorrectly cited by the Tenth Circuit in *National Commodity*. *Steagall* had actually reversed a ruling by a district court that it lacked jurisdiction based on the plaintiff's use of the name, "Doe," stating: "[T]he district court's determination that it lacked jurisdiction to issue a protective order cannot stand."[61]

As to a federal court's subject matter jurisdiction, a district court is required to entertain a complaint seeking recovery under the Constitution or the laws of the United States unless the alleged federal claim "clearly appears to be immaterial and solely made for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[62] M.A.C.'s complaint is based on the United States Constitution, and therefore, the district court did not lack subject matter jurisdiction under §1331, and the court was required to entertain the suit. "Jurisdiction is the authority to decide a case either way."[63] As to the federal claims in the case at bar, they are not "wholly insubstantial and frivolous," meaning subject matter jurisdiction was not lost due to M.A.C.'s use of her initials in the caption. This Court said in *Arbaugh*:

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[60] 653 F.2d 180 (5th Cir. 1981).
[61] *Id.*, at 186 ("We conclude that the almost universal practice of disclosure must give way in this case due to the privacy interests at stake").
[62] *Bell v. Hood*, 327 U.S. 678, 681-82 (1946).
[63] *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

> Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva,* 229 F. 3d at 361. We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit.[64]

The lower courts in the case at bar relied on a "drive-by jurisdictional ruling" in *National Commodity* that **should have been accorded "no precedential effect."** Specifically, the district court incorrectly relied on another case, *W.N.J. v. Yocom*.[65] However, the source of authority in *Yocom* was *National Commodity* in holding that an **appellate court lacked jurisdiction** without the district court's **prior permission** to proceed anonymously. As in *National Commodity*, *Yocom* was a "drive-by jurisdictional ruling" that did not differentiate between *in personam* or subject matter jurisdiction. Importantly, *Yocom*'s analysis, stemming from *National Commodity*, is viewed negatively by courts[66] outside of the Tenth Circuit.[67] For example:

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[64] *Arbaugh*, 126 S.Ct. 1242-43.
[65] 257 F. 3d 1171 (10th Cir. 2001).
[66] *But see Capers v. Nat'l R.R. Passenger Corp.*, 673 Fed. Appx. 591, 596 (8th Cir. 2016) (unpublished) (applying state law but citing *National Commodity* in holding that no action was "commenced.")
[67] In *United States ex rel. Little v. Triumph Gear Systems, Inc.,* 870 F.3d 1242 (10th Cir. 2017), the Tenth Circuit relied on *Yocom* and *National Commodity* to hold that a complaint referring generally to two John Doe plaintiffs did not commence an action "with respect to them." 870 F.3d 1242, 1250. *Triumph* was likewise improperly decided and, moreover, it did not involve minors or sexual abuse, nor specific factual allegations of harm to plaintiffs, nor dismissal on the third day after filing where counsel had stated an intent to file a motion for leave to proceed using initials.

In *A.W. v. Tuscaloosa City Sch. Bd. of Educ.*,[68] defendants contended that no action was "commenced" unless and until the district court had granted approval to proceed anonymously, that any pleading filed prior to such approval was a "nullity and thus, *void ab initio*," and "incapable of amendment."[69] The court in *A.W.* rejected the argument, specifically referring to jurisdiction and stating: "We cannot agree with this approach. After all, courts may authorize amendment of a complaint under Rule 15 **even in the absence of jurisdiction**."[70] It further stated:

> [Defendants'] proposed rule is difficult if not impossible to reconcile with our precedent in this area, which allows parties to proceed anonymously and describes Rule 10(a)'s disclosure requirement as a 'procedural custom' that 'is not absolute' and is grounded in the 'public's legitimate interest in knowing all of the facts involved,' not something more fundamental. [citations omitted]. For these reasons, though we can think of others, we reject the appellants' assertion that A.W. could not amend her complaint or that the court was prohibited from basing its remand decision on the amended complaint.[71]

The court in *A.W.* further stated:

> Even if we adopted the Tenth Circuit's view that federal courts lack jurisdiction over unnamed parties absent court approval to proceed anonymously – though, to be clear, we do not decide that jurisdictional question – it does not logically follow that A.W.'s complaint was a nullity that could not be amended. And the **Tenth Circuit has never held as much**."[72]

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[68] 744 Fed. Appx. 668 (11th Cir. 2018) (not selected for publication) (Case no. 18-10534).
[69] *Id.*, at 670.
[70] *Id.* at 672 (citations omitted) (emphasis added).
[71] *Id.*
[72] *Id.*, at 673, n. 4 (emphasis added).

In *Weissenbach v. Tuscaloosa Cty. Sch. Sys.*,[73] defendants moved to dismiss because only the last name of the plaintiff was listed in the complaint's caption. At the same time, plaintiff moved for leave to correct the caption, as she had no intent to proceed anonymously.[74] Like the situation in the case at bar in which the government agents already know M.A.C.'s identity, in *A.W.*, the defendants' motion and attachments showed that they already knew her full name.[75] But they relied on a case that relied on *Yocom*, namely *Estate of Rodriquez v. Drummond Co.*,[76] The court stated: "*Rodriquez* based its jurisdiction characterization of the use of fictitious-party pleading without leave to proceed on [*Yocom*]."[77]

The court in *Weissenbach* distinguished *Yocom's* procedural facts and noted:

> Absent indication from Congress, there appears to be no reason why Weissenbach cannot amend her Complaint to correct this issue. The non-binding **Tenth Circuit authority** relied upon by Defendants does not prohibit such a reasonable fix…When the real party in interest is not properly named, 'Rule 17(a)(3) requires the court to provide an opportunity to substitute in the correct party **before the court dismisses the case**, provided that the substitution is made within a reasonable time after objection." [78]

In *Doe v. UNUM Life Ins. Co. of Am.,*[79] defendants sought dismissal for plaintiff's failure to identify himself. "Defendants argue that because Doe initiated

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[73] 2018 WL 9986741 (N.D. Ala., June 5, 2018) (slip opinion).
[74] *Id.*, at *2.
[75] *Id.*
[76] 256 F. Supp. 2d 1250 (N.D. Ala. 2003).
[77] 2018 WL 9986741 at *4.
[78] *Id.* (emphasis added).
[79] 164 F. Supp. 3d 1140 (N.D. Calif., 2016).

his lawsuit anonymously without prior leave of court, the complaint should be dismissed under Rule 10(a)."[80] "Defendants rely primarily on the Tenth Circuit's holding in [*Yocom*] and [*National Commodity*]."[81]

The court in UNUM Life rejected these Tenth Circuit holdings, stating:

> I will not follow the Tenth Circuit's decision in *Yocom*. '[D]istrict courts within the Ninth Circuit have concluded that dismissal for lack of jurisdiction is not warranted when the plaintiff files a motion to proceed under a pseudonym, **even if** that motion is filed after the defendant filed a motion to dismiss.' [citations omitted] Courts have reasoned that … 'as the initial complaint is a matter of public record, and once a plaintiff has opened a file number in federal court using his or her real name, any **attempt to proceed under a pseudonym would be pointless**.'[82]

In *G.E.G. v. Shinseki*,[83] a complaint using initials for the plaintiff contained a request to proceed using a pseudonym, but a separate motion had not been filed.[84] Defendant moved to dismiss for lack of a separate motion, citing an unpublished Sixth Circuit opinion that relied on *National Commodity*.[85] The court in *G.E.G.* stated: "Plaintiff **validly points out** that if a court can fully consider a case in which the plaintiff proceeds under a pseudonym, it raises a question whether a person's name is truly required to confer jurisdiction [initially]." [86] The court also acknowl-

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[80] *Id.*, at 1143.
[81] *Id.,* at 1143-44.
[82] *Id.* (citations omitted) (emphasis added).
[83] 2012 WL 381589 (W.D. Mich., Feb. 6, 2012).
[84] *Id.,* at *1.
[85] *Id.,* at *3.
[86] *Id.* (emphasis added).

edged that, even though in some cases a complaint that fails to divulge the plaintiff's identity is ineffective to commence an action,[87] the case at hand was different:

> Here, **Defendant is fully aware of Plaintiff's identity and the underlying facts of this case,** which are set forth in the Complaint, including the specific factual allegations supporting Plaintiff's discrimination claim, as well as the **case numbers and details** of the EEO complaint. Although Plaintiff did not file a motion to proceed pseudonymously, **he did recognize the need for**, and requested, the Court's permission to so proceed in the first paragraph of his Complaint, which stated: 'Plaintiff G.E.G. resides in Lexington, Kentucky and seeks to proceed under a pseudonym due to the private nature of his disabilities.[88]

In *Doe v. Barrow* County*, Ga.*[89], the court rejected *Yocom's* statement that "no action had been commenced," as adopted in *Estate of Rodriquez, supra*. The *Barrow* court stated:

> This court respectfully disagrees with the *Rodriquez's* court's conclusion and specifically with the reliance placed on *Yocom.*"[90]

The *Barrow* court further stated: "There is support from within the Eleventh Circuit for the proposition that a motion to proceed anonymously **need not** be filed contemporaneously with the complaint **in order to vest the district court with jurisdiction**."[91]

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[87] *Id.,* at *3.
[88] *Id.* (emphasis added).
[89] 219 F.R.D. 189 (N.D. Ga. 2003).
[90] *Id.,* at 192.
[91] *Id.* (emphasis added), *citing Roe v. Aware Woman Ctr. for Choice, Inc.,* 253 F.3d 678 (11th Cir. 2001).

The court in *Barrow* also pointed out that, under Fed. R.Civ. P. 17(a), the failure to bring an action "in the name of the real party in interest does not immediately and automatically divest a district court of jurisdiction."[92] Finally, the court in *Barrow* granted plaintiff's motion to proceed in part because "the inconvenience to defendant should be relatively low."[93] Likewise, in the case at bar, inconvenience to the named defendants will be low because they are already accustomed to the confidentiality requirements of CINC proceedings under state law and they have not objected in the older siblings' cases to proceeding using initials for the plaintiffs.

In the case at bar, the named defendants (not yet served) are well aware of M.A.C.'s identity and of the underlying facts alleged in the complaint, including the case number of the underlying CINC action, because defendants had themselves initiated its filing and the disputed seizure in Colorado.

III. The TENTH Circuit split from the Fifth Circuit in holding that M.A.C. was required to file a Rule 59(e) motion in the district court so as make a record prior to appealing a *sua sponte* dismissal.

The Fifth Circuit, in *Davoodi v. Austin Indep. Sch. Dist.*,[94] expressly abrogated[95] a prior ruling impliedly requiring a Rule 59(e) motion prior to appealing from a *sua sponte* dismissal. The court stated: "Indeed, we have long --- and with some fre-

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[92] *Id., citing New York Blood Ctr.*, 213 F.R.D. 108, 109 (E.D.N.Y. 2003).
[93] *Id.* at194.
[94] 755 F.3d 307 (2014).
[95] *Id.*, at fn. 4.

quency --- permitted parties to appeal the improper *sua sponte* dismissal of their claims, even when those parties have not filed a Rule 59(e) motion."[96]

The panel opinion held that M.A.C. was required to file a Rule 59(e) motion so as to tell the district court "why its order may have unintentionally created prejudice," and that, by not doing so, the argument of prejudice was waived.[97] This ruling lacked cited precedent to put M.A.C. on notice that she had no "appeal as of right" from the order of dismissal.

IV. The TENTH Circuit, in upholding *sua sponte* dismissal without prior opportunity to respond, is split from the FIRST, SECOND, THIRD, FIFTH, SIXTH, SEVENTH, ELEVENTH and D.C. Circuits

A plaintiff with an arguable claim is ordinarily entitled to notice of a motion to dismiss and an opportunity to amend the complaint. *Neitzke v. Williams*.[98] The instant case involves a wrongful seizure under the Fourth and Fourteenth Amendments stemming from alleged sexual abuse against minors by a relative, occurring three years before the wrongful seizure.[99] In a Fifth Circuit case where, as here, a *sua sponte* dismissal resulted in a bar to litigating the case on its merits because the time for refiling the action had expired, a district court abused its discretion.[100]

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[96] *Id.,* at 311 (citations omitted).
[97] 2021 WL 1016422 at *3.
[98] 490 U.S. 319 (1989); *see also Day v. McDonough*, 547 U.S. 198 (2006).
[99] *See generally*, Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, The Mentally Ill, And Others in Appellate Court Opinions,* 42 Ga. L. Rev. 471 (Winter 2008).
[100] *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972).

Notably, M.A.C.'s case was not dismissed on the basis of sanctions and she should have been given notice of any deadline to seek permission to proceed anonymously. In a Colorado case involving sexual assault, then-Chief Judge Krieger wrote: "In deciding whether to allow a party to proceed under a pseudonym, a court weighs that party's interest in privacy against the public's interest in knowing the party's identity."[101]

> Victims of rape and other forms of sexual assault are often stigmatized in a manner that affects their educational, employment, and social prospects. See Paul Marcus & Tara L. McMahon, Limiting Disclosure in Rape Victims' Identities, 64 S. Cal. L. Rev. 1020, 1030-36 (1991). The Court has previously denied that portion of the Roes' motion that sought to seal the entirety of this action from public view (# 99), ensuring that the public is fully apprised of the nature of the allegations herein, but the Court finds that the Roes' interests, as victims of sexual assault, have shown good cause to proceed under pseudonyms here. Those privacy interests outweigh the public's interests in identifying the Roes by name. Accordingly, the Roes may continue to pursue this action under their pseudonyms.[102]

A. First Circuit

In *Gonzalez-Gonzalez v. United States*,[103] the First Circuit reversed a district court, noting that *sua sponte* dismissal without notice or opportunity to be heard "is disfavored in federal practice and will rarely be upheld."[104] It further noted:

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[101] *Roe v. Minguela*, 16-cv-02744-MSK-KMT (D. Colo. Aug. 30, 2018), *citing Coe v. U.S. Dist. Ct.*, 676 F.2d 411, 418 (10th Cir. 1982).
[102] *Id.*
[103] 257 F.3d 31 (1st Cir. 2001).
[104] *Id.,* at 36-37.

> If a defendant files a motion to dismiss for failure to state a claim, see Fed. R. Civ. P. 12(b)(6), the plaintiff, as a practical matter, has notice of the motion and an opportunity to amend the complaint as of right, see Fed. R. Civ. P. 15(a). But where, as here, a court jettisons an action sua sponte, the dismissal deprives the plaintiff of these core protections. Thus, the standard for upholding such a sua sponte dismissal is more rigorous than the 'failure to state a claim' standard of Rule 12(b)(6). *Cf. Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (explaining that sua sponte dismissal under 28 U.S.C. 1915 is warranted only if a complaint is 'based on an indisputably meritless legal theory' or is 'clearly baseless.')"

B. Second Circuit

In *Perez v. Ortiz*,[105] the Second Circuit reversed a *sua sponte* dismissal under the "general rule that 'a district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard.'"[106] Also, in *Thomas v. Scully*,[107] the court reversed a *sua sponte* dismissal, finding that the complaint was not found to be frivolous and that dismissal was inappropriate. "A complaint may fail to state a claim that is not frivolous [under 28 U.S.C. §1915(d)]."[108]

C. Other Circuits

Third: "Since the face of the complaint does not refute plainly [the plaintiff's] averment of jurisdictional amount, it was error for the District Court to

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[105] 849 F.2d 793 (2nd Cir. 1988).
[106] *Id.,* at 797.
[107] 943 F.2d 259 (2d Cir. 1991).
[108] *Id., citing Neitzke, supra.*

dismiss the complaint without giving the appellant an opportunity, either orally or in writing, to respond and establish jurisdiction."[109]

Fifth: "As such, [plaintiff] had no notice or opportunity to be heard before the district court issued its order of dismissal. 'This treatment of the case did not provide adequate fairness to the appellants, and thus was reversible error.'"[110]

Sixth: Dismissal requires (1) service on defendants, (2) notice of the court's intent to dismiss, (3) plaintiff's and defendant's opportunity to respond, and (4) the court's reasons for dismissal.[111]

Seventh: "In conclusion, we believe that a wasteful shuttling of cases involving complaints which are substantial enough to invoke federal jurisdiction, but which may ultimately fail to state a claim, is best avoided by following [*Bryan v. Johnson*, 821 F.2d 455, 457-58 (7th Cir. 1987)]. Issuance and service of summons should be allowed according to the mandate of Rule 4(a), and if the court concludes that the complaint should be dismissed sua sponte for failure to state a claim, the parties must be given both notice of the court's intention and an opportunity to respond."[112]

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[109] *Dougherty v. Harper's Magazine Co.,* 537 F.2d 758, 761-62 (3rd Cir. 1976).
[110] *Davoodi, supra* at 310 (citation omitted).
[111] *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983).
[112] *Ricketts v. Midwest Nat. Bank*, 874 F.2d 1177 (7th Cir. 1989).

Eleventh: To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond before dismissing an action *sua sponte*.[113]

D.C.: *Sue sponte* dismissal for failure to state a claim without leave to amend is reversible error unless the plaintiff cannot possibly win relief because the facts alleged affirmatively preclude relief, or because, even though plaintiff makes clear that he has facts to add to his complaint, he would not have a claim upon which relief could be granted even with those facts.[114]

D. Previous Tenth Circuit cases

"[S]ua sponte dismissals without prior notice or opportunity to be heard are hazardous…[U]nless the defect is clearly incurable, a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction."[115] In the case at bar, the complaint did not contain an incurable defect.

In *Smilde*, the Tenth Circuit stated: "In weighing the advisability of a sua sponte dismissal based on the complaint alone, however, the court must keep in mind that a plaintiff with an arguable claim is ordinarily accorded notice of a pend-

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[113] *Tazoe v. Airbus S.A.S.,* 631 F.3d 1321 (11th Cir. 2011).
[114] *Rudder v. Williams,* 666 F.3d 790 (D.C. Cir. 2012).
[115] *Smilde v. Herman*, 201 F.3d 449 (10th Cir. 1999)(unpublished, vacating order of dismissal) (Case no. 99-1217), *citing Joyce v. Joyce*, 975 F.2d 379, 386 (7th Cir. 1992) (affirming a *sua sponte* dismissal due to an incurable defect in the complaint).

ing dismissal to alert him to the legal theory underlying [a] challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds…so as to conform to the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case.'"[116]

The Tenth Circuit has also held that *sua sponte* dismissal under Rule 12(b)(6) is only proper when it is "patently obvious that the plaintiff could not prevail on the facts alleged, and allowing him the opportunity to amend his complaint would be futile."[117] In the instant case, M.A.C. should have been afforded the opportunity to "meaningfully respond" to the district court's concerns prior to dismissal.

[116] *Id.*, *citing Neitzke,* 490 U.S. at 329-30.
[117] *Hall v. Belmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (quotation omitted).

CONCLUSION

In the Colorado case, the right to notice and hearing dates back decades for *ex parte*-ordered child seizures. Procedural due process was "clearly established law" and a "bright line rule" long before Petitioners' seizure in 2009. In the Kansas case, the Tenth Circuit erred by following *National Commodity*, a "drive-by jurisdictional" ruling that was entitled to "no precedential value" under this Court's *Arbaugh* ruling.

WHEREFORE, Petitioners pray that the Court will grant this *Petition for Writs of Certiorari* to the United States Court of Appeals for the Tenth Circuit and grant such other and further relief that the Court deems just and proper.

Respectfully submitted,

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JUNE 4, 2021

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

March 17, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

M.A.C.,

Plaintiff - Appellant,

v.

MONICA GILDNER, in their individual capacity; ANGELA WEBB, in their individual capacity; TINA ABNEY, in their individual capacity,

Defendants - Appellees.

No. 20-3105
(D.C. No. 2:20-CV-02226-HLT-KGG)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BALDOCK**, and **CARSON**, Circuit Judges.

Three days after plaintiff M.A.C. filed a lawsuit in the United States District Court for the District of Kansas, the district court dismissed the case without prejudice for lack of jurisdiction because plaintiff had not moved to proceed by her initials only. Under our binding precedent, we hold that the district court correctly identified a jurisdictional defect. We also hold that plaintiff did not preserve her

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. 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.

argument that the district court's dismissal unintentionally created prejudice. Thus, exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND & PROCEDURAL HISTORY

Plaintiff claims that in 2009 she and her nine siblings traveled from their Kansas home to Colorado to visit family friends. While plaintiff and her siblings were at their friends' home, Colorado officials acted on allegedly unlawful Kansas child protection orders to separate them from their mother and place them in Kansas state custody, in violation of the Fourth and Fourteenth Amendments. As the younger children have reached the age of majority, they have filed or joined new suits for redress. So far, this court has upheld the district court's dismissals in each case. *See E.M.M. v. Douglas Cnty.*, ___ F. App'x ___, 2021 WL 28569 (10th Cir. Jan. 5, 2021); *N.E.L. v. Gildner*, 780 F. App'x 567 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 936 (2020); *N.E.L. v. Douglas Cnty.*, 740 F. App'x 920, 922 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1320 (2019).

Plaintiff filed her lawsuit on May 3, 2020. Although she is no longer a minor, she identified herself in the complaint by her initials only. She says she did so because:

- she shares the same last name with still-minor siblings who are identified in the complaint by their initials, *see* Fed. R. Civ. P. 5.2(a)(3) (presumptively requiring minors to be identified only by their initials);
- Kansas state law regarding child protection matters requires confidentiality; and

- the complaint includes allegations of sexual abuse committed upon some of plaintiff's siblings.

However, plaintiff did not provide these explanations to the district court because she did not file a contemporaneous motion to proceed by her initials only. Plaintiff tells us in her opening brief that she intended to file such a motion but her counsel experienced technical challenges with the district court's electronic filing system.

Counsel's description of her filing troubles is vague. She successfully filed the complaint on May 3, 2020, and she does not explain why she did not file a motion to proceed by initials the same day. Counsel instead reports she sent an e-mail to the district court clerk's office one day later, May 4, announcing her intent to file a motion to proceed using initials. In that e-mail, counsel further explained that, "[when] filing the case, the system made me put in a first and last name. I was hoping your office could fix that problem, too, if it's not too much trouble to remove one of the sets of initials." Aplt. Opening Br. at 3 (internal quotation marks omitted). This e-mail seems to say that, to satisfy the filing system requirements, counsel wrote "M.A.C." in both the first- and last-name fields. But plaintiff does not explain why this interfered with filing a motion to proceed by initials.

Plaintiff next says that on May 5, her counsel called and e-mailed the district court clerk's office "to report a sudden difficulty receiving emails at counsel's primary email address and also, to provide an alternative email address to receive [Notices of Electronic Filing]." *Id.* at 4 (footnote omitted). Again, she does not explain why this interfered with her ability to file a motion.

Plaintiff represents that on May 6, she received a communication from the clerk's office, directing her "to call the Office of Attorney Registration ('OAR')." *Id.* Then, "OAR's staff person apologized for not returning counsel's call because, due to the pandemic, the court-issued cell phone had never rung." *Id.* Yet again, she does not explain why this interfered with her ability to file a motion.

In any event, the same day, May 6, the district court entered a *sua sponte* order dismissing the action for lack of jurisdiction, given the failure to obtain permission to proceed by initials:

> The Federal Rules of Civil Procedure require that pleadings include the names of all parties, and that actions be prosecuted in the name of the real party in interest. The Federal Rules thus make no provision for suits by persons using fictitious names or for anonymous plaintiffs. Instead, a party who wishes to file anonymously or proceed under a pseudonym must first petition the district court for permission. If a party does not have permission, a federal court lacks jurisdiction over the unnamed parties. And because this issue is jurisdictional, a court may raise it sua sponte.
>
> Here, M.A.C. has not requested to proceed under a pseudonym. Accordingly, this Court lacks jurisdiction and must dismiss this case without prejudice. Upon re-filing, Plaintiff is cautioned that she must first request permission to proceed anonymously, if she wishes to do so.

Aplt. App. at 41–42 (internal quotation marks, citations, and footnote omitted).

Plaintiff, however, tells us she could not simply have re-filed the action. The events at issue took place in 2009 and normally she would have been required to bring any § 1983 claim within two years of those events. *See Hamilton v. City of Overland Park*, 730 F.2d 613, 614 (10th Cir. 1984) (en banc) (holding that Kan. Stat.

Ann. § 60-513(a)(4)'s two-year statute of limitations applies to § 1983 claims in Kansas). Plaintiff received the benefit of a statute extending her time to file for one year after she turned eighteen, *see* Kan. Stat. Ann. § 60-515(a), but she represents in her opening brief that "her nineteenth birthday intervened between the date the complaint was filed on May 3, 2020, and the date the dismissal was entered on May 6, 2020," Aplt. Opening Br. at 29—meaning the extended statute of limitations expired while the case was pending.

II. ANALYSIS

Plaintiff's arguments on appeal raise essentially two issues: (i) whether the district court lacked jurisdiction; and, if so, (ii) whether the district court appropriately dismissed *sua sponte*, without warning.

A. District Court's Jurisdiction

We review de novo a district court's finding that it lacks subject matter jurisdiction. *See, e.g.*, *Harms v. IRS*, 321 F.3d 1001, 1007 (10th Cir. 2003). The district court dismissed for lack of jurisdiction based on *National Commodity & Barter Association v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989) (*NCBA*) (per curiam). *NCBA* was essentially a tax protester lawsuit in which some plaintiffs wished to remain anonymous. *See id.* at 1244–45. This court noted that Federal Rule of Civil Procedure 10(a), as then worded, said, "In the complaint, the title of the action shall include the names of all the parties . . . ." *Id.* at 1245 (ellipsis in original; internal

quotation marks omitted).[1] "The Federal Rules thus make no provision for suits by persons using fictitious names or for anonymous plaintiffs," although courts make exceptions in "certain limited circumstances." *Id.* But the unnamed plaintiffs had never asked for an exception.

In this light, the court announced that, "[a]bsent permission by the district court to proceed anonymously, and under such other conditions as the court may impose (such as requiring disclosure of their true identity under seal), the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them." *Id.* The court therefore dismissed the complaint as to the unnamed plaintiffs. *Id.* The court further noted that it could do so, despite the defendants having never raised the argument, because the matter was "jurisdictional" and could be raised *sua sponte*. *Id.* n.3.

Plaintiff argues that *NCBA* has been partly superseded by the 2007 amendments to the Federal Rules of Civil Procedure. Those amendments added Rule 5.2, which, among other things, requires minors to be named only by their initials unless the court orders otherwise. *See* Fed. R. Civ. P. 5.2(a)(3). Thus, according to Plaintiff, *NCBA* is outdated when it says that "[t]he Federal Rules . . . make no provision for suits by persons using fictitious names or for anonymous plaintiffs." 886 F.2d at 1245. But this provides no help to plaintiff, who became an adult before she filed her complaint.

[1] Rule 10(a) still says as much, but in more direct language: "The title of the complaint must name all the parties . . . ."

Plaintiff also cites extra-circuit decisions supposedly disagreeing with *NCBA*. Plaintiff apparently hopes to convince us that *NCBA* was wrongly decided. But "[t]his panel cannot overrule prior panel decisions." *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 792 (10th Cir. 2013). This court continues to cite *NCBA* for its holding that proceeding anonymously without permission is a jurisdictional defect that may (and, indeed, must) be raised *sua sponte*. *See United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242, 1249–50 (10th Cir. 2017); *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001).

Because *NCBA* is still the law of the circuit, the district court correctly identified a defect in its subject-matter jurisdiction, namely, plaintiff's failure to provide her full name or seek permission to do otherwise. Dismissal for lack of jurisdiction was therefore substantively appropriate. However, plaintiff also raises a procedural objection.

B. *Sua Sponte* Dismissal Without Prior Notice

Plaintiff alternatively argues that even if jurisdiction was lacking, the district court should not have dismissed without notice or an opportunity to be heard. And the without-prejudice nature of the dismissal does not render the purported error harmless, plaintiff says, because the statute of limitations expired during the three days the suit was pending. *Cf. AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs.*, 552 F.3d 1233, 1236 (10th Cir. 2009) ("This court has recognized that a dismissal without prejudice can have the practical effect of a dismissal with prejudice if the statute of limitations has expired.").

This court has apparently never stated a standard of review for a district court's choice to dismiss immediately (rather than issue an order to show cause) when it identifies a jurisdictional defect. But we need not announce a standard of review because the factual predicate of plaintiff's argument was not before the district court and is not properly before us.

Plaintiff points to nothing in the record alerting the district court to the statute-of-limitations problem that dismissal purportedly created, and her counsel's representations in the opening brief on appeal are not a substitute for making a proper record in the district court. *See, e.g.*, Fed. R. App. P. 28(a)(8)(A) ("The appellant's brief must contain . . . citations to the authorities and parts of the record on which the appellant relies . . . ."); *Am. Stores Co. v. Comm'r*, 170 F.3d 1267, 1271 (10th Cir. 1999) ("[W]hatever counsel . . . may have represented or argued in a brief, it was not evidence. It was only argument . . . ."). Plaintiff, apparently intent on overturning *NCBA*, decided to appeal immediately, without first telling the district court why its order may have unintentionally created prejudice (a matter with no necessary connection to whether *NCBA* remains good law). By failing to show she made her argument to the district court, plaintiff waived it for purposes of appeal. *See Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) ("A federal appellate court, as a general rule, will not reverse a judgment on the basis of issues not presented below.").

Nor can plaintiff claim lack of opportunity to make the argument. Of course "the district court should allow a plaintiff an opportunity to cure technical errors."

Curley v. Perry, 246 F.3d 1278, 1284 (10th Cir. 2001). But in the context of a due process challenge to district courts' authority to screen *in forma pauperis* complaints for failure to state a claim, this circuit has held that

> lack of prior notice of a sua sponte dismissal with prejudice for failure to state a claim is harmless when, as here, the plaintiff has a reasonable post-judgment opportunity to present his arguments to the district court and the appellate court, including the opportunity to suggest amendments that would cure the complaint's deficiencies.

Id. This reasoning applies equally well to jurisdictional dismissals that unintentionally operate with prejudice. Plaintiff could have filed a postjudgment motion, such as under Federal Rule of Civil Procedure 59(e), thus giving the district court a chance to assess and rule on the claim that its dismissal was effectively with prejudice. At a minimum, such a motion would have created the necessary factual record before appealing. Plaintiff filed no such motion. We therefore do not reach her argument that the district court's dismissal unintentionally created prejudice.

III. CONCLUSION

We affirm the district court.

Entered for the Court

Joel M. Carson III
Circuit Judge

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

January 5, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

E.M.M.; N.M.M.; G.J.M.,

Plaintiffs - Appellants,

v.

DOUGLAS COUNTY, COLORADO; LESA ADAME, individually; CARL GARZA, individually,

Defendants - Appellees.

No. 19-1391
(D.C. No. 1:18-CV-02616-RBJ)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **CARSON**, Circuit Judges.

Plaintiffs appeal the district court's dismissal with prejudice of this action based on claim preclusion. We affirm the dismissal, but on alternate grounds.

BACKGROUND

This is the third appeal related to this dispute. In our two previous decisions we comprehensively discussed the facts and legal theories underlying claims brought by N.E.L., M.M.A., and E.M.M. These three prior plaintiffs, children of Mr. and

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. 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.

Mrs. Doe, alleged they were taken into custody and temporarily separated from their parents as the result of wrongful actions by Kansas and Colorado authorities. *See N.E.L. v. Gildner (N.E.L. II)*, 780 F. App'x 567 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 936 (2020); *N.E.L. v. Douglas Cnty. (N.E.L. I)*, 740 F. App'x 920 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1320 (2019). *N.E.L. I* pertained to Colorado officials and was litigated in the District of Colorado. *N.E.L. II* pertained to Kansas officials and was first transferred to and then litigated in the District of Kansas. In each case we affirmed the district court's dismissal of all claims.

Following our latest decision, E.M.M., who was a plaintiff in *N.E.L. II* (the District of Kansas case) and two of his siblings, N.M.M. and G.J.M., who were not named as plaintiffs in the prior litigation but have now reached the age of majority, filed this new suit in the District of Colorado against the Colorado defendants. Five of their claims are substantially identical to the claims asserted in *N.E.L. I*. Plaintiffs have also added two claims, alleging that defendants violated (1) their Fourteenth Amendment rights, by failing to provide them with notice and a hearing in Colorado; and (2) their right to travel.

The defendants moved to dismiss this action on several grounds: claim preclusion, issue preclusion, the statute of limitations, qualified immunity, and failure to plead a claim of municipal liability. The district court determined that claim preclusion barred plaintiffs' claims, dismissed their claims with prejudice, and did not reach the other asserted grounds for dismissal.

As plaintiffs acknowledge, *see* Aplt. Opening Br. at 7, 23, we may affirm this judgment on any ground that finds support in the record. *See GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 882 (10th Cir. 2005). Here, affirmance is appropriate because all plaintiffs' claims fail as a matter of law. To the extent plaintiffs raise claims identical to those previously raised by their older siblings, those claims were thoroughly litigated in our prior appellate decisions and fail for the reasons we have identified.[1] To the extent plaintiffs attempt to raise new claims, or rely on newly stated facts, those claims fail for reasons we will now specify.

DISCUSSION

In assessing whether a complaint states a claim, 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) (internal quotation marks omitted).

1. Previously Asserted Claims

The older siblings' complaint in *N.E.L. I* raised six claims under the Fourth and Fourteenth Amendments. As the district court noted, the complaint in this action "is largely identical to the older siblings' complaint." Aplt. App. at 223. Five of the seven claims raised in this action "are identical to claims asserted in the older

[1] We have not simply affirmed based on our decisions in those prior cases, however. Instead, we have carefully considered the arguments plaintiffs have raised in their appellate briefing in this case.

siblings' complaint, except to the extent that plaintiffs have removed [Kansas defendants] Gildner, Webb, and Abney," *id.*, and substituted themselves as plaintiffs. These five claims are

- "that Adame and Garza violated the Fourth Amendment by approving and/or conducting 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,"
- "that Adame and Garza violated plaintiffs' Fourteenth Amendment right to maintain a familial relationship,"
- "that Adame and Garza conspired to deprive plaintiffs of their constitutional rights,"
- "that plaintiffs were entitled to exemplary damages because the actions of Adame and Garza were attended by intent, recklessness, callous disregard or indifference to plaintiffs' rights," and
- "that Douglas County violated the Fourth Amendment by adopting as its policy or practice warrantless seizure, or alternatively by acting with deliberate indifference in failing to train personnel."

Id. at 223-24 (alterations and internal quotation marks omitted).

In *N.E.L. I*, we affirmed the dismissal of each of these claims, as asserted by the older siblings. We determined that the Fourth Amendment and Fourteenth Amendment claims against Adame and Garza failed because the defendants were entitled to qualified immunity. *See N.E.L. I*, 740 F. App'x at 929-30 (Fourth

Amendment claims); *id.* at 931 (Fourteenth Amendment claims). And the older siblings' Fourth Amendment claim against Douglas County failed because they did not plead sufficient facts to sustain a claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), whether their claim was based on formal policy, *see N.E.L. I*, 740 F. App'x at 932-33; custom, *see id.* at 933; or deliberate indifference, *see id.* at 933-34.

Plaintiffs' identical claims in this suit fail for substantially the same reasons. And even though their complaint asserts additional facts to support their municipal-liability claim, those facts do not warrant a different result.

A. Additional Facts Concerning Formal Policy

In *N.E.L. I*, we noted the older siblings' contention that Douglas County unconstitutionally followed a formal policy of complying with a 2007 state-court standing order that allegedly led its employees to violate the Fourth Amendment. But we found this argument waived, because the older siblings "didn't mention the standing order in their First Amended Complaint" or their opening brief. *N.E.L. I*, 740 F. App'x at 932. Perhaps in response to this holding, plaintiffs have added a paragraph to their complaint alleging that "Douglas County adopted a policy contained in a standing order, CJO 07-11, authorizing the warrantless entry and seizure of Plaintiffs, which policy was the moving force behind the deprivation of Plaintiffs' [constitutional rights]." Aplt. App. at 34, ¶ 188a. But this additional allegation does not require a different outcome.

Notwithstanding our waiver determination in *N.E.L. I*, we also addressed the older siblings' formal-policy argument on the merits. We concluded their reliance on the policy at issue here, CJO 07-11, failed to establish a *Monell* claim because the standing order did not authorize county officials to enter homes without a warrant. *See N.E.L. I*, 740 F. App'x at 932-33. Plaintiffs' invocation of this policy in their complaint does not dictate a different result.

B. Additional Facts Concerning Deliberate Indifference

In *N.E.L. I* we also addressed the older siblings' contention that Douglas County's failure to adopt an adequate policy and training concerning the enforceability of out-of-state *ex parte* orders constituted deliberate indifference. We concluded the older siblings failed to allege facts plausibly showing that failure to adopt such a policy was "substantially certain to result in illegal seizures or entries into homes without warrants," or that Douglas County was on notice that its failure to act would lead to illegal seizures or warrantless entries into homes and was deliberately indifferent to the risk of harm. *Id.* at 934 (internal quotation marks omitted).

Plaintiffs have added two paragraphs to their complaint concerning this claim. The first confirms that Douglas County lacked an official policy for handling requests to enforce out-of-state *ex parte* orders. *See* Aplt. App. at 35, ¶ 190a. The second relies on a provision in Douglas County's policy manual providing that "[o]ut-of-state Court Orders are not valid on their face in Colorado, except for Foreign Protection Orders." *Id.*, ¶ 191a (internal quotation marks omitted). Plaintiffs

contend this policy manual provision made it obvious that Douglas County needed to adopt and implement an official policy prohibiting the seizure of children based on out-of-state *ex parte* orders. But neither new allegation fills the hole in the complaint that we previously identified: failure to plausibly allege facts that rise to the level of *deliberate indifference*.

2. New Claims

Plaintiffs also added two new claims to their complaint, alleging that the defendants (1) violated their procedural due process rights under the Fourteenth Amendment and Colorado's UCCJEA by failing to afford them notice and a hearing in Colorado, and (2) violated their right to travel. Our analysis in *N.E.L. I* dictates dismissal of the procedural due process claim as stated in plaintiffs' complaint, both as it relates to the individual defendants, who are entitled to qualified immunity, *see N.E.L. I*, 740 F. App'x at 931 n.21; and as it relates to Douglas County, *see id.* at 932-34. In addition, plaintiffs have failed to identify clearly established law or a basis for municipal liability that would permit them to pursue a claim against these defendants for an alleged deprivation of their right to travel.

Seeking to resurrect their procedural due process claim, plaintiffs nevertheless urge us to "overturn [our] previous rulings in *N.E.L. I and II* [and] find that Plaintiffs had a clearly established right to a post-seizure hearing in Colorado based on the detailed requirements of Colorado's UCCJEA and federal decisional law." Aplt. Opening Br. at 7. In response, the defendants urge us to follow our law-of-the-circuit principle, under which we may overturn a prior panel decision only in very specific

circumstances, such as when there has been an en banc consideration or an intervening Supreme Court decision. *See, e.g.*, *United States v. Doe*, 865 F.3d 1295, 1298-99 (10th Cir. 2017). Plaintiffs respond that this principle is inapplicable here, because both *N.E.L. I* and *II* were unpublished decisions. *See Kennedy v. Lubar*, 273 F.3d 1293, 1300 n.9 (10th Cir. 2001) ("[T]he law of the circuit doctrine . . . refers generally to our policy that prior circuit precedent, derived from a *published opinion on the merits*, will not be overturned absent an *en banc* ruling of this court.").

But even if we consider this issue on the merits, the dismissal must still be affirmed. Having carefully reviewed plaintiffs' arguments as well as our decisions in *N.E.L. I* and *II*, we conclude that given the unusual facts of this case plaintiffs have failed to point us to "existing precedent [that] placed the statutory or constitutional question beyond debate," *Kisela v. Hughes*, ___U.S.___, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted), and that made it "sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (internal quotation marks omitted). Their reliance on the UCCJEA's procedural requirements to support their Fourteenth Amendment argument does not satisfy their burden, *cf. N.E.L. I*, 740 F. App'x at 930 ("Having failed to provide us authority clearly establishing that violating the Colorado UCCJEA is a Fourth Amendment violation, [the older siblings] haven't met their burden."), and the other authorities they cite are insufficiently particularized to the facts of this case to constitute clearly established law. Thus, dismissal of this claim is proper based on qualified immunity.

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Gregory A. Phillips
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

M.A.C., **Plaintiff,** **v.** **MONICA GILDNER, et al.,** **Defendants.**	**Case No. 2:20-CV-02226-HLT-KGG**

ORDER

M.A.C. has sued three employees of the Kansas Department of Children and Families. Doc. 1. Although M.A.C. is now an adult, the events at issue apparently took place when she was a child. Although all Defendants are named in the complaint, M.A.C. and all of her family members or family friends are referenced only by initials or pseudonyms. M.A.C. has not sought leave to proceed in this fashion.

The Federal Rules of Civil Procedure require that pleadings include the names of all parties, and that actions be prosecuted in the name of the real party in interest. *See* Fed. R. Civ. P. 10(a); Fed. R. Civ. P. 17(a). "The Federal Rules thus make no provision for suits by persons using fictitious names or for anonymous plaintiffs." *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989). Instead, a party who wishes to file anonymously or proceed under a pseudonym must first petition the district court for permission. *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001). If a party does not have permission, a federal court lacks jurisdiction over the unnamed parties. *Id.*; *see also L.E.H. v. Kan. Dep't of Children & Families*, 2018 WL 1256513, at *1 (D. Kan. 2018). And because this issue is jurisdictional, a court may raise it sua sponte. *Nat'l Commodity*, 886 F.2d at 1245 n.3.

Here, M.A.C. has not requested to proceed under a pseudonym.[1] Accordingly, this Court lacks jurisdiction and must dismiss this case without prejudice. Upon re-filing, Plaintiff is cautioned that she must first request permission to proceed anonymously, if she wishes to do so. Any such requests will be evaluated using the standards set forth by this district and the Tenth Circuit. *See Doe 1 v. Unified Sch. Dist. 331*, 2013 WL 1624823, at *1 (D. Kan. 2013) (noting that proceeding under a pseudonym is permitted in "exceptional circumstances . . . where disclosure of plaintiff's name would implicate significant privacy interests or threats of physical harm").

THE COURT THEREFORE ORDERS that M.A.C.'s complaint (Doc. 1) is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

IT IS SO ORDERED.

Dated: May 6, 2020

/s/ *Holly L. Teeter*
HOLLY L. TEETER
UNITED STATES DISTRICT JUDGE

[1] This is somewhat surprising given that M.A.C.'s attorney is counsel of record in at least two related cases where this same issue was addressed. In one case, the plaintiffs were ordered to show cause on this issue and then later requested leave to proceed anonymously. *See E.M.M., N.M.M., and G.J.M. v. Douglas Cty., Colo.*, Case No. 18-2616 (D. Colo. 2018) (Doc. 4, ordering the plaintiffs to show cause, and Doc. 5, subsequent motion). In another case, which was initially filed in Colorado and then transferred to Kansas, the plaintiff moved to proceed anonymously. *See N.E.L. & M.M.A. v. Douglas Cty., Colo.*, No. 15-2847 (D. Colo. 2016) (Doc. 9, motion to proceed anonymously).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 18-cv-02616-RBJ

E.M.M., *et al.*,

Plaintiffs,

v.

DOUGLAS COUNTY, COLORADO,
LESA ADAME, individually, and
CARL GARZA, individually,

Defendants.

ORDER GRANTING MOTION TO DISMISS

Defendants Douglas County, Colorado, Lesa Adame, and Carl Garza move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for failure to state a claim on which relief could be granted. The motion is granted.

I. FACTS

Plaintiffs' claims are the latest in a series of litigations to arise out of a welfare check on a home in Colorado. Mr. and Mrs. Doe have ten children, including the three plaintiffs in this case. At the time of the events alleged in this case, the family lived in Kansas but were staying with friends in Colorado.

In spring of 2008, allegations first surfaced that a relative was abusing some of the children. Mr. and Mrs. Doe reported the first allegations to the Kansas Department of Social and

Rehabilitation Services ("SRS/DCF") in June 2008.[1] Thereafter Mr. and Mrs. Doe began a fast-souring relationship with SRS/DCF and in particular with the social worker assigned to them, Monica Gildner, and Gildner's supervisors, Angela Webb and Tina Abney.

On April 20, 2009 the Kansas District Attorney's Office filed ten Child-in-Need-of-Care petitions in Kansas state court, one for each child. These petitions requested termination of Mr. and Mrs. Doe's parental rights, appointment of a permanent custodian for the children, temporary removal of the children from Mr. and Mrs. Doe's custody, and an order of child support. A non-emergency hearing was set for May 11, 2009.

Sometime between April 20, 2009 and April 30, 2009, Mrs. Doe took the ten children to Colorado. They stayed at the home of family friends Dr. and Mrs. G in Douglas County. Presumably upon learning of this, the Kansas state court served ten ex parte orders of protective custody on Mr. Doe, who had remained in Kansas. Plaintiffs acknowledge that the ex parte orders contain "alarm[ing]" allegations that Mr. and Mrs. Doe had abused their children. ECF No. 12 ¶ 116. However, plaintiffs maintain that these allegations are false and based on "fraudulent[] misrepresent[ations]" that were retaliatory in nature. *Id*. ¶¶ 115, 118b.

On May 6, 2009 two Colorado state authorities—defendant Lesa Adame, a Douglas County social worker, and defendant Carl Garza, a Douglas County Sheriff's deputy—visited the Doe family at Dr. and Mrs. G's Colorado home. It is this visit that forms the foundation of the complaint. Plaintiffs allege that at the home, Adame and Garza misrepresented the ex parte orders by incorrectly claiming that they provided for Kansas to take custody of the children, and

[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." ECF No. 12 at 2–3.

that they used threats and intimidation to enter the house. Once inside, Adame communicated that Kansas was taking custody of the children and restricting Mr. and Mrs. Doe's communication with the children. Adame and Garza informed Dr. and Mrs. G that Kansas state authorities would be arriving at an unspecified time to take physical custody of the children. Instead of waiting for the authorities to arrive in Colorado, Dr. and Mrs. G transported the children back to Kansas and delivered them to SRS/DCF custody themselves. Dr. G requested temporary custody of the children, or alternatively for the children's paternal grandparents to take custody. SRS/DCF denied this request, separated the children, and placed them with foster families.

Procedural History

In 2015, upon reaching the age of majority, two of plaintiffs' older siblings—N.E.L. and M.M.A.—filed suit related to the 2009 conduct ("older siblings' complaint"). *See N.E.L. v. Douglas Cty., Colo.*, No. 15-CV-02847-REB-CBS, 2017 WL 1242992, at *1, 2 n.2 (D. Colo. Jan. 27, 2017), *aff'd*, 740 F. App'x 920 (10th Cir. 2018), *reh'g denied* (July 17, 2018), *cert. denied sub nom. N.E.L. v. Douglas Cty., Colo.*, 139 S. Ct. 1320 (2019). Plaintiffs named as defendants Douglas County, Adame, Garza, Gildner, Webb, and Abney. *Id*.

The older siblings' complaint asserted six § 1983 claims under the Fourth Amendment and Fourteenth Amendment: (1) that all defendants violated the Fourth Amendment by "approv[ing] and/or conduct[ing] 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;" (2) that Gildner, Webb, and Abney violated the Fourth Amendment by holding plaintiffs "against their will for five days prior to a hearing on the

CINC petitions;" (3) that Adame, Garza, Gildner, Webb, and Abney violated plaintiffs' Fourteenth Amendment right to maintain a familial relationship; (4) that Adame, Garza, Gildner, Webb, and Abney conspired to deprive plaintiffs of their constitutional rights; (5) that plaintiffs were 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 [p]laintiffs' rights, or indifference to [p]laintiffs' rights;" and (6) that Douglas County violated the Fourth Amendment "by adopting an unlawful policy that authorized county sheriff's personnel 'to seize [p]laintiffs 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.'" *Id*. (quoting First Amended Complaint at 44, *N.E.L.*, 2017 WL 1242992 (No. 15-CV-02847-REB-CBS)).

A magistrate judge recommended dismissal with prejudice of all of the claims against Douglas County, Adame, and Garza. *See N.E.L.*, 2017 WL 1242992, at *18. Following the older siblings' objections to that recommendation, a Colorado district court adopted the recommendation in full.[2] *See id*. The court dismissed the Fourth Amendment and Fourteenth Amendment claims against Adame and Garza based on qualified immunity. *See id*. at *10 (finding that plaintiffs had failed to allege a Fourth Amendment violation and had failed to show

[2] The court also transferred all of the claims against Gildner, Webb, and Abney to the District of Kansas upon finding that it lacked personal jurisdiction. *See N.E.L.*, 2017 WL 1242992, at *17. The claims against Gildner, Webb, and Abney are not relevant to the disposition of this case, in which plaintiffs have named only Douglas County, Adame, and Garza as defendants. Incidentally, the Kansas district court dismissed all of the claims based on qualified immunity, *see N.E.L. v. Gildner*, No. 17-2155-CM, 2018 WL 1185262, at *11 (D. Kan. Mar. 7, 2018), and the Tenth Circuit affirmed, *see N.E.L. v. Gildner*, No. 18-3059, 2019 WL 2592557, at *1 (10th Cir. June 25, 2019).

that defendants violated clearly established law); *id*. at *12 (finding that plaintiffs had failed to allege a Fourteenth Amendment violation). Because the court dismissed the substantive claims against Adame and Garza, it also dismissed the civil-conspiracy claim. *Id*. at *13 n.14. Finally, the court found that lack of any constitutional violation by Adame and Garza defeated the claim against Douglas County. *See id*. at *14 ("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.").

The Tenth Circuit affirmed in full and denied plaintiffs' subsequent petition for panel rehearing. *See N.E.L. v. Douglas Cty., Colo.*, 740 F. App'x 920, 934 (10th Cir. 2018), *reh'g denied* (July 17, 2018), *cert. denied sub nom. N.E.L. v. Douglas Cty., Colo.*, 139 S. Ct. 1320 (2019). N.E.L. and M.M.A. filed a petition for a writ of certiorari to the United States Supreme Court, which was also denied. *See N.E.L.*, 139 S. Ct. at 1320.

In the instant case, three different Doe siblings—E.M.M, N.M.M, and G.J.M—have filed a complaint against Douglas County, Adame, and Garza ("younger siblings' complaint"). ECF No. 12 at 1; *id*. ¶¶ 196–223. This younger siblings' complaint is largely identical to the older siblings' complaint. The plaintiffs assert seven § 1983 claims under the Fourth Amendment, the Fourteenth Amendment, and the right to travel. *Id*. ¶¶ 196–223. Four of these claims are identical to claims asserted in the older siblings' complaint, except to the extent that plaintiffs have removed Gildner, Webb, and Abney as defendants. These four identical claims include: (1) that Adame and Garza violated the Fourth Amendment by "approv[ing] and/or conduct[ing] 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," *id.* ¶¶ 196–98; (2) that Adame and Garza violated plaintiffs' Fourteenth Amendment right to maintain a familial relationship, *id.* ¶¶ 202–08; (3) that Adame and Garza conspired to deprive plaintiffs of their constitutional rights, *id.* ¶¶ 209–12; (4) that plaintiffs were entitled to exemplary damages because "[t]he actions of Adame and Garza were attended by intent, recklessness, callous disregard or indifference to [p]laintiffs' rights," *id.* ¶¶ 217–18; and (5) that Douglas County violated the Fourth Amendment by "adopt[ing] as its policy or practice . . . warrantless seizure," or alternatively by "act[ing] with deliberate indifference" in failing to train personnel, *id.* ¶¶ 219–23. Plaintiffs have also added two new claims, including: (1) that all defendants violated the Fourteenth Amendment rights by "fail[ing] to afford [p]laintiffs notice and hearing in Colorado;" *id.* ¶¶ 199–201, and (2) that all defendants violated plaintiffs' right to travel, *id*. ¶ 213–16.

Defendants Douglas County, Adame, and Garza collectively move to dismiss. ECF No. 13 at 1. They argue that plaintiffs' claims against all defendants are barred by claim preclusion, issue preclusion, and the applicable statute of limitations; that plaintiffs' claims against Adame and Garza are barred by the doctrine of qualified immunity; and that plaintiffs' claims against Douglas County have failed to plead a claim for municipal liability. *Id*. at 3, 6, 8, 13.

"Plaintiffs naturally take strong exception to all of these arguments." *N.E.L.*, 2017 WL 1242992, at *2. Relevant here, plaintiffs contest the application of claim preclusion because they are not in privity with their siblings from the prior suit, ECF No. 29 at 3, and because the complaints do not share an identical cause of action, *id*. at 4.

Because I find that claim preclusion bars plaintiffs' claims, I do not address the remainder of defendants' arguments in their motion to dismiss.

II. STANDARD OF REVIEW

To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), conclusory allegations are not entitled to be presumed true, *Iqbal*, 556 U.S. at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g., Twombly,* 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

The court may also consider certain documents beyond the pleadings. The court may take judicial notice of "its own files and records" and "facts which are a matter of public record" without converting a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. *See Tal v. Hogan*, 453 F.3d 1244, 1264–65 n.24 (10th Cir. 2006) (quoting *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000)); *see also St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."). However, these documents "may only be considered to show their contents, not to

prove the truth of matters asserted therein." *Tal*, 453 F.3d at 1264–65 n.24 (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

III. ANALYSIS

Claim preclusion "prevent[s] a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). It is based on the principle that "a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not have another chance to do so." *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1275 (10th Cir. 2006) (citation omitted). "To apply claim preclusion, three elements must exist: '(1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.'" *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoting *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997)). Additionally, "even if these three elements are satisfied, there is an exception to the application of claim preclusion where the party resisting it did not have a 'full and fair opportunity to litigate' the claim in the prior action." *Id*. (quoting *MACTEC*, 427 F.3d at 831).

Here, plaintiffs do not dispute defendants' assertion that the first element of claim preclusion—a final judgment on the merits in an earlier action—is met. Neither do I. The district court's dismissal with prejudice of the claims asserted by N.E.L. and M.M.A. against Douglas County, Adame, and Garza constitute a final judgment on the merits. *See N.E.L.*, 2017 WL 1242992, *aff'd*, 740 F. App'x 920 (10th Cir. 2018), *reh'g denied* (July 17, 2018), *cert. denied sub nom. N.E.L. v. Douglas Cty., Colo.*, 139 S. Ct. 1320 (2019). The Tenth Circuit affirmed this final judgment and the Supreme Court denied cert. *See id*. However, plaintiffs do dispute that

the second and third elements of claim preclusion are met. Plaintiffs argue that the parties in the two suits were not in privity and that there was no identity of the cause of action between the suits. I address both of these topics in turn, beginning with identity of the cause of action.

A. Identity of the Cause of Action

The Tenth Circuit uses the transactional approach to analyze identity of the cause of action. *See Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997). Under the transactional approach, "a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event or occurrence." *Id.* A new legal theory related to the same transaction, event, or occurrence as in the prior suit is thus precluded (assuming the other elements of claim preclusion are met). *See, e.g.*, *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 504–06 (10th Cir. 2002) (finding that plaintiff's new Title VII claim against employer was barred under claim preclusion because plaintiff had asserted a Fair Labor Standards Act claim in a prior suit against the same employer for the same employment relationship). What constitutes the same transaction, event, or occurrence "is to be determined pragmatically, giving such weight to considerations as whether the facts are related in time, space, origin, or motivation." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir. 1999) (quoting Restatement (Second) of Judgments § 24 (1982)).

Plaintiffs argue that identity of the cause action does not exist because the younger siblings' complaint includes both new claims and new factual allegations. ECF No. 29 at 2. Contrary to plaintiffs' assertions, neither their new claims nor their new factual allegations constitute a new cause of action. As defendants point out—and as plaintiffs do not contest—the thirty-four-page complaints from both suits are textually identical aside from a few discrete

phrases and paragraphs. Four of the claims in the younger siblings' complaint are entirely identical to the older siblings' complaint. There are two allegedly new claims: (1) violation of procedural due process based on defendants' "fail[ure] to afford [p]laintiffs notice and hearing in Colorado," and (2) violation of plaintiffs' "right to travel to Colorado." ECF No. 12 ¶¶ 199–201, 213–16. Yet these two claims arise from the same transaction as did those in the older siblings' complaint: the removal of the ten children from Mr. and Mrs. Doe's custody by Colorado state authorities acting pursuant to a Kansas state court order. Plaintiffs' instant complaint explicitly states that "the warrantless entry and seizure of [p]laintiffs . . . was the moving force behind the deprivation of [p]laintiffs' liberty, *procedural due process*, familial association and *right to travel*." *Id*. ¶ 188a (emphasis added). I find that because all six legal claims in the younger siblings' complaint arise from the same transaction as those in the older siblings' complaint, they share identity of the cause of action.

Nor are plaintiffs' new factual allegations sufficient to defeat preclusion. "[N]ew facts in support of claims asserted in a prior action will usually not avoid application of claim preclusion" unless the new facts "*in themselves* establish *independent grounds* for a claim against the defendants in the previous action." *Hatch*, 471 F.3d at 1150 n.8 (quoting 18 James William Moore, *Moore's Federal Practice* § 131.22[1], at 131–55 (3d ed. 2006)). Here, the new factual allegations include more evidence about (1) the lack of "probable cause for [p]laintiffs' removal," [3] ECF No. 12 ¶ 187a, and (2) Douglas County's policies related to the alleged "warrantless entry and seizure of [p]laintiffs," *id*. ¶¶ 188a, 190a, 191a. Defendants' allegedly

[3] Specifically, plaintiffs allege that the Kansas state court that granted the CINC petitions "found and made an entry into the court's minutes, after testimony by Gildner, that no probable cause existed for [p]laintiffs' removal from their [p]arents and [g]randparents." ECF No. 12 ¶ 187a.

unconstitutional seizure and alleged adoption of an unconstitutional policy are not independent grounds for a claim; they are reiterations of the same grounds provided in the older siblings' complaint.

Neither plaintiffs' new claims nor their new factual allegations are sufficient to distinguish the cause of action. Plaintiffs' complaint thus hinges on whether the two sets of siblings were in privity.

B. Privity

Claim preclusion applies only when the parties in both suits are either identical or in privity. *See Lenox MacLaren*, 847 F.3d at 1240. The concept of privity is admittedly vague; the Tenth Circuit has recognized "that no definition of privity can be automatically applied in all cases involving the doctrine of [claim preclusion]." *Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008). At the very least privity requires "a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same." *Id.* (quoting *Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1275 (10th Cir.1989) (internal quotations omitted)).

The Tenth Circuit has not yet had occasion to consider the extent to which familial relationships establish privity. Other circuit courts recognize that although familial relationships are not on their own sufficient, they can "constitute an important factor when assessing the preclusive effects of a prior litigation." *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1996); *see also Baloco v. Drummond Co.*, 767 F.3d 1229, 1250 (11th Cir. 2014) ("While familial relationship standing alone is not enough, it is certainly a consideration . . . .").

The Supreme Court has provided some limiting guidance on the concept of privity in federal law. In *Taylor v. Sturgell*, the Court rejected the expansive doctrine of "virtual representation," which counseled preclusion "whenever the relationship between a party and a non-party is close enough to bring the second litigant within the judgment."[4] 553 U.S. 880, 894, 898 (2008). In lieu of virtual representation, the Court provided six categories that can establish privity. *See id*. at 894, 893 n.6 (noting that the list of categories "is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy"). These categories include: (1) when a party agrees to be bound; (2) when there exists a "pre-existing substantive legal relationship;" (3) when a nonparty was "adequately represented by someone with the same interests who [was] a party" in an earlier suit;" (4) when the nonparty assumed control over the litigation; (5) when a nonparty later sues as the designated representative of a party to the earlier suit; and (6) when a special statutory scheme so directs *Id*. at 894–95.

Here, defendants assert that the "familial relationship, shared factual involvement, shared counsel and shared cause of action" establish privity. ECF No. 13 at 4. Plaintiffs respond (1) that there was no pre-existing substantive legal relationship between the three Doe siblings in the instant suit ("younger siblings") and the two older siblings from the prior suit ("older siblings") and (2) that the younger siblings were not adequately represented by the older siblings because there was neither any "understanding that [the older siblings] were authorized to act for [the

[4] However, the Court also noted that its rejection of the term "virtual representation" was "unlikely to occasion any great shift in actual practice." *Id*. at 904 ("Many opinions use the term 'virtual representation' in reaching results at least arguably defensible on established grounds. In these cases, dropping the 'virtual representation' label would lead to clearer analysis with little, if any, change in outcomes.").

younger siblings]" nor any "special procedures by the prior court(s) protect[ing]" the younger siblings. ECF No. 29 at 3–4.

I find that privity does exist between the younger siblings and the older siblings. Plaintiffs are correct that, post-*Taylor*, privity requires something more than mere close relationship. However, I find that that something is met here. Although there is no pre-existing substantive legal relationship, the younger siblings were adequately represented by the older siblings in the prior suit.

1. Pre-Existing Substantive Legal Relationship

The younger siblings do not have a pre-existing substantive legal relationship with the older siblings. The Tenth Circuit has described such a relationship as "one in which the parties to the first suit are somehow accountable to nonparties who file a subsequent suit raising identical issues." *Pelt*, 539 F.3d at 1290. They often originate in property law, including "preceding and succeeding owners of property, bailee and bailor, assignee and assignor, guardian and ward and trustee and beneficiary." *Id.* (citing *Richards*, 517 U.S. 793, 798 (1996)).

Here, there is no "fiduciary, contractual or property relationship between current and prior litigants." *Id.* at 1290–91. The older siblings were not guardians or fiduciaries of their younger siblings. Nor do plaintiffs' Fourth and Fourteenth Amendment claims against government agents involve any fiduciary, contractual, or property law considerations. *See Roybal v. City of Albuquerque*, No. CIV.08-0181 JB/LFG, 2009 WL 1300048, at *7 (D.N.M. Feb. 2, 2009). Defendants rely improperly on *Baloco v. Drummond Co., Inc*, in which the Eleventh Circuit found privity between two sets children, some of which were half-siblings. 767 F.3d at 1250–51 (noting that the children in the first suit were represented by their mothers as

their guardians). Although the familial relationship was a factor in finding a substantive legal relationship, the court established privity primarily because the requested relief implicated property law considerations. *Id*. The children all sought to share an award of wrongful death damages as heirs or legal beneficiaries of the decedent, and thus "successive awards would be improperly duplicative." *Id*. at 1250. In contrast, the younger siblings have requested relief based on individual harm, not as heirs or legal beneficiaries.

2. Adequate Representation

However, I do find that the younger siblings were adequately represented by the older siblings in the prior suit. The Supreme Court has clarified that adequate representation requires, "at a minimum," that "(1) the interests of the nonparty and her representative were aligned, and (2) *either* the party understood herself to be acting in a representative capacity *or* the original court took care to protect the interests of the non-party." *Taylor*, 553 U.S. at 900 (citations omitted) (emphasis added). "In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented." *Id*. The Court noted that "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries." *Id*. at 895 (citations omitted).

First, the interests of both sets of children were aligned. Plaintiffs attempt to rely on *Roybal v. City of Albuquerque* to show that familial association alone is insufficient to show joint interest. 2009 WL 1300048, at *8. In *Roybal*, a New Mexico district court held that a wife had not acted in a representative capacity for her husband for the purpose of their similar civil rights claims. *See id*. at *1. Many of the facts underlying the Roybals' separate claims were similar:

They revolved around an alleged wrongful search of their shared home and alleged wrongful arrests of both. *See id*. Yet the particulars of the individual claims were distinct. Mrs. Roybal alleged that she was arrested in her home's stairway and in retaliation for protesting the entry of the officers into her home by "pok[ing] one of the officers in the chest." *Id*. at *1, 2. Mr. Roybal alleged that he was arrested for an incident involving excessive force occurring in the garage. *Id*. at *2. Defendants in *Roybal* attempted to argue that "the Roybals' long marriage, close relationship, and joint ownership of the home that police entered" was sufficient to establish privity. *Id*. at *3. The court disagreed. *See id*. at *8–9. It held that a "close, intimate relationship" is insufficient to find privity under *Taylor*, and therefore that Mrs. Roybal had not been acting as a representative or fiduciary for her husband. *Id*. at *8.

In contrast to the facts of *Roybal*, more than mere familial relationship aligns the younger and older siblings here. As discussed above, the siblings sought the same relief for the *exact* same alleged conduct. Plaintiffs have alleged no relevant facts that might distinguish the two claims. The two suits are bound by more than mere "genetic relationship;" they are bound by identical facts, identical claims, and identical requests for relief. In short, they are bound by identical interests.

The older siblings also vigorously pursued those interests throughout litigation. *See Pelt*, 539 F.3d at 1287 ("Once the case proceeds to final judgment and is asserted as part of a claim preclusion defense, the question shifts from incentive to litigate to whether the absent parties' interests were *in fact* vigorously pursued and protected."). The older siblings briefed the issues in the defendants' motion to dismiss, submitted objections to the magistrate judge's recommendation, appealed the district court's adoption of the magistrate judge's

recommendation to the Tenth Circuit, and then petitioned the Supreme Court for certiorari (not to mention the parallel litigation and subsequent appeal to the Tenth Circuit regarding the claims against Gildner, Webb, and Abney).

Second, the older siblings must have understood that their suit positioned them in a representative capacity for all of their eight siblings, including the three sibling plaintiffs in the instant complaint. It is true that implied consent by a nonparty to be bound by a former judgment is not often found. *See* § 4453 Preclusion by Consent and Estoppel by Conduct, 18A Fed. Prac. & Proc. Juris. § 4453 (3d ed.). It is also true that the older siblings expressly stated in their complaint that they brought suit "on their own behalf." First Amended Complaint at 2, *N.E.L.*, 2017 WL 1242992 (No. 15-CV-02847-REB-CBS).

Yet there is strong indiction throughout the older siblings' complaints that the older siblings understood that their suit would serve as a quasi "test case" for the younger siblings. § 4453 Preclusion by Consent and Estoppel by Conduct, 18A Fed. Prac. & Proc. Juris. § 4453 (3d ed.). The older siblings' complaint largely reads as if it were asserting claims on behalf of all ten of the siblings. The ten siblings are primarily referred to collectively as "the children" or variations of "[p]laintiffs and their siblings." The older siblings' complaint does not differentiate between the interests of any of the ten siblings, much less between the two distinct sets of siblings. In fact, the complaint could be resubmitted under the names of any of the siblings without any alteration save the names at the top (and indeed this is almost precisely what happened here).

Further, the older siblings here had no apparent reason to believe they might *not* be acting in a representative capacity for the younger siblings. This is in contrast to cases in which

plaintiffs were deemed not in privity after intentionally deciding not to pursue class actions or group claims. *See Pelt*, 539 F.3d at 1289 (finding that the prior plaintiffs did not understand that they were serving in a representative capacity where they intentionally decided not to pursue a class action based on tensions between the respective parties). The instant case is not one in which "[t]here is no evidence that plaintiffs and their counsel were working on anyone's behalf other than their own."[5] *Id*. The language of the complaint, the close familial relation, and the shared counsel all indicate to the contrary.[6] *See Baloco*, 767 F.3d at 1250; *Trevino*, 99 F.3d at 924.

Third, contrary to plaintiffs' claims, the district court did not need to impose "special procedures" to protect their interests. ECF No. 29 at 3. Special procedures are necessary only when plaintiffs in the prior suit did not understand that they acted in a representative capacity. *See Navajo Nation v. Wells Fargo & Co.*, 344 F. Supp. 3d 1292, 1307 (D.N.M. 2018) (citing *Taylor*, 553 U.S. at 900 n.11) ("[S]pecific effort to protect the interests of a nonparty are required only if the litigating party does not intend to act as a representative of the nonparty's interests."). Here, as discussed above, I find that the older siblings did understand that they acted in a representative capacity.

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[5] Plaintiffs do emphasize that they were minors at the time that their older siblings filed suit. ECF No. 12 at 3. Yet this has little bearing on whether the *older siblings* understood themselves to be acting in a representative capacity for the younger siblings. If anything, I find it tips in favor of finding that the older siblings did understand as much. Indeed, the older siblings provided for the interests of their siblings to the extent that their status as minors mattered. In the beginning of litigation, the older siblings—who at that time were not minors—moved to redact all identifying information regarding all ten children to prevent "expos[ing] the identity of the Does' entire family, including the eight minor children." Plaintiffs' Motion to Proceed Anonymously at 2, *N.E.L.*, 2017 WL 1242992 (No. 15-CV-02847-REB-CBS).

[6] Note that these factors alone may be insufficient to show privity under *Taylor*'s rejection of virtual representation. 553 U.S. at 904. However, I find that these factors are sufficient to show this particular prong of the adequate representation analysis in this admittedly unusual case.

Furthermore, even if the older siblings did not understand themselves to be acting as representatives for their younger siblings, I find that the court engaged in adequate special procedures to protect the interests of the younger siblings. Special procedures are generally considered relevant in the context of class actions. *See Taylor*, 553 U.S. at 900–01 ("In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23."); *see, e.g.*, *Pelt*, 539 F.3d at 1284–89 (describing a court's duties in protecting absent class members). Indeed, the Supreme Court's rationale for rejecting virtual representation was that it could "allow[] courts to 'create *de facto* class actions at will.'" *See Taylor*, 553 U.S. at 901.

Plaintiffs here do not elaborate on what kind of special procedures should have been imposed. Plaintiffs and the prior litigants are siblings who share the same counsel, so formal notice was not necessary. *See Taylor*, 533 U.S. at 900 n.11 ("[N]otice is required in some representative suits, e.g., class actions seeking monetary relief . . . . But [the Supreme Court has] assumed without deciding that a lack of notice might be overcome in some circumstances." (citing *Richards*, 517 U.S. at 801)). Thus finding adequate representation here does not constitute the kind of common-law class action rejected in *Taylor*. *See id.*; *cf. Pelt*, 539 F.3d at 1289.

Claim preclusion applies to bar plaintiffs' claims. The younger siblings were in privity with the older siblings, who obtained a final judgment on the merits on a complaint that shares identity of the cause of action.

ORDER

Defendants' motion to dismiss, ECF No. 13, is GRANTED. Plaintiffs' claims against defendants are dismissed with prejudice.

DATED this 27th day of September, 2019.

BY THE COURT:

R. Brooke Jackson
United States District Judge

APPENDIX E

FILED
United States Court of Appeals
Tenth Circuit

June 25, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

N.E.L.; M.M.A.; E.M.M.,

Plaintiffs - Appellants,

v.

MONICA GILDNER; ANGELA WEBB; TINA ABNEY,

Defendants - Appellees.

No. 18-3059
(D.C. No. 2:17-CV-02155-CM-JPO)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Kansas child-and-family-services employees obtained an ex parte order from a Kansas state court to take ten minor children, including plaintiffs, into immediate physical custody. They then arranged with Colorado authorities to execute the Kansas custody order in Colorado, where the children were temporarily located. Plaintiffs N.E.L. and M.M.A. later sued both Kansas and Colorado officials under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. 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.

The District of Colorado determined it lacked personal jurisdiction over the Kansas defendants and transferred the case against them to the United States District Court for the District of Kansas. The District of Kansas denied a motion to re-transfer the case to the District of Colorado, granted the defendants qualified immunity, and dismissed the case. Plaintiffs appeal the dismissal and the denial of their motion to re-transfer to Colorado. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In a related appeal, we affirmed the District of Colorado's order dismissing the plaintiffs' first amended complaint against the Colorado defendants. *N.E.L. v. Douglas Cty.*, 740 F. App'x 920, 922-27, 934 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1320 (2019) (*N.E.L. I*). After those defendants were dismissed and the action against the Kansas defendants was transferred to the District of Kansas, plaintiffs filed their operative second amended complaint (SAC). The SAC added an additional plaintiff (E.M.M.) and two additional claims.

We detailed plaintiffs' factual allegations at length in *N.E.L. I*. *See id.* at 922-26. We need not repeat that discussion here. Essentially, plaintiffs contend that the defendants obtained ex parte orders of protective custody from a Kansas court based on omissions and misrepresentations, then acted in concert with the Colorado defendants in wrongfully executing the orders, resulting in plaintiffs' removal from Jane Doe's custody and their temporary placement in state custody.

The SAC includes claims for unlawful seizure in violation of the Fourth Amendment, unlawful detention in violation of the Fourth Amendment, deprivation of familial association in violation of the Fourteenth Amendment, conspiracy to deprive plaintiffs of their constitutional rights, exemplary damages, deprivation of the right to travel, and malicious prosecution and/or abuse of process. The district court granted the defendants qualified immunity on all claims.

"A motion to dismiss based on qualified immunity imposes the burden on the plaintiff to show both that [1] a constitutional violation occurred and [2] that the constitutional right was clearly established at the time of the alleged violation." *Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir.), *cert. denied*, 2019 WL 1116409 (U.S. May 20, 2019) (No. 18-1173) (internal quotation marks omitted). In deciding the qualified immunity question the district court considered not only the allegations of the SAC but also documents the defendants provided in support of their motion to dismiss. It determined the uncontested facts in these documents showed that "[m]ost of the claimed 'misrepresentations and omissions' set forth in [the SAC] are refuted . . . or are not material." Jt. App., Vol. II at 206. The district court concluded based on the uncontested factual allegations in the Child in Need of Care (CINC) petitions "combined with the parents' post-petition conduct, it would be reasonable for an official to believe an ex parte order of protective custody was justified." *Id.* at 207.

On appeal, the plaintiffs argue that (1) the district court construed their complaint too narrowly and failed to address the defendants' actions taken in conspiracy with the Colorado defendants to unlawfully execute the ex parte orders;

(2) the district court erred in deferring to the defendants' judgment; and (3) clearly established law prohibited the Kansas defendants from seizing plaintiffs from a private home without a warrant, a valid court order, exigent circumstances, or consent. They also argue the district court clearly erred by failing to re-transfer their case to the District of Colorado.

DISCUSSION

1. Grant of Qualified Immunity

"We review de novo the grant of a motion to dismiss under Rule 12(b)(6) due to qualified immunity." *Doe*, 912 F.3d at 1288. "At the motion to dismiss stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness." *Id.* (brackets and internal quotation marks omitted).

A clearly established right "should not be defined at a high level of generality." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted). Instead, "the clearly established law must be particularized to the facts of the case." *Id.* (internal quotation marks omitted). Although plaintiffs need not cite "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted).

A. Execution of Ex Parte Orders

Plaintiffs argue the district court erred by discussing only the defendants' conduct in seeking the ex parte orders and ignoring plaintiffs' claims concerning the execution of those orders and their subsequent detention. We need not decide whether the district court failed to fully and individually discuss plaintiffs' execution- and detention-related claims, because we may affirm on any basis supported by the record, *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), and we elect to do so here.

In *N.E.L. I*, we determined the Colorado defendants (a social worker and deputy sheriff) were entitled to qualified immunity in connection with plaintiffs' claims that they "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 [the children]," 740 F. App'x at 929; "relied on the facially invalid Kansas ex parte order to enter the home," *id.*; "deprived [N.E.L. and M.M.A.] 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," *id.* at 931; and conspired to violate N.E.L. and M.M.A.'s Fourth Amendment and Fourteenth Amendment rights, *see id.* at 931 n.22. We reasoned plaintiffs failed to show the alleged actions violated clearly established law. *See id.* at 929-31.

Likewise, the Kansas defendants are entitled to qualified immunity on plaintiffs' seizure and detention-related claims in this case, because plaintiffs have failed to present clearly established law that supports their Fourth and Fourteenth Amendment claims. For substantially the reasons stated in *N.E.L. I*, we affirm the dismissal on qualified-immunity grounds of plaintiffs' claims relating to the execution of the ex parte orders and plaintiffs' resulting detention.

B. Lawfulness of CINC Petitions and Ex Parte Orders

Plaintiffs also attack the lawfulness of defendants' conduct in filing the CINC petitions and obtaining the ex parte orders. They contend defendants misrepresented or omitted facts to create the impression there was probable cause to believe that plaintiffs met the definition of "children in need of care" and were in immediate danger. *See* SAC ¶ 213, Jt. App., Vol. II at 49 (internal quotation marks omitted). "[G]overnment officials' procurement through distortion, misrepresentation and omission, of a court order to seize a child is a violation of the Fourth Amendment." *Malik v. Arapahoe Cty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 (10th Cir. 1999) (citation and internal quotation marks omitted).[1]

[1] Plaintiffs argue the district court's conclusion that "it would be reasonable for an official to believe an ex parte order of protective custody was justified," Jt. App., Vol. II at 207, contradicts its earlier findings that (1) "the allegations in the [SAC]—that defendants sought the ex parte order[s] knowing there was no emergency and knowing they were omitting and misrepresenting relevant facts—[establish that they] violate[d] clearly established Tenth Circuit law," *id.* at 200, and (2) no travel restrictions prohibited plaintiffs' travel to Colorado. Assuming these district court findings are contradictory, we are not bound by them in conducting our de novo review. *Cf. Brokers' Choice of Am., Inc. v. NBC Universal,*

But plaintiffs must show the alleged omissions and misstatements were "so probative they would vitiate probable cause." *Id.* (internal quotation marks omitted). "[W]e measure probable cause by (1) removing any false information from the [document supporting a probable cause determination], (2) including any omitted material information, and then (3) inquiring whether the modified [document] establishes probable cause." *Patel v. Hall*, 849 F.3d 970, 982 (10th Cir. 2017) (addressing claim that arrest warrant included false information and/or omissions that vitiated probable cause); *cf. Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990) (discussing evaluation of probable cause in context of "judicial deception" claim involving social workers' investigation).

(1) Reliance on Matters Outside Complaint

As an initial matter, plaintiffs complain the district court improperly relied on matters outside the SAC without converting the motion to dismiss to a motion for summary judgment and without giving them notice and an opportunity to present evidence in opposition to the "summary judgment" motion. "Generally, a district court can consider . . . materials [outside a complaint] only by converting the motion to dismiss to a motion for summary judgment." *Lincoln v. Maketa*, 880 F.3d 533, 537 n.1 (10th Cir. 2018). But a district court may consider indisputably authentic documents that are central to the plaintiff's claim and referred to in the complaint

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Inc., 861 F.3d 1081, 1104 (10th Cir. 2017) ("[W]e need not address . . . alleged errors regarding the district court's analytical tools because our review is de novo.").

without converting the motion to one for summary judgment. *Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008). "We review for abuse of discretion a district court's refusal to convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017).

Here, the district court considered the outside documents after concluding there was no dispute as to their authenticity, plaintiffs had referred to them in the SAC, and the facts in these documents were central to plaintiffs' claims. Plaintiffs fail to show it abused its discretion in doing so.

Plaintiffs argue that even if they conceded the *authenticity* of the outside documents, they did not agree that the records' *contents* were true. They accuse the district court of using the CINC petitions to refute the facts they specifically pled in the SAC. The district court noted that plaintiffs had raised no challenge to the underlying facts in the CINC petitions. Jt. App., Vol. II at 202 ("[W]hile plaintiffs allege the CINC petitions were not based on probable cause, they have not contested the facts in the CINC petitions."). Although plaintiffs now purport to dispute the underlying facts in the petitions, their generalized assertions about the source of defendants' knowledge of certain facts or the conclusions to be drawn from these facts fail to present any significant challenge to the specific underlying facts themselves.

(2) Probable Cause

The factual challenges plaintiffs raise are insufficient to show that defendants sought the CINC petitions without probable cause, relying on known falsehoods and omissions, in violation of clearly established law. The facts as summarized by the district court provided probable cause for filing the CINC petitions. Plaintiffs' claims of misrepresentations or omissions are insufficient to demonstrate otherwise.

That brings us to the heart of plaintiffs' claim: that defendants lacked probable cause to believe that plaintiffs were in immediate danger when they sought ex parte orders. According to plaintiffs, the motion for the orders, filed by an assistant district attorney at defendants' behest, falsely stated to the court that an emergency existed because the family had fled the state of Kansas. In their opening brief, plaintiffs make six arguments why the motion and/or orders were not supported by probable cause, and were based on alleged false statements and omissions made to the issuing court: (1) a non-emergency hearing had been set on the CINC petitions, (2) the CINC petitions did not prohibit them from traveling, (3) defendants were aware of their precise location in Colorado, (4) defendants had no reason to believe they were in immediate physical danger, (5) the Does had not refused to participate in family preservation services, and (6) plaintiffs ultimately prevailed in the CINC proceeding when the judge found no probable cause to remove them from their parents. None of these challenges establishes that defendants proceeded without probable cause in violation of clearly established law.

First, the CINC court presumably was aware of its own docket and the fact that a non-emergency hearing had been set. The omission of that fact did not conceal a lack of probable cause.

Second, the failure to mention that the CINC petitions lacked travel restrictions was not a significant omission. The gist of the motions was that the Does had left the state soon after the initiation of CINC proceedings and shortly before a scheduled hearing. This timing-related concern remained valid regardless of whether the plaintiffs were subject to express travel restrictions.

Third, the CINC filings did not state that the children's whereabouts were unknown. In fact, the motion for ex parte orders acknowledged that the Does' food stamp card was used in Littleton, Colorado on May 2, 2009. This is consistent with the representation in the SAC that the defendants "had information that the Doe family was in Littleton, Colorado as of May 2, 2009." Jt. App., Vol. II at 28 ¶ 99.

We note the SAC further alleges that when they sought the ex parte orders, defendants knew the "precise" address where the children were located. *Id.* at 29-30 ¶ 108. Given this alleged fact, defendants' representation in the motion that they merely knew locations where the Doe family's food stamp card had been used in Colorado may seem disingenuous. But disingenuousness is not enough. We must ask whether inclusion of the precise address where the plaintiffs were staying would have vitiated probable cause. Again, the core concern was that the children had been

removed from the state after the initiation of CINC proceedings and shortly before a scheduled hearing, not whether their precise location was known.[2]

Fourth, although defendants may not have had a basis to be concerned about plaintiffs' physical safety, for the reasons we have stated they did have a concern about their mental well-being. This concern formed the basis for the underlying petitions and the asserted emergency.

Fifth, the motion requesting ex parte orders asserted that family preservation services had been offered and that John Doe indicated he was willing to participate in the services. The motion did not state that the Does had rejected such services. To the extent the ex parte orders could have created a misleading impression by stating only that such services had been offered, without disclosing Mr. Doe's willingness to accept them, this did not vitiate probable cause. The court found *both* that reasonable efforts had been made to avoid removal of the children from their home, *and* that such reasonable efforts were not required because an emergency existed. Mr. Doe's willingness to participate in family preservation services arguably affected only the non-emergency-based rationale.

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[2] The ex parte orders themselves go further, affirmatively stating that the children's whereabouts are unknown. But it is unclear that statement can be attributed to the defendants. The SAC merely asserts, on information and belief, that the defendants "participated in intentionally crafting the language of the *Ex Parte* Orders." Jt. App., Vol. II at 30 ¶ 112. An allegation on information and belief that defendants participated in some unspecified way in drafting a court order that purportedly contained an inaccuracy falls short of plausibly asserting a basis for liability. *Cf. Madonna v. United States*, 878 F.2d 62, 66 (2d Cir. 1989) (fraud on the court must be pled with particularity).

Sixth, the fact that plaintiffs ultimately prevailed in state-court proceedings does not mean that defendants' alleged misrepresentations and omissions violated clearly established law. For the reasons we have stated, plaintiffs fail to show such a violation.

Whether we would have concluded that an emergency existed under the facts alleged if the question were presented to us in the first instance is not the issue. Rather, it is whether the defendants, in making the alleged misrepresentations and omissions, violated clearly established law by knowingly presenting the need for emergency seizure and detention without probable cause. They did not. The district court therefore properly granted qualified immunity concerning this claim.

2. Denial of Motion to Re-Transfer

In the prior appeal we noted plaintiffs had failed to appeal the transfer of their claims against the Kansas defendants to the District of Kansas. *N.E.L. I*, 740 F. App'x at 927. In its order denying their motion to re-transfer, the district court concluded, based on the prior decision, that it was constrained by the "law of the case" doctrine. Jt. App., Vol. II at 183 (internal quotation marks omitted). It determined plaintiffs failed to assert any good reason for departing from that doctrine. *See id.* at 184.

The law of the case doctrine does not deprive a transferee court of its power to correct an erroneous transfer decision. *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). A litigant dissatisfied with the transfer decision may still "bring[] a motion to retransfer in the transferee court." *Id.* at 222. But the prior transfer

decision of a coordinate court should only be revisited in extraordinary circumstances, "such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (internal quotation marks omitted).

The district court determined that plaintiffs failed to demonstrate clear error. It noted the District of Colorado's rationale that all the defendants' conduct took place in Kansas with the goal of returning the children to Kansas, and that any contacts with defendants in Colorado were too slight to overcome the fact that most of the conduct plaintiffs complain of occurred in Kansas. Plaintiffs advance several arguments in opposition to this conclusion, *see* Jt. Opening Br. at 23-29, centered on the allegedly unlawful seizure and/or deprivations they contend took place in Colorado. But the District of Colorado granted qualified immunity to the Colorado defendants concerning those claims. For substantially the same reasons cited by the District of Colorado, we have determined the District of Kansas properly granted qualified immunity to the Kansas defendants. Thus, plaintiffs cannot show they had any likelihood of a different result had they been permitted to pursue their claims in the District of Colorado rather than the District of Kansas, and any error in the transfer decision was therefore harmless.

CONCLUSION

We affirm the district court's orders dismissing the case and denying plaintiffs' motion for re-transfer to Colorado. We grant plaintiffs' unopposed motion to seal the CINC records contained in Volume III of the Appendix.

Entered for the Court

Gregory A. Phillips
Circuit Judge

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit

July 3, 2018

Elisabeth A. Shumaker
Clerk of Court

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*

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,

* 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.

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.

BACKGROUND

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

[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.

[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).

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 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

[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.

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 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

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

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 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

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

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.

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

[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.

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 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.

[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).

[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.

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.

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 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

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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.").

[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.

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 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

[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.

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

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 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

[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.

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 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]

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

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 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

[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)).

'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 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

[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)).

[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)).

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 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 their burden. *Rios*, 456 F. App'x at 725

[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,

(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

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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 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.").

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 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 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)

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

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 E*x 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

APPENDIX G

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

Plaintiffs N.E.L., M.M.A., and E.M.M. bring this action against defendants Monica Gildner, Angela Webb, and Tina Abney, for violations of their constitutional rights under 42 U.S.C. § 1983. Plaintiffs allege defendants—who at the relevant time were social workers with the Kansas Department of Children and Families ("DCF")—engaged in a series of acts which led to plaintiffs' unconstitutional seizure and detainment. The matter is now before the court on defendants' Motion to Dismiss Second Amended Complaint (Doc. 120). For the reasons set forth below, the court grants the motion.

I. Background

This case has a long, storied past. It comes before this court after it was transferred from the District of Colorado on March 14, 2017. Plaintiffs originally filed their complaint in the District of Colorado on December 31, 2015, alleging constitutional violations against defendants as well as two Colorado state officials and Douglas County, Colorado. A magistrate judge recommended the district court grant defendants' motions to dismiss, finding the Colorado defendants were entitled to qualified immunity and that the court lacked personal jurisdiction over the Kansas defendants. (Doc. 91.) The district court judge adopted the recommendations and transferred the claims against the Kansas

defendants to this court. (Doc. 98.) Upon transfer, plaintiffs filed a second amended complaint against defendants. This amended complaint is the subject of the current motion to dismiss.

Accepting the facts in the second amended complaint as true and viewing them in the light most favorable to the plaintiffs, the court will summarize the incident that gave rise to the current litigation.

Plaintiffs are three of John Doe and Jane Doe's ten children. In 2008, John Doe, Jane Doe, and their ten children lived in Johnson County, Kansas. In the spring of 2008, one of the younger children, who is not a party to this case, began exhibiting troubling behavior and making comments regarding improper behavior involving a relative of Jane Doe. The parents made a report to authorities at the Kansas Department of Social and Rehabilitation Services (now known as DCF) and advised them that none of their children had seen the relative, or any other members of Jane Doe's family, since 2006.

Defendant Monica Gildner was assigned by her superiors, defendant Angela Webb and defendant Tina Abney, to oversee the Doe family's case. Defendants referred the children to Sunflower House for interviews regarding the alleged abuse. After a criminal investigation into the allegations against the relative, law enforcement notified defendant Gildner that no charges would be pursued. Gildner then closed the Doe family's file. After the file was closed, however, the reporting child shared additional information, which the parents reported to DCF. Defendant Gildner referred the child again to the Sunflower House and reopened the DCF file. Another Doe child then reported abuse by the same relative and was referred to the Sunflower House. The children were also seeing a counselor.

At some point, defendant Gildner took the position that the abuse allegations against the relative were fabricated and that Jane Doe was suffering from post-partum depression and mental instability. She recommended the children continue counseling and that Jane Doe begin counseling. John Doe then attempted to cease contact with defendant Gildner because of her adversarial position to his wife and him and her "antagonistic, biased, and baseless positions." Defendants Webb and Abney refused to

replace defendant Gildner with a different social worker. At some point after John Doe asked for defendant Gildner to be taken off the case, Gildner threatened to initiate court action and required that the entire family participate in Family Preservation Services, which plaintiffs allege was in retaliation for John Doe's complaint against her.

In February 2009, defendant Gildner received two more reports regarding the allegations by the second-reporting Doe child. Shortly thereafter, John Doe filed a formal complaint with DCF regarding defendant Gildner's inaction as he was concerned that no medical exams were ordered and no follow up interviews were being conducted for the child. Defendant Gildner sought a meeting with John Doe to discuss her concerns about the children being subjected to continued interviews about the allegations and how the family was going to move forward. Plaintiffs allege defendant Gildner believed the relative and maternal grandmother's denials of the alleged abuse over the children's claims. Defendant Gildner told John Doe that if he refused to meet with her or participate in recommended services that she may have to involve the District Attorney's Office and the court. Plaintiffs allege this meeting and the imposition of services was in retaliation for their complaint against her.

In March 2009, a third Doe child reported abuse allegations by the same relative to DCF. On April 20, 2009, the District Attorney's Office filed Child In Need Of Care ("CINC") petitions for all ten of the Doe children in the Johnson County, Kansas District Court. After the petitions were filed, the court set a non-emergency hearing for May 11, 2009. The children remained in John and Jane Doe's custody.

On April 29, 2009, John Doe notified defendant Gildner that he was willing to participate in Family Preservation Services. On April 30, 2009, defendant Gildner was notified by a relative of the Doe family that Jane Doe and the children may have left town. Evidence suggested Jane Doe and the children had gone to Colorado. On May 4, 2009, defendant Gildner went to the Doe home and met John

Doe, who told her any contact with him needed to be through his attorney. John Doe provided the address of where the family was in Colorado to the Overland Park, Kansas police.

On May 5, 2009, defendants sought an ex parte order of protective custody. An application for the order was filed by the District Attorney's Office and was granted by the Johnson County District Court. According to the order, the court found:

1. that remaining in the home would be contrary to the welfare of the children,
2. immediate placement was in the best interest of the children based on allegations of physical, sexual, mental, or emotional abuse in the CINC petitions and,
3. it was reported that the children had left the area, that John Doe had refused to provide any information about the whereabouts of the children, and that the whereabouts of the children were presently unknown.

Plaintiffs allege defendants "fraudulently misrepresented to the court the factual basis for obtaining the Ex Parte Orders and participated in intentionally crafting the language of the Ex Parte Order to make it appear that an immediate danger to the children existed when Defendants knew in fact that no such immediate danger existed or . . . they had no facts upon which to form a reasonable suspicion that Plaintiffs were in immediate danger . . ." (Doc. 114, at 15–16.)

Plaintiffs allege the following facts in the ex parte order that falsely state or insinuate in a manner intended to alarm and mislead:

- That the parents had committed physical, sexual, mental, or emotional abuse when such statement had no basis in the facts alleged in the CINC petitions or in the facts known to defendants.
- That John and Jane Doe had refused Family Preservation Services when in fact John Doe had specifically accepted the offer of Family Preservation Services.

- That an emergency existed which threatened the safety of the children when defendants knew the Doe children were not in danger based on their actions:
    - in initially closing the DCF file
    - in disbelieving that the children's abuse had actually occurred
    - in filing CINC petitions only after John Doe had lodged a complaint against defendant Gildner
    - in not seeking immediate custody of the children upon filing the CINC petitions
    - in failing and refusing to contact John and Jane Doe's attorney or the children's court-appointed guardian *ad litem* prior to seeing the ex parte order.
- That John Doe would not provide any information on the whereabouts of the children when he actually instructed defendant Gildner to contact his attorney, which she did not.
- That the whereabouts and safety of the children were unknown, when defendants knew that Jane Doe and the children had gone to Colorado and defendants made no attempt to obtain information from the children's guardian *ad litem.*

Plaintiffs also allege defendants intentionally or recklessly failed to disclose the following facts that, but for their omission, would have resulted in a denial of the ex parte order:

- The CINC petitions contained no prohibition against travel by John or Jane Doe or the children before the CINC hearing.
- The request for the ex parte order was in retaliation for John and Jane Doe's complaint against defendant Gildner and/or for their retaining counsel to represent them.
- Defendants had failed to contact either the children's guardian *ad litem* or John and Jane Doe's attorney before seeking the ex parte order.
- Defendants disbelieved the children's allegations of abuse by their relative.

- Defendants had no reasonable suspicion to believe any of the Doe children were in imminent danger of physical harm or neglect.
- The Doe children did not meet the definition of children in need of care under K.S.A. § 38-2202(d).

Plaintiffs allege that the ex parte orders lacked any objectively reasonable basis for believing the facts alleged in support were sufficient to establish probable cause to temporarily remove the children from the custody of their parents, and defendants applied for the orders without an objectively reasonable basis for believing there was probable cause.

On May 6, 2009, Jane Doe was with her ten children visiting family friends in Douglas County, Colorado. Lesa Adame, a social worker with the state of Colorado, and Carl Garza, an employee of the Douglas County, Colorado Sheriff's Office, went together to the home where Jane Doe and the Doe children were staying. Adame and Garza told the family friend, Dr. G, that they had a court order from the State of Kansas to seize custody of all ten of the Doe children. Adame and Garza entered the home with an order from the Colorado Department of Social Services and the Douglas County Department of Human Services that required Dr. G and his wife Mrs. G to take custody of the Doe children and follow through with a safety plan. The order also required Jane Doe to not have any contact with the children. Dr. and Mrs. G were allowed to personally transport the Doe children to Kansas, and upon arrival in Kansas, the children were transferred to DCF custody. Dr. G requested temporary custody of the children or, alternatively, for the children to be placed in the custody of their paternal grandparents. DCF declined this request and instead separated the children and placed them with foster families.

II. Legal Standards

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Rule 8(a)(2) states that a pleading must contain "a short and plain statement of

the claim showing that the pleader is entitled to relief." To withstand a motion to dismiss under 12(b)(6), a complaint must contain "enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A claim is plausible when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). When the complaint contains well-pleaded factual allegations, a court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

Generally, when reviewing a Rule 12(b)(6) motion, a court only considers the contents of the complaint. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Exceptions to this rule include: 1) documents that the complaint incorporates by reference, 2) documents referred to in the complaint if the documents are central to the plaintiffs' claim and the parties do not dispute the documents' authenticity, and 3) matters of which a court may take judicial notice. *Id.*; *see also Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964 (10th Cir. 1994) (courts may consider documents attached to the complaint when reviewing a 12(b)(6) motion); *Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000) ("[T]he court is permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record."), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir.2001); *GFF Corp. v. Assoc'd Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.").

In this case, plaintiffs have attached various documents to their second amended complaint, including a copy of the Ex Parte Order of Protective Custody filed in Johnson County District Court on

May 5, 2009 (Doc. 114-1), and a "Safety Plan" from the Colorado Department of Social Services and Douglas County Department of Human Services (Doc. 114-2). In their motion to dismiss, defendants attached:

1) Motion for Request for Ex Parte Orders of Protective Custody filed by the Johnson County District Attorney on May 4, 2009,

2) copies of the CINC petitions for all three plaintiffs filed April 20, 2009 in Johnson County District Court,

3) copies of the Ex Parte Order of Protective Custody for all three plaintiffs filed May 5, 2009 in Johnson County District Court,

4) copies of the Motion for Pick-Up Order for all three plaintiffs filed May 5, 2009 in Johnson County District Court,

5) copies of the Order for Pick Up filed May 5, 2009 in Johnson County District court for all three plaintiffs, accompanied by an affidavit submitted by the District Attorney in support of the Pick-Up Order,

6) Journal Entry Nunc Pro Tunc filed on May 8, 2009 in Johnson County District Court ordering the Doe children be placed in custody of the Secretary of Social and Rehabilitation Services.

(Docs. 123-1–14 *SEALED*.)

Because there is no dispute to the authenticity of these documents, and because the plaintiffs refer to these documents in their complaint and the facts in the documents are central to plaintiffs' claims, the court will consider the exhibits without converting the motion into a motion for summary judgment.

III. Analysis

Plaintiffs' Second Amended Complaint includes the following claims:

1) Unlawful seizure in violation of the Fourth Amendment,

2) Unlawful detention in violation of the Fourth Amendment,

3) Deprivation of familial association in violation of the Fourteenth Amendment,

4) Conspiracy (with the Colorado officials) to deprive plaintiffs of their constitutional rights,

5) Exemplary damages,

6) Deprivation of the right to travel, and

7) Malicious prosecution and/or abuse of process.

All of the claims are related to defendants' conduct in seeking the ex parte order for protective custody, which, when it was granted by a judge in Johnson County District Court, resulted in plaintiffs' removal from Jane Doe's custody in Colorado and subsequent temporary placement in state custody.

Defendants move to dismiss the complaint arguing 1) the *Rooker-Feldman* doctrine bars plaintiffs' claims, 2) they are entitled to absolute immunity, 3) plaintiffs failed to state a claim as the seizure was inherently reasonable, 4) plaintiffs failed to state a claim for deprivation of their right to familial association, 5) plaintiffs failed to state a claim for malicious prosecution or abuse or process, 6) plaintiffs failed to state a claim for deprivation of the right to travel, 7) they are entitled to qualified immunity, 8) plaintiffs failed to establish defendant Webb and defendant Abney's personal involvement, and 9) the claims are barred by the statute of limitations.

a. Rooker-Feldman

Defendants insist that the *Rooker-Feldman* doctrine applies to plaintiffs' claims and, therefore, this court does not have jurisdiction over the case. Because this implicates whether the court has subject matter jurisdiction over the case, the court will take up this argument first.

The *Rooker-Feldman* doctrine "precludes lower federal courts 'from effectively exercising appellate jurisdiction over claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment.'" *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1193 (10th Cir. 2010)

(citing *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006)). The doctrine extends to "all state-court decisions—final or otherwise . . . and covers not only claims actually decided by the state court but issues inextricably intertwined with such claims." *Atkinson-Bird v. Utah, Div. of Child & Family Servs.*, 92 F. App'x 645, 647 (10th Cir. 2004). The Supreme Court has recently clarified the "narrow scope" of the doctrine, noting it applies only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Wagner*, 603 F.3d at 1193 (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). In deciding whether the doctrine applies, courts should determine whether "the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks redress," and whether success on the claims "would require the district court to review and reject [the state court's] judgments." *Id.* For example, the doctrine would bar a claim for constitutional violations if the alleged violation was the result of the state court's order. *See Atkinson-Bird*, 92 F. App'x at 647 ("[A]n unsuccessful state litigant cannot challenge an adverse state judgment and circumvent the rule of *Rooker-Feldman* simply 'by bringing a constitutional claim under the civil rights statutes.'")

Defendants claim the *Rooker-Feldman* doctrine applies, arguing plaintiffs are effectively seeking appellate review of the ex parte order of protective custody. Defendants note that orders of temporary custody are appealable under K.S.A. § 38-2273, therefore the ex parte order was a final, appealable order and plaintiffs chose not to seek appellate review and are prohibited from seeking such review in this court. The doctrine further precludes subject matter jurisdiction because the relief plaintiffs seek is "inextricably intertwined" with the ex parte order.

First, there is no indication the ex parte order was a final, appealable order. The Kansas Court of Appeals has held that an ex parte order is not appealable because it does not fall under the definition

of "temporary custody order" in K.S.A. § 38-2243 and because "[e]x parte orders issued . . . upon a verified application are designed to be short-lived orders that remain in effect until the temporary custody hearing. . . ." *In re K.W.C.*, Nos. 112,904–907, 2015 WL 6112013, at *5 (Kan. Ct. App. Oct. 16, 2015). Regardless, the doctrine applies to all state-court decisions "final or otherwise," including issues "inextricably intertwined with such claims." *Atkinson-Bird*, 92 F. App'x at 647.

Although defendants argue that plaintiffs' claims in substance attack the state-court order and/or are "inextricably intertwined" with the issues in the order, the court finds they do not. Plaintiffs allege that defendants' pre-order conduct—including misleading the court with factual misrepresentations and omissions and seeking an ex parte order fully knowing there was no probable cause to do so—ultimately led to their illegal seizure. Plaintiffs are not asking for the invalidation of the ex parte order, rather, they seek relief for defendants' alleged illegal actions which led to the issuance of that ex parte order. *See Kovacic v. Cuyahoga Cnty. Dep't of Children & Families*, 606 F.3d 301, 310 (6th Cir. 2010) (finding the *Rooker-Feldman* doctrine did not apply to plaintiffs' Fourth Amendment claims and claims for due process violations because they did not "seek review or reversal of the decision of the juvenile court to award temporary custody to the state, but instead focus[ed] on the conduct of Family Services and of the social workers *that led up to* the juvenile court's decision to award temporary custody to the County."). Because the Supreme Court has advised that the *Rooker-Feldman* doctrine has a "narrow application," the court finds it does not apply in this case and subject matter jurisdiction exists over plaintiffs' claims.

b. Absolute Immunity

Defendants next argue they have absolute immunity from suit based on the nature of their functions. Absolute immunity is "necessary to assure that judges, advocates, and witnesses can perform their respective functions, often controversial, without concern about possible repercussions." *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990). The Supreme Court has applied a "functional approach"

when determining whether particular acts of government officials are eligible for absolute immunity, looking to "the nature of the function performed, not the identity of the actor who performed it." *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). The Tenth Circuit has held that "the more distant a function is from the judicial process, the less likely absolute immunity will attach." *Snell*, 920 F.2d at 687. So, for example, an officer applying for a warrant is not absolutely immune from suit, but a prosecutor seeking an indictment may enjoy absolute immunity. *Id.* The Tenth Circuit has found specifically that social workers are not absolutely immune from suits involving their investigative functions. *See Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F. 3d 1306, 1314 (10th Cir. 1999) (denying absolute immunity for social workers in a suit related to their "participation in the investigative act of seeking a placement order). In contrast, the Tenth Circuit has granted absolute immunity for social workers in suits related to their functions as a testifying witness. *See English v. LeBaron*, 3 F. App'x 872, 873 (10th Cir. 2001).

Because the facts in the second amended complaint allege defendants committed constitutional violations when they relied on factual misrepresentations and omissions when they recommended the District Attorney seek an ex parte order of protective custody, the court finds absolute immunity does not apply, as defendants' conduct involved their investigative function.

c. Qualified Immunity

Defendants next argue that if they are not absolutely immune, they are at least entitled to qualified immunity. Qualified immunity recognizes "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A defendant is entitled to qualified immunity unless the plaintiff can show "(1) a reasonable jury could find facts supporting a

violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). The Supreme Court has held a court has the discretion to consider "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." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Following this instruction from the Supreme Court, the court will first address whether defendants violated clearly established law. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Determining when a law is clearly established ordinarily requires "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains." *Booker*, 745 F.3d at 427. The Tenth Circuit has adopted a sliding scale approach to determine when law is clearly established. *Id.* Under the sliding scale approach, "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation." *Id.* The question we must answer, therefore, is whether officials—in this case social workers—"of reasonable competence could disagree about the lawfulness of the challenged conduct." *Gomes v. Wood*, 451 F.3d 1122, 1136 (10th Cir. 2006). If so, the court must grant defendants qualified immunity.

The Fourth Amendment prohibits the government from unreasonably removing children from their home. *See Burgess v. Houseman*, 268 F. App'x 780, 783 (10th Cir. 2008) (finding an unreasonable seizure when a social worker helped seize and detain a child without a warrant or probable cause to

believe the child would be abused if she remained in her mother's custody); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1244 (finding a child was unreasonably seized within meaning of the Fourth Amendment when state actors removed him from his home under belief that his health was at risk.). Plaintiffs maintain that in the Tenth Circuit, the law is clearly established that obtaining a court order to seize a child through distortion, misrepresentation, and omission is a violation of the Fourth Amendment. *See Malik*, 191 F.3d at 1316 ("Officials cannot reasonably assume that the law permits them to obtain a custody order in retaliation for a parent's retaining counsel and through reckless omission of probative facts to a magistrate.").

In *Malik*, a police officer and state social worker sought an order from a magistrate judge to remove a four-year-old girl from her mother's custody so that they could interview her regarding nude photographs taken of her. *Id*. at 1310–13. In seeking the order, the social worker failed to inform the judge that authorities did not consider the girl to be in imminent danger, that the photographs were five months old and taken by an uncle who did not live in the area, that the mother had already been interviewed, that the officer had already cancelled one of the previously scheduled interviews with the child, and that a medical professional had expressed doubt that the child had bruises on her in the photographs. *Id.* at 1311–12. The social worker also failed to mention that the mother had retained an attorney who had insisted on certain conditions for the child to be interviewed, and proposed alternative interview dates should officials agree to the conditions. *Id*. at 1310. The magistrate judge granted the order and once the child had been removed from her mother's custody, another officer allegedly told the mother, "this wouldn't have happened if you hadn't gotten an attorney." *Id*. at 1312. The Tenth Circuit found the officer and social worker were not entitled to qualified immunity because "[o]fficials' desire to circumvent an attorney's attempt to negotiate protective conditions for an interview does not rise to the level of an extraordinary circumstance dangerous to the child . . .," because the magistrate judge's

order was procured because of relevant factual omissions, and because it was clearly established that an individual's rights are violated when a police officer retaliates against him for hiring an attorney. *Id.* at 1315–16.

Defendants, however, note that the Tenth Circuit has found qualified immunity for social workers in suits against them for violations resulting from the removal of children. In *Gomes v. Wood*, for example, the Tenth Circuit found that because officers of reasonable competence could disagree as to whether an immediate threat to the safety of the child did not exist, the social worker—who had recommended removal of a child who had suffered a skull fracture—was entitled to qualified immunity. 451 F.3d at 1137. In granting qualified immunity, the Tenth Circuit emphasized that "considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse." *Id.* Further, qualified immunity should only be denied if, when presented with all relevant information in the case, a reasonable official would have "understood that there were no 'emergency circumstances which pose an immediate threat to [the child's] safety.'" *Id.* In deciding whether officials have a reasonable suspicion of threat to a child, courts must consider "*all relevant circumstances*, including the state's reasonableness in responding to a perceived danger, as well as the objective nature, likelihood, and immediacy of danger to the child." *Id.* at 1131.

The court agrees with plaintiffs that the allegations in the second amended complaint—that defendants sought the ex parte order knowing there was no emergency and knowing they were omitting and misrepresenting relevant facts—does violate clearly established Tenth Circuit law. Yet the Tenth Circuit has recognized the difficulty social workers face in making "on-the-spot judgments on the basis of limited and often conflicting information . . . with limited resources to assist them," and has emphasized that courts must consider all relevant circumstances when deciding whether an official acted

within the bounds of the law. *Id.* at 1138, 1131. Therefore, the court must consider not only plaintiffs' allegations but also the uncontested documents provided by defendants in support of their motion to dismiss to determine whether any official could disagree with the reasonableness of defendants' conduct.

As mentioned above, plaintiffs claim constitutional violations based on defendants' alleged omissions and misrepresentations in seeking the ex parte order of protective custody. Plaintiffs argue defendants knew no exigencies existed to justify removing them from their mother's custody and that the ex parte order was invalid, and therefore, their removal was a seizure under the Fourth Amendment. Again, the Tenth Circuit has instructed us to give deference to officials who are acting to protect children, and to consider all the relevant circumstances. In reviewing the documents attached to defendants' motion to dismiss, the court will briefly summarize defendants' and the Johnson County District Attorney's positions in regard to plaintiffs, their siblings, and John and Jane Doe.

In the Motion for Request For Ex Parte Orders of Protective Custody, the Johnson County District Attorney stated that CINC petitions had been filed for all ten children and that the facts alleged in the petitions "pursuant to the investigation of [DCF], remained the primary concern the State has for the welfare of the minor children." (Doc. 123-1 *SEALED*, at 2.) After the petitions were served on the parents, John Doe contacted defendant Abney to express his willingness to cooperate with the DCF investigation and services. This information was passed along to defendant Gildner. Defendant Webb contacted John Doe and he also expressed to her he wanted to work with Family Preservation as soon as possible, and that he intended to cooperate with DCF. On May 1, defendant Gildner received a message from the children's maternal grandmother, who stated that one of her children had driven by the Doe home and had seen them loading luggage into their vehicle, and that later the home was dark and the family's vehicle was gone. The family's social worker for SRS benefits stated that the family's food stamp card had been used in Colorado on May 2 and May 3. The District Attorney then stated "[b]ased

on this information, [DCF] has reason to believe that [Jane Doe] and the children have left the State of Kansas. Based upon these activities as well as the facts as outlined in the petitions filed of record, the State believes that the children may be at imminent risk for harm." (Doc. 123-1 *SEALED*, at 3.)

Because the motion for the ex parte order was based partially on the allegations in the CINC petitions, it is necessary to summarize those here. It is important to note that while plaintiffs allege the CINC petitions were not based on probable cause, they have not contested the facts in the CINC petitions. According to the petitions, filed by the Johnson County District Attorney, DCF began working with the Doe family in June 2008 after allegations of sexual abuse of one of the non-plaintiff children arose. This non-plaintiff child alleged that a maternal relative had touched her inappropriately. The Doe family was estranged from the maternal relatives because Jane Doe felt it was inappropriate that this same maternal relative had been tickling her children.

The non-plaintiff reporting child as well as two other non-plaintiff children were interviewed about the allegations. The maternal relative was also interviewed by police regarding the allegations, which he denied. Because the allegations were unsubstantiated, DCF closed the case. DCF recommended Jane Doe seek counseling to address anger toward her family, as she had reported she had been sexually abused by a relative.

In November 2008, DCF received another report alleging the original reporting non-plaintiff child had disclosed additional information about the alleged sexual abuse by the maternal relative. The child was again interviewed, but the details were inconsistent with the original report. In December 2008, another non-plaintiff child reported that she and the original reporting non-plaintiff child were given pills, shown dead animals, and forced to watch pornography on the maternal relative's computer. Jane Doe reported that the maternal relative threatened to kill the children if they told anyone about the alleged abuse and that he gave the children injections, showed them pornography on his computer, and

forced them to watch animals being shot and mutilated. She also alleged the relative pushed his mother down the stairs in front of the children.

DCF notified law enforcement about these allegations and concern was expressed regarding Jane Doe's mental stability as she recently had given birth and had a history of post-partum depression. DCF was concerned that because of the "fantastic nature" of the allegations, Jane Doe may be experiencing delusions related to the allegations. After further interviews of the children, law enforcement executed a search warrant for the computers in the maternal relative's home. There was no pornography found on any of the computers. Based on the children's statements, an elder abuse investigation was also initiated, but was closed as the allegations were unconfirmed. Through this investigation, however, officials found out that the maternal relative and Jane Doe's mother and father had loaned the Doe family tens of thousands of dollars to help with necessities with the understanding the Doe family would pay them back. When the maternal relative confronted John and Jane Doe about how the money was being spent, John and Jane Doe became upset and cut off contact with the maternal side of the family. John and Jane Doe had also been involved with several lawsuits and had legal issues related to passing bad checks. Jane Doe had allegedly been soliciting money on the internet and the family had to file for bankruptcy. The maternal side of the family had expressed concern for the children's physical and emotional well-being and Jane Doe's mental health and safety. DCF had also received documentation that Jane Doe had been participating in online chat groups for victims of sexual abuse and had been asked to leave due to people being uncomfortable with her and feeling that she had been lying about allegations she had been reporting.

The family initially had accepted DCF's offer of Family Preservation Services, but later declined, stating the children were going to continue therapy and that Jane Doe was going to begin therapy elsewhere. In March 2009, John Doe called DCF to express his disappointment with their services.

Shortly after, DCF was informed by Leawood, Kansas and Kansas City, Missouri Police Departments that law enforcement and the FBI were involved in an investigation regarding allegations that the maternal relative had taken some of the Doe children to a bar in Kansas City, Missouri, had given them shots, stripped them naked, and made them lick a dead rat. Both agencies declined to further investigate the allegations based on lack of information.

DCF expressed concern about the "fantasticality" of the allegations and the high frequency of reports from the family. DCF believed that much of the information reported by the Doe family was untrue based on reports from others interviewed during the investigation. John Doe had reported he would continue to seek action against the maternal relative, including filing a lawsuit, and DCF was concerned about the emotional impact this would have on the children due to their continued exposure to interviews and investigations because of their parents' action. DCF reported they had attempted to discuss these concerns with John and Jane Doe, but the first meeting was rescheduled, and the second meeting was canceled by John Doe, who had expressed he no longer wanted to cooperate with DCF. DCF believed John and Jane Doe were unwilling to listen to DCF's concerns regarding their children and DCF remained concerned with the children's emotional well-being and safety, as Jane Doe was the primary caregiver, was home with the children all day, and was potentially suffering from mental health issues. DCF believed that, based on reports, the source of much of the information regarding the allegations was from Jane Doe, not the children. And John and Jane Doe had become increasingly uncooperative in the investigation, and had recently denied DCF requests to interview the children.

The petition then stated that reasonable efforts have been provided to prevent removal of the children from the home, including ensuring the children were safe from the alleged perpetrator in the original investigation, and that the children and Jane Doe had been participating in therapy. DCF noted, however, that financial support from the maternal relatives had been cut off, and that the family declined

Family Preservation Services and had been declining to cooperate with DCF. The petition then stated it was contrary to the children's welfare to remain in the home and that placement out of the home was in the best interest of the child due to: concerns about how the children's emotional and physical needs were being met, the continued on-going investigations and fantastic allegations being made against the maternal relative and the impact this had on the children's emotional health, and Jane Doe's mental stability.

As mentioned above, the court set a hearing on the petitions for May 11, 2009. On May 5, 2009, the Johnson County District Attorney filed an affidavit in support of a pick-up order of the children after the ex parte order of protective custody was issued. In the affidavit, the Johnson County District Attorney claimed that on May 5, defendant Gildner responded to the Doe family home after it was reported John Doe was seen there. He informed defendant Gildner he would not divulge the whereabouts of his children and that any communication would need to go through his attorney. The District Attorney stated the pick-up order was necessary "to assure the juvenile's continuing placement, is necessary as there is no assurance that said juvenile will appear for hearing in this Court, and is made in the best interest of the child and the community." (Doc. 123-11 *SEALED*, at 3.)

The court finds it is important to outline the facts from the Johnson County documents as they refute many of the "misrepresentations and omissions" plaintiffs rely on to support their argument that defendants violated their constitutional rights. For example, plaintiffs allege that defendants had represented that "the parents had committed physical, sexual, mental, or emotional abuse when such statement had no basis in the facts alleged in the CINC petitions or in the facts known to defendants." As the details from the CINC petitions make clear, defendants had concern that the children were subject to at least emotional and mental abuse, and the facts alleged provided support for this concern. Plaintiffs also claim "that John and Jane Doe had refused Family Preservation Services when in fact John Doe had

specifically accepted the offer of Family Preservation Services." In the motion for the ex parte order, the District Attorney specifically states that after the CINC petitions were filed, John Doe accepted the offer of Family Preservation Services and stated he was willing to cooperate with DCF. Further, plaintiffs claim that defendants knew the Doe children were not in danger because they initially closed their file, disbelieved the children's abuse had actually occurred, and didn't seek immediate custody of the children upon filing the CINC petitions. The motion for the ex parte order, however, states that the allegations in the CINC petition, combined with the parents taking the children out of state, created an immediate need to take custody of the children. The CINC petition itself stated *it was contrary to the children's welfare to remain in the home and that placement out of the home is in the best interest of the child due to*: concerns about how the children's emotional and physical needs are being met, the continued on-going investigations and fantastic allegations being made against the maternal relative and the impact this has on the children's emotional health, and Jane Doe's mental stability. (Emphasis added.)

Based on a review of the Johnson County documents, the court can distinguish this case from the facts of *Malik*, which plaintiffs rely on to show the law was clearly established. In *Malik*, the evidence showed the officials had no reason to remove the child from the home beyond the fact that they were having difficulty scheduling the child for an interview. There were no facts that the child was in danger, and the social worker omitted material facts about the situation when seeking an order from the magistrate judge. Here, the District Attorney, likely based on a recommendation from defendants, sought an ex parte order of protective custody based on the allegations in the CINC petition and the parents' post-petition conduct—removing the children from the state and not being forthcoming about the children's whereabouts. Most of the claimed "misrepresentations and omissions" set forth in plaintiffs' complaint are refuted by the Johnson County documents or are not material. Plaintiffs do claim that

there were no travel restrictions placed on the family in the time period between the filing of the petition and the hearing, and therefore it was unreasonable to use the family's travel to justify the ex parte order. The court has not found any travel restrictions in any of the documents. The court, however, has to give reasonable deference to defendants' judgment in deciding when a child may be in danger.

The court therefore finds that reasonable officials could disagree as to whether there was a threat to plaintiffs' safety. And based on the factual allegations in the CINC petition—which have not been contested—combined with the parents' post-petition conduct, it would be reasonable for an official to believe an ex parte order of protective custody was justified.

For these reasons, the court finds defendants are entitled to qualified immunity because the law is not clearly established that their conduct violated plaintiffs' constitutional rights.

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss Second Amended Complaint (Doc. 120) is granted.

This case is closed.

Dated March 7, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

APPENDIX H

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

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 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]

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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).

[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

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. 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

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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).

[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.").

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.

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]

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

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

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 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:

Robert E. Blackburn
United States District Judge

APPENDIX I

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

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 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

[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.

[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.

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." *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

[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.

the First Amended Complaint fails to state a viable claim for relief against Douglas 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]

[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

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. 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

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judicial records subject to judicial notice by this court.

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]

[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."

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 time-stamped by the Clerk of the 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] Therefore, the rationale

[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 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 COURT HEREBY ORDERS THAT the above named children

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. 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

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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.

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, 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 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

[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.*

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 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

[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.

Garza Defendants "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 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

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[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 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).

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 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; 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]

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

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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 county department and by any person who is believed to be responsible for child abuse or neglect shall be at the discretion of 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.

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 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. The court specifically found that it was not "objectively reasonable for the officers to believe that [the minor child] was in danger of

[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).

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. 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 anxiety, 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, 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 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

[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 ("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]

C. The Claim Against Defendant Douglas County

The Sixth Claim in the First Amended Complaint asserts that "[u]nder 42 U.S.C. § 1983,

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

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 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 "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.

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[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.

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 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

[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.