**No.**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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RITA STANBACK and FRANK TENNANT,

Petitioners,

v.

GINNY HUMPHREY, as Parent and Legal Guardian of Minor Child, O.H.; ANGEL GIPSON, as Parent and Legal Guardian of Minor Child, B.W.; DEBBIE ALLARD, as Parent and Legal Guardian of Minor Child, B.S.; and BARRY MARTINDELL, as Parent and Legal Guardian of Minor Children, A.M. and C.M.,

Respondents.

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*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Millington Reserve Officer Rickie Friar allegedly sexually abused Plaintiffs' minor children while he was babysitting them at his house between May, 2013 and August, 2015. During this time, a YMCA employee or his parent allegedly reported to the Millington Police Department that Friar had taken pictures of minor children at a YMCA pool, and the step-grandmother of one of Respondents' minor children allegedly asked a lieutenant at the department to investigate Friar's background to assuage her suspicions of possible pedophilia. An unidentified reserve officer allegedly told Interim Chief Rita Stanback (2012-2014) and Chief Frank Tennant (2014-2015) that Friar should be investigated because he had heard from an unidentified chief deputy with the Shelby County Sheriff's Office that Friar had been terminated from the Shelby County Sheriff's Office more than 30 years earlier for sexual misconduct with young girls and allegedly told Interim Chief Stanback and Chief Tennant that he had personally observed Friar engage in "improper conduct towards young female children while on duty." The question presented is:

Whether the Sixth Circuit contradicted a fundamental principle of this Court's qualified immunity precedent when it denied qualified immunity to Petitioners on the grounds that their challenged conduct violated clearly established law and premised its determination solely upon cases that were decided after Petitioners' challenged conduct?

## PARTIES TO THE PROCEEDING, RULE 29.6 STATEMENT, AND RELATED CASES

The parties to the proceedings in the Sixth Circuit, whose judgment is sought to be reviewed, were as follows:

- Respondents, Ginny Humphrey, as parent and legal guardian of minor child, O.H.; Angel Gibson, as parent and legal guardian of minor child, B.W.; Debbie Allard, as parent and legal guardian of minor child, B.S.; and Barry Martindell, as parent and legal guardian of minor children, A.M. and C.M., were the appellants below;
- Petitioners, Interim Chief Rita Stanback and Chief Frank Tennant, were appellees below; and
- The City of Millington, Ray Douglas, Richard Hodges, Linda L. Carter, and Terry Jones, who have no interest in the outcome of this Petition, were appellees below.

No corporations are involved in this proceeding.

The proceedings in other courts that are directly related to this case are as follows:

- *Humphrey v. Friar, et al.*, No. 2:17-cv-02741-SHL, U.S. District Court for the Western District of Tennessee. Amended Judgment entered Oct. 29, 2018.
- *Gipson v. Friar, et al.*, No. 2:17-cv-02756-SHL-cgc, U.S. District Court for the Western District of Tennessee. Amended Judgment entered Oct. 29, 2018.

- *Allard v. Friar, et al.*, No. 2:17-cv-02757-SHL-cgc, U.S. District Court for the Western District of Tennessee. Amended Judgment entered Oct. 29, 2018.
- *Martindell v. Friar, et al.*, No. 2:17-cv-02802-SHL-tmp, U.S. District Court for the Western District of Tennessee. Amended Judgment entered Oct. 29, 2018.
- *Humphrey v. Friar, et al.*, No. 18-6111, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 4, 2020; rehearing denied Mar. 11, 2020.
- *Gipson v. Friar, et al.*, No. 18-6112, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 4, 2020; rehearing denied Mar. 11, 2020.
- *Allard v. Friar, et al.*, No. 18-6113, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 4, 2020; rehearing denied Mar. 11, 2020.
- *Martindell v. Friar, et al.*, No. 18-6115, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 4, 2020; rehearing denied Mar. 11, 2020.

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## OPINIONS BELOW

The decision of the United States District Court for the Western District of Tennessee dismissing Respondents' claims is unpublished but is available at 2018 WL 8807154.[1] (App. B at 1-54.)

The decision of the panel of the Sixth Circuit Court of Appeals affirming the dismissal of all Respondents' claims except their § 1983 failure to supervise claims against Petitioners is unpublished but is available at 792 Fed. Appx. 395.[2] (App. A at 1-2.)

[1] Each Respondent filed a separate action in the District Court. The District Court entered the same order of dismissal in each of the separate actions.

[2] Respondents separately appealed the District Court's dismissal of their claims, and the Sixth Circuit consolidated the four appeals for briefing, argument and decision.

## JURISDICTION

The Sixth Circuit filed its opinion on February 4, 2020 and denied Petitioners' timely petition for rehearing and *en banc* review on March 11, 2020. In accordance with Sup. Ct. R. 12.4, Petitioners have filed a single Petition for Writ of Certiorari seeking review of the Sixth Circuit's decision adjudicating Respondents' four consolidated appeals. Petitioners have timely filed this Petition for Writ of Certiorari under Sup. Ct. R. 13.1 and this Court's March 19, 2020 Order, which extended Petitioners' filing deadline to 150 days after the Sixth Circuit's denial of their petition for rehearing and *en banc* review. This Court has jurisdiction to review the Sixth Circuit's decision by writ of certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought this action under 42 U.S.C. § 1983 alleging violations of their minor children's constitutional rights to bodily integrity. The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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, suit in equity, or other proceeding for redress . . . .

42 U.S.C. § 1983.

## STATEMENT OF THE CASE

## I. ALLEGATIONS OF RESPONDENTS' AMENDED COMPLAINTS

This case[3] arises out of the alleged sexual abuse of Respondents' minor children, O.H., B.W., B.S., A.M., and C.M. ("Minor Children") by Rickie Friar, a former reserve officer with the Millington Police Department ("MPD"), while he was babysitting the Minor Children at his house. (2d Am. Compl., RE 52, Page ID # 511-12.)[4] Petitioners are a former interim chief and a former chief of the MPD, against whom Respondents have asserted "supervisory liability" claims under 42 U.S.C. § 1983. In this case, the Court is once again called upon to correct a lower court of appeals that has egregiously deviated from the Court's qualified immunity precedent and wrongly subjected individual officers to liability.

### A. Respondents' Allegations of Sexual Abuse by Friar

In their Amended Complaints, Respondents make the following allegations concerning how they and the Minor Children met and befriended Friar and how Friar sexually abused the Minor Children while he babysat them at his house:

Respondent Humphrey met Friar at a neighborhood gathering in May, 2013, and, a few days later, Friar and another officer visited several homes in her

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[3] Each Respondent filed a separate lawsuit in the District Court. The District Court entered the same order dismissing Respondents' claims in each of the four cases. The Sixth Circuit consolidated the four separate appeals filed by Respondents and issued a single decision, which is the subject of this Petition. In accordance with Sup. Ct. R. 12.4, this Petition addresses all four lawsuits filed by Respondents.

[4] Except where indicated, all citations are to the record in *Humphrey v. Friar, et al.*, W.D. Tenn. No. 2:17-cv-02741-SHL.

neighborhood and gave out pictures that Friar had taken of children during the neighborhood event. (2d Am. Compl., RE 52, Page ID # 526.) Friar thereafter developed trust with parents of many children, including Humphrey, and he bought Humphrey and O.H. gifts, gave them money, and bought Humphrey a car. (2d Am. Compl., RE 52, Page ID # 527.) Friar offered to babysit for Humphrey and other families, and, "over time," Friar invited O.H. and other minor children to spend the night at his house. (2d Am. Compl., RE 52, Page ID # 527.) Friar molested O.H. and other minor children at his house "when he had 'sleepovers' and babysat them." (2d Am. Compl., RE 52, Page ID # 527.)

Respondent Allard's child, B.S., met Friar "on or around July 2013" "through her friendship with another minor victim." (*Allard* Am. Compl., RE 50, Page ID # 486.)[5] Friar "manipulated his relationship with another child and her mother to forge an inappropriate relationship" with B.S. "by having a friend [of B.S.] invite her on outings and events with Defendant Friar," and Friar gained Allard's trust. (*Allard* Am. Compl., RE 50, Page ID # 487-88.) "Over time," Friar invited B.S. and other minor children to spend the night at his house and molested B.S. "when he had 'sleepovers' and babysat them" at his house. (*Allard* Am. Compl., RE 50, Page ID # 488-89.)

Respondent Gipson's ex-husband and B.W. met Friar "while swimming at the YMCA of Millington pool in the late spring of 2013," and, "[s]oon after meeting [her ex-husband and B.W.], Friar pursued a friendship with Gipson's ex-husband. (*Gipson*

[5] *Allard v. Friar, et al.*, W.D. Tenn. No. 2:17-cv-02757-SHL-cgc.

Am. Compl., RE 49, Page ID # 458.)[6] Soon, the two men were friends and spending time together at the YMCA during the visitation time that [Gipson]'s ex-husband exercised with [B.W.]" (*Gipson* Am. Compl., RE 49, Page ID # 458.) Friar "gained the trust of [Gipson]'s ex-husband for the purpose of gaining access to [B.W.]" (*Gipson* Am. Compl., RE 49, Page ID # 458.) Friar and another officer came to Gipson's ex-husband's neighborhood "on or around May 20, 2013" with photographs of children that had been taken during a neighborhood event, and Friar subsequently gained Gipson's trust as well. (*Gipson* Am. Compl., RE 49, Page ID # 459.) Friar offered to babysit for Gipson and, "over time," invited B.W. and other minors to spend the night at his house. (*Gipson* Am. Compl., RE 49, Page ID # 459.) Friar molested B.W. at his house "when he had 'sleepovers' and babysat them." (*Gipson* Am. Compl., RE 49, Page ID # 460.)

Respondent Martindell's grandchildren, A.M. and C.M., met Friar "on or around July 2013" through their friendship with another child. (*Martindell* Am. Compl., RE 45, Page ID # 447-48.)[7] Friar "manipulated his relationship with another child and her mother to forge an inappropriate relationship with [A.M. and C.M.]" by having the child invite Martindell's grandchildren on outings and events with Friar. (*Martindell* Am. Compl., RE 45, Page ID # 447-48.) Martindell met Friar at the YMCA "and began a friendship with him based on their shared interests and hobbies," and Friar established a relationship of trust with Martindell. (*Martindell* Am. Compl., RE

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6 *Gipson v. Friar, et al.*, W.D. Tenn. No. 2:17-cv-02756-SHL-cgc.

7 *Martindell v. Friar, et al.*, W.D. Tenn. No. 2:17-cv-02802-SHL-tmp.

45, Page ID # 448.) "Over time," A.M. and C.M. "were invited to spend time with Defendant Friar for long periods of time, as he babysat other parent's children, including friends of [A.M. and C.M.]," and misconduct of a sexual nature by Friar involving A.M. and C.M. took place at Friar's house. (*Martindell* Am. Compl., RE 45, Page ID # 447, 448-49.)

### B. Respondents' Allegations of Petitioners' Failure to Supervise Friar

Respondents make no allegation that Friar had a criminal record. (2d Am. Compl., RE 52, Page ID # 511-45.) They allege that, at an unspecified time, an employee of the YMCA and/or his parent reported to the MPD that Friar had taken pictures of minor children at the YMCA pool. (2d Am. Compl., RE 52, Page ID # 529, 530.) In March, 2014, Respondent Humphrey's stepmother (O.H.'s step-grandmother), Michelle Brown, "spoke with Lieutenant Charlie Coleman of the MPD and requested that he investigate Friar's background for any misconduct to assuage her suspicions of possible pedophilia," and Lieutenant Coleman reported to Brown that Friar's "MPD records did not reveal any misconduct." (2d Am. Compl., RE 52, Page ID # 531.) At different times, an unidentified reserve officer with the MPD advised Petitioners that Friar should be investigated because he had heard from an unidentified chief deputy with the Shelby County Sheriff's Office ("SCSO"), with whom Friar had been employed more than thirty years earlier, that Friar had been terminated from the SCSO for sexual misconduct with young girls. (2d Am. Compl., RE 52, Page ID # 523, 524.) The unidentified reserve's accounting of Friar's

termination from the SCSO contradicted the SCSO's public records,[8] which stated that Friar had been terminated after an investigation revealed that "Friar was not conducting his Sheriff's Dept. business properly in taking offense reports and in transporting prisoners and sto-ping [sic] at a females [sic] residence. DISPOSITION: TERMINATED." (City Mot. to Dismiss Ex. 1, RE 55-1, Page ID # 555.) The unidentified reserve also advised Petitioners that he had observed Friar engage in "improper conduct towards young female children while on-duty." (2d Am. Compl., RE 52, Page ID # 524.) Respondents assert that, based on their actual and/or constructive knowledge of Friar's inappropriate actions, Petitioners violated the Minor Children's constitutional rights by failing to prevent Friar from causing further harm. (2d Am. Compl., RE 52, Page ID # 530.)

## II. PROCEDURAL HISTORY

### A. Proceedings in the District Court

Respondents sued the City of Millington, Petitioners, Ray Douglas (MPD Chief, 2009-2012), Richard Hodges (Mayor, 2008-2012), Linda L. Carter (Mayor, 2012-2013), Terry Jones (Mayor, 2013-Present), and Rickie Friar[9] and asserted claims

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[8] Respondents reference and rely upon the SCSO public records throughout their Amended Complaints. When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a district court may consider public records and exhibits attached to a defendant's motion to dismiss that are referenced in the complaint and are central to the claims asserted in the complaint without converting the motion to a motion for summary judgment. Bassett v. NCAA, 528 F.3d 426, 430 (6th Cir. 2008); Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999).

[9] Neither Respondents' claims against Friar nor Friar were part of the proceedings before the Sixth Circuit.

under 42 U.S.C. § 1983 and under state law arising out of Friar's sexual abuse of the Minor Children.[10] (2d Am. Compl., RE 52, Page ID # 511, 514-16.) Respondents alleged that the City and the individual defendants, including Petitioners, violated the Minor Children's constitutional rights in the hiring, training and supervision of Friar. After Respondents amended their complaints, the City and the individual defendants, except Friar, moved under Fed. R. Civ. P. 12(b)(6) to dismiss Respondents' claims against them. (Mots. to Dismiss, RE 55, 56, Page ID # 549-52, 604-07.) On September 28, 2018, the District Court granted the City and individual defendants' motions to dismiss and, on October 29, 2018, found that there was no just reason for delaying the entry of a final judgment dismissing Respondents' claims against the City and the individual defendants and directed entry of a final judgment in accordance with Fed. R. Civ. P. 54(b). (App. B at 54; Order Granting Mot. for Final J., RE 102, Page ID # 1273.)

With respect to the § 1983 supervisory claims against Petitioners, the District Court held that, while the allegations of the Amended Complaints stated a plausible claim that Friar had violated the Minor Children's substantive due process rights to bodily integrity, the allegations failed to state plausible claims that Petitioners had violated the Minor Children's constitutional rights. (App. B at 54.) The District Court found that Friar's reported photographing of minor children in public at the YMCA

[10] Respondents also sued the YMCA of the Midsouth asserting claims under state law, and the District Court dismissed those claims. Neither the claims against the YMCA nor the YMCA were part of the proceedings before the Sixth Circuit.

pool was not a constitutional violation and that, even accepting as true that Petitioners were aware of allegations against Friar regarding his conduct with the SCSO and "vague allegations of 'improper conduct . . . while on-duty'" with the MPD and that "Michelle Brown asked MPD to conduct a background check on Friar 'to assuage her suspicions of pedophilia,'" "none of these assumptions plausibly establish that [Petitioners] knew that Friar had sexually abused Plaintiffs' minor children, or could have known that he would do so—much less that [Petitioners] authorized, approved, knowingly acquiesced, encouraged or participated directly in Friar's crimes." (App. B at 28, 43.) The District Court reasoned that the alleged workplace misconduct three decades earlier at the SCSO "would not lead anyone to conclude that an investigation of sexual abuse of minors needs to occur;" that Ms. Brown's call to the MPD "while raising questions, did not include any specific allegation to be investigated;" and that the background check Ms. Brown requested "would not have uncovered Friar's actions." (App. B at 43.) Accordingly, the District Court concluded that Petitioners had not violated the Minor Children's constitutional rights because they "could not have authorized, approved, knowingly acquiesced, encouraged or participated directly in Friar's Millington crimes if they were completely unaware that they were happening." (App. B at 43.) The District Court also concluded that Petitioners were entitled to qualified immunity because Respondents had failed to cite any authority to demonstrate that Petitioners' alleged conduct violated clearly established law. (App. B at 45, 46.)

### B. Proceedings in the Sixth Circuit

On February 4, 2020, the Sixth Circuit correctly affirmed the dismissal of Respondents' claims against the City of Millington, Ray Douglas, Richard Hodges, Linda L. Carter, and Terry Jones for the reasons stated in the District Court's order of dismissal. (App. A at 2.) The Sixth Circuit, however, reversed the District Court's dismissal of Respondents' § 1983 failure to supervise claims against Petitioners. (App. A at 2.) The Sixth Circuit's analysis and denial of qualified immunity to Petitioners comprises four sentences. (App. A at 2.) The Sixth Circuit found that the allegations of the Amended Complaints made a plausible showing that Petitioners had "reason to know that Friar was likely to abuse young children if given the chance" and that Petitioners' failure to take any action in response "plausibly amounted to deliberate indifference to or acquiescence in the abuse that followed." (App. A at 2.) The Sixth Circuit also found that, based on two cases that were decided after Petitioners' challenged conduct, Petitioners' actions and omissions violated clearly established law. (App. A at 2.)

Petitioners timely sought both a rehearing and *en banc* review by the Sixth Circuit. On March 11, 2020, Petitioners' requests were denied. (App. C at 1.)

## REASONS FOR GRANTING THE WRIT

In direct contravention of this Court's qualified immunity precedent, the Sixth Circuit relied solely on cases decided after Petitioners' challenged conduct to find that their challenged conduct violated clearly established law. The Sixth Circuit's denial of qualified immunity, therefore, is so manifestly erroneous that summary reversal is appropriate.

### I. THE SIXTH CIRCUIT VIOLATED A FUNDAMENTAL PRINCIPLE OF THIS COURT'S QUALIFIED IMMUNITY PRECEDENT BY RELYING ONLY ON CASES DECIDED AFTER PETITIONERS' CHALLENGED CONDUCT TO FIND THAT THEIR CHALLENGED CONDUCT VIOLATED CLEARLY ESTABLISHED LAW.

Petitioners "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). It is a fundamental principle of the Court's qualified immunity precedent that the clearly established prong of the qualified immunity analysis is determined by the state of the law that exists at the time of the officer's challenged conduct. Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (per curiam); Wesby, 138 S. Ct. at 589; Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017); White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam); Taylor v. Barkes, 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015) (per curiam); Carroll v. Carman, 574 U.S. 13, 16 (2014) (per curiam); Plumhoff v. Rickard, 572 U.S. 765, 779 (2014); Wood v. Moss, 572 U.S. 744, 757 (2014); Reichle v. Howards, 566 U.S. 658, 664 (2012); Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam); Harlow v. Fitzgerald, 457

U.S. 800, 818 (1982). The existing law must be "'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." Wesby, 138 S. Ct. at 589 (quoting al-Kidd, 563 U.S. at 741). It is axiomatic that cases decided after the officer's challenged conduct are "'of no use in the clearly established inquiry'" because an officer cannot "reasonably be expected to anticipate subsequent legal developments." Kisela, 138 S. Ct. at 1154 (emphasis added); see Plumhoff, 572 U.S. at 779; Brosseau, 543 U.S. at 200 n.4; Harlow, 457 U.S. at 818.

The Sixth Circuit's analysis of the state of the law governing Petitioners' challenged conduct is so markedly flawed that it effectively nullifies the clearly established prong altogether. In determining that Petitioners' challenged conduct violated clearly established law, the Sixth Circuit relied on only two cases—Howard v. Knox County and Peatross v. City of Memphis. (App. A at 2.) The Sixth Circuit decided Howard in 2017, and it decided Peatross in 2016. Peatross v. City of Memphis, 818 F.3d 233 (6th Cir. 2016); Howard v. Knox County, 695 Fed. Appx. 107 (6th Cir. 2017). Petitioners' challenged conduct, however, occurred during their tenures as Chief of the MPD between 2012 and 2015. (2d Am. Compl., RE 52, Page ID # 514.) At the time of Petitioners' challenged conduct, Peatross and Howard had not yet even been decided. Neither case could have provided any notice to Petitioners of what the law required of them. Hence, Peatross and Howard are of no use in the clearly established analysis, and the Sixth Circuit's reliance on them to demonstrate the clearly established law at the time of Petitioners' challenged conduct contradicts a fundamental principle of the Court's qualified immunity precedent. Kisela, 138 S.

Ct. at 1154; Plumhoff, 572 U.S. at 779, Brosseau, 543 U.S. at 200 n.4; Harlow, 457 U.S. at 818.

## II. THE SIXTH CIRCUIT ERRED BY DENYING QUALIFIED IMMUNITY TO PETITIONERS BECAUSE PETITIONERS' CHALLENGED CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED LAW.

Qualified immunity "is an *immunity from suit* rather than a mere defense to liability;" it protects Petitioners from the burdens of litigation, including the avoidance of disruptive discovery, unless and until the legal question of whether their challenged conduct violated clearly established law has been resolved. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); accord Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009); Harlow, 457 U.S. at 818. The Sixth Circuit's reliance on only irrelevant cases negates its determination that Petitioners' challenged conduct violated clearly established law. Consequently, the Sixth Circuit stripped Petitioners of qualified immunity without engaging in the analysis mandated by this Court's precedent.

This Court's precedent requires an analysis of the law that existed at the time of Petitioners' challenged conduct to determine whether the existing law clearly established the illegality of Petitioners' challenged conduct. Kisela, 138 S. Ct. at 1154; Wesby, 138 S. Ct. at 589; Ziglar, 137 S. Ct. at 1866; White, 137 S. Ct. at 551; Taylor, 575 U.S. 822, 135 S. Ct. at 2044; Carroll, 574 U.S. at 16; Plumhoff, 572 U.S. at 779; Wood, 572 U.S. at 757; Reichle, 566 U.S. at 664; al-Kidd, 563 U.S. at 735; Brosseau, 543 U.S. at 198; Harlow, 457 U.S. at 818. This Court has repeatedly emphasized to lower courts that "'clearly established law' should not be defined 'at a high level of generality.'" White, 137 S. Ct. at 552 (quoting al-Kidd, 563 U.S. at 742). Instead,

"clearly established law must be 'particularized' to the facts of the case." White, 137 S. Ct. at 552. "This requires a high 'degree of specificity.'" Wesby, 138 S. Ct. at 590. To meet this demanding standard, the legal principle must "clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Id. (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)). "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate,'" so that "every 'reasonable offic[er] would understand that what he is doing' is unlawful." Wesby, 138 S. Ct. at 589 (quoting al-Kidd, 563 U.S. at 741). The unlawfulness of the officer's conduct should follow immediately from the determination of the clearly established rule. Wesby, 138 S. Ct. at 590.

To constitute a clearly established rule, "a legal principle must have a sufficiently clear foundation in then-existing precedent." Wesby, 138 S. Ct. at 589. "It is not enough that the rule is suggested by then-existing precedent." Id. at 590. "The rule must be 'settled law,' which means it is dictated by 'controlling authority'[11] or 'a robust consensus of cases of persuasive authority.'" Id. at 589-90 (internal citations omitted). "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise the rule is not one that 'every reasonable official' would know." Id. at 590 (internal

[11] This Court has not yet determined what precedents, other than Supreme Court precedents, "qualify as controlling authority for the purposes of qualified immunity." Wesby, 138 S. Ct. at 591 n.8.

citations omitted). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991).

This Court's precedent required the Sixth Circuit to identify controlling authority from this Court or a robust consensus of persuasive authority from the lower courts of appeals that would have made it clear to every reasonable officer in the particular circumstances before Petitioners that Petitioners' challenged conduct violated the law. The Sixth Circuit failed to identify even a single existing case, let alone a robust consensus of persuasive authority, that would have made it clear to Petitioners that their challenged conduct was unlawful. The correct analysis plainly shows that Petitioners' challenged conduct did not violate clearly established law.

### A. The particular circumstances allegedly before Petitioners were a statement concerning possible remote sexual misconduct, a vague report of unspecified misconduct, and a report of conduct that was not illegal or unconstitutional.

Clearly established law must "clearly prohibit the officer's conduct in the particular circumstances before him." Wesby, 138 S. Ct. at 590. The first step in the analysis, therefore, is to define the particular circumstances before the officer. Wesby, 138 S. Ct. at 590. This Court has instructed that the particular circumstances before an officer are confined to the facts known to the officer at the time he or she engaged in the challenged conduct. Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017); White, 137 S. Ct. at 550. "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." Hernandez, 137 S. Ct. at 2007.

The Sixth Circuit did not heed the Court's instruction and, instead, considered circumstances that were not allegedly known by Petitioners. Particularly, the Sixth Circuit improperly relied on a communication that occurred between O.H.'s step-grandmother, Michelle Brown, and Lieutenant Coleman. (App. A at 2.) There is no allegation that Petitioners had knowledge of the communication between Ms. Brown and Lieutenant Coleman. Respondents specifically allege that Ms. Brown spoke to Lieutenant Coleman and asked him to check Friar's background to assuage her suspicion of possible pedophilia and that Lieutenant Coleman reported back to Ms. Brown "that MPD records did not reveal any misconduct." (2d Am. Compl., RE 52, Page ID # 531.) The communication between Ms. Brown and Lieutenant Coleman was not a circumstance known by Petitioners and, therefore, is irrelevant to the qualified immunity analysis. Hernandez, 137 S. Ct. at 2007; White, 137 S. Ct. at 550. By considering the communication as a circumstance known to Petitioners for qualified immunity purposes, the Sixth Circuit violated this Court's precedent.[12]

The only circumstances concerning Friar that were specifically alleged to have been known by Petitioners involved an unidentified reserve officer with the MPD stating to Petitioners that Friar should be investigated because he had heard from

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[12] Moreover, to the extent the Sixth Circuit premised its denial of qualified immunity to Petitioners on the alleged conduct of Lieutenant Coleman, it violated another established tenet of this Court's qualified immunity precedent: that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." Iqbal, 556 U.S. at 676. "In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. Id. at 677.

an unidentified SCSO chief deputy that Friar had been terminated from the SCSO more than thirty years earlier for sexual misconduct with young girls and that the unidentified reserve officer had observed Friar engage in "improper conduct towards young female children while on-duty." (2d Am. Compl., RE 52, Page ID # 523, 524.) The only other alleged circumstance that could conceivably be interpreted as being known by Petitioners is the report that Friar had taken pictures of minor children at the YMCA pool, which was made to the MPD and did not constitute a violation of state law[13] or a violation of the children's constitutional rights.[14] Construing that allegation in the light most favorable to Respondents, the reference to the MPD could be broadly interpreted to include Petitioners. Thus, the determinative question for the clearly established prong of the qualified immunity analysis, which the Sixth Circuit never framed or analyzed, is whether it was clearly established between 2012 and 2015—the time of Petitioners' challenged conduct—that an officer, who was aware of a statement that a subordinate officer may have been terminated from employment more than 30 years prior for sexual misconduct with young girls; a vague

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[13] See Tenn. Code Ann. § 39-13-605 (2010) (making it a criminal offense to "knowingly photograph . . . [a minor] when the [minor] has a reasonable expectation of privacy without the prior effective consent . . . of the minor's parent or guardian . . . ."); State v. Herrera, No. W2010-00937-CCA-R3-CD, 2011 WL 4432895, at *3 (Tenn. Ct. Crim. App. Sept. 23, 2011) (finding that a person does not have a reasonable expectation of privacy in a public place).

[14] See Schmidt v. City of Bella Villa, 557 F.3d 564, 567-68, 574 (8th Cir. 2009) (finding that the defendant officer did not violate the constitutional rights of the plaintiff arrestee when he required her to unbutton her jeans and fold them inwards so that he could photograph a tattoo located approximately two inches from the plaintiff's hipbone and hidden by her clothing).

report that the subordinate officer had engaged in unspecified "improper conduct towards young female children;" and a report that the subordinate officer had taken photographs of minor children at a public pool, violated minor children's substantive due process rights to bodily integrity by failing to investigate, arrest and terminate the subordinate officer.

### B. Based on the particular circumstances before them, Petitioners' challenged conduct did not violate clearly established law.

#### 1. The existing law at the time of Petitioners' challenged conduct did not clearly establish that not acting on a statement regarding possible remote sexual misconduct, a vague report of unspecified misconduct, and a report of conduct that was neither illegal nor unconstitutional violated minor children's substantive due process rights to bodily integrity.

At the time of Petitioners' challenged conduct, it was not clearly established that a failure to act on a statement regarding possible remote sexual misconduct, a vague report of unspecified misconduct, and a report of conduct that was neither illegal nor unconstitutional constituted a violation of the Minor Children's substantive due process rights. No controlling authority from this Court had held that an officer's failure to act under circumstances similar to those facing Petitioners rose to the level of violating substantive due process. See Wesby, 138 S. Ct. at 591 n.8 (stating that the Court has "not decided what precedents—other than [the Court's precedent]—qualify as controlling authority for purposes of qualified immunity"). Likewise, there was not "a robust 'consensus of cases of persuasive authority'" from the circuit courts of appeals that had held that a failure to act under similar circumstances violated substantive due process. Wesby, 138 S. Ct. at 589-90 (quoting

al-Kidd, 563 U.S. at 741-42). In fact, reported decisions in the Eighth and Tenth Circuits had found no violation of substantive due process rights in situations where supervisory officials were aware of conduct by subordinates that was far more egregious than the conduct by Friar of which Petitioners allegedly were aware.

In Jojola v. Chavez, which involved sexual molestation of a student by a school employee, the Tenth Circuit found that the defendant school supervisors had not violated the plaintiff's constitutional rights despite allegations that they were aware of complaints that the employee "had put a hole in the wall of the girls' locker room through which he watched girls using the facility;" that "rumors had circulated at the school concerning the employee's improper sexual behavior;" that the employee "had made sexual comments to girls at the school;" that the employee had previously been "removed from his position as a school bus driver because of inappropriate behavior with a preteen female student;" and that the employee had been "transferred to the high school after he had unhooked brassieres of junior high school girls." Jojola v. Chavez, 55 F.3d 488, 491 (10th Cir. 1995). The Jojola court concluded that the officials' alleged knowledge of four incidents and rumors did not demonstrate the requisite pattern of behavior necessary to impose liability for violating the plaintiff's constitutional rights. Jojola, 55 F.3d at 491.

Similarly, in Doe v. Gooden, which involved physical and sexual abuse of students by a teacher,[15] the Eighth Circuit found that the defendant school officials

[15] There were also allegations of verbal abuse by the teacher. Doe v. Gooden, 214 F.3d 952, 954 (8th Cir. 2000). The Gooden court held that the alleged verbal abuse did not violate the students' constitutional rights. Id. at 955.

had not violated the students' constitutional rights. Doe v. Gooden, 214 F.3d 952, 956 (8th Cir. 2000). As to the physical abuse by the teacher, the plaintiffs alleged that the defendant school officials were aware that the teacher "had grabbed a student around the neck in order to bring the student to the school office;" that the teacher "had kicked a desk across the classroom while a student was sitting in the desk;" that the teacher had thrown "a clenched fist toward a student's face but did not hit the student;" that the teacher had grabbed a student by the shoulders and turned the student around in the student's desk;" that the teacher "had thrown a book at a student on two different occasions;" and that the teacher "had grabbed a student and pushed the student against the wall of the building." Gooden, 214 F.3d at 956. The Gooden court found that, even though the defendant officials may have been aware of an incident or two by the teacher that rose to the level of a constitutional violation, "the isolated instances of which [the officials] had notice were not sufficient to constitute notice of a pattern of unconstitutional acts." Id. As to the sexual abuse by the teacher, the plaintiffs alleged that the officials "should have known that [the teacher] 'constituted a potential danger' based on various sexual remarks and sexually harassing behavior that [the teacher] exhibited toward his female teacher-colleagues, as well as [the teacher's] reference to female students as 'bimbos.'" Id. The Gooden court found that the officials' knowledge of this alleged misconduct was not "the type of notice that is required to impose § 1983 liability on [the officials] for [the teacher's] alleged sexual abuse of students" because the officials "lacked sufficient

notice of [the teacher's] alleged unconstitutional sexual behavior toward his students . . . ." Gooden, 214 F.3d at 956.

In Jane Doe "A" v. Special Sch. Dist. of St. Louis County, which involved physical and sexual abuse of handicapped students by a school bus driver, the Eighth Circuit found that the defendant school officials had not violated the students' constitutional rights despite allegations that the school officials knew of complaints that the driver had "used profanity on the bus;" "had kissed a boy on the bus;" "had pushed one of the plaintiffs down the bus steps and pulled his hair;" "had kissed and kicked a child and had given him a 'snuggle;'" "had put his hand down a boy's pants and pulled down a boy's pants and spanked him;" "had been touching boys' crotches;" "had made a homosexual proposition towards a deliveryman in the restroom on school premises;" "had made an inappropriate physical gesture towards a female employee of the [school] District at a nightclub;" and "had made a lewd gesture with his lips towards a female employee of the [school] District" at a Christmas party. Jane Doe "A" v. Special Sch. Dist. of St. Louis County, 901 F.2d 642, 644, 646 n.4 (8th Cir. 1990). The court found "that the evidence, viewed in the light most favorable to the plaintiff, [did] not support a finding that the individual defendants had notice of a pattern of unconstitutional acts" by the bus driver.[16] Doe "A", 901 F.2d at 646. The court further found that the evidence concerning the bus driver's sexual relationships

[16] The court noted that the failure by one of the defendant officials to respond to the complaint that the bus driver "had put his hand down a boy's pants and pulled down a boy's pants and spanked him" was, at most, negligent conduct, which is insufficient to implicate Fourteenth Amendment protections. Doe "A", 901 F.2d at 646.

with adults did not constitute "the type of notice that could be held to impose section 1983 liability upon the individual defendants . . . ." Doe "A", 901 F.2d at 646 n.4.

Moreover, at the time of Petitioners' challenged conduct, existing precedent held that an allegation of "inappropriate behavior" was insufficient to constitute notice of sexual misconduct. In Doe v. Flaherty, the Eighth Circuit found that a teacher's assertion to the principal of "potential accounts of unspecified 'inappropriate behavior' from unidentified individuals did not notify [the principal] of sexual misconduct." Doe v. Flaherty, 623 F.3d 577, 585-86 (8th Cir. 2010). Similarly, in Gebser v. Lago Vista Indep. Sch. Dist., this Court found that a complaint from students' parents that a teacher had made "inappropriate comments" was "plainly insufficient" to alert a school official to the possibility that the teacher was sexually involved with a student. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998).

Neither Respondents nor the Sixth Circuit has cited any precedent existing at the time of Petitioners' challenged conduct that even suggests that a statement concerning the need to investigate possible sexual misconduct that allegedly occurred thirty years earlier, a report of unspecified inappropriate conduct from an unidentified individual, and a report of conduct that is neither illegal nor unconstitutional were sufficient notice that a subordinate officer posed such a substantial risk of sexually abusing minor children that the failure to investigate, arrest, and terminate the subordinate violated the Minor Children's substantive due process rights. The precedent that did exist at the time of Petitioners' challenged

conduct plainly showed that a statement regarding the need to investigate a possible remote incident of sexual misconduct, a report of unspecified inappropriate conduct from an unidentified individual, and a report of conduct that was neither illegal nor unconstitutional was insufficient notice that a subordinate officer posed a substantial risk of sexually abusing minor children and did not require a supervisory official to take action against the subordinate to avoid violating the minor children's substantive due process rights to bodily integrity. The Sixth Circuit's failure to analyze the state of the law at the time of Petitioners' challenged conduct and its denial of qualified immunity to Petitioners on the basis of irrelevant cases constitutes such an egregious departure from this Court's qualified immunity precedent that it warrants summary reversal by this Court.

2. Notwithstanding their irrelevance to the qualified immunity analysis, neither of the cases cited by the Sixth Circuit clearly established that, based on the particular circumstances before them, Petitioners' challenged conduct violated the Minor Children's substantive due process rights to bodily integrity.

The particular circumstances before the defendant officials in Howard and Peatross were significantly different from those before Petitioners. Unlike this case, in both Howard and Peatross, the defendant officials had actual knowledge of recent and persistent unconstitutional conduct by their subordinates that involved the very type of conduct that violated the plaintiff's constitutional rights.

Howard involved a supervisory liability claim against a school principal based on a teacher's physical abuse of special-needs students. Howard, 695 Fed. Appx. at 108. The complaint in Howard alleged that the parents of minor plaintiff L.R. had

made repeated complaints of physical and verbal abuse of L.R. to the defendant principal and, thereafter, threatened legal action when they discovered bruising on L.R.'s knees and learned that the teacher had kept L.R. isolated in a room alone and had prohibited her from using the restroom for an entire day; that the mother of minor plaintiff W.H. witnessed the teacher "forcefully grab W.H.'s face and shake it while screaming at her" and immediately informed the defendant principal of the incident; and that other students and their parents had also informed the defendant principal of the teacher's mistreatment and abuse of special-needs children, including the minor plaintiffs. Howard, 695 Fed. Appx. at 114. Additionally, the complaint alleged that, despite his knowledge of the teacher's abuse, the defendant principal promoted the teacher to an assistant position in a special-needs classroom. Id. at 109, 115. The Howard court found that the numerous complaints of *specific* incidents of abuse to the defendant principal demonstrated a pattern of abuse toward special-needs children by the teacher that indicated a strong likelihood that the teacher would continue to harm special-needs students and that the defendant principal's decision to place the teacher as an assistant in a special-needs classroom despite his knowledge of the teacher's abuse and his prior acknowledgment that she was ill-suited to care for minor plaintiff L.R. demonstrated deliberate indifference to the imminent danger he knew the teacher posed to students. Id. at 115-16.

Peatross involved a supervisory claim against a police chief based on an incident in which two officers shot and killed an individual. Peatross, 818 F.3d at 236-37. The complaint in Peatross alleged facts showing a four-year pattern of shootings

by department officers; the specific number of people shot or killed by officers in the year prior to the shooting at issue; that, prior to the shooting at issue, the defendant chief had acknowledged a dire need to review and improve the department's operations and the need to improve the department's disciplinary process and its policies and procedures; that, prior to the shooting at issue, the mayor had publicly admonished the defendant chief and described the department as unacceptable; that, notwithstanding his actual knowledge of the deficiencies, the defendant chief made no improvements to the department; that the two officers involved in the shooting at issue had previously been involved in two separate excessive force incidents; that the defendant chief did not punish subordinate officers' use of excessive force and, instead, rubber-stamped officer misconduct; and that the defendant chief attempted to cover-up the unconstitutional conduct of his subordinate officers by exonerating them in an effort to escape liability. Peatross, 818 F.3d at 238, 243. The Peatross court found that these allegations demonstrated that the defendant chief had knowingly acquiesced in the subordinate officers' unconstitutional conduct by "ratif[ying] the conduct of officers who shoot first and make judgments later, evincing a brazen disregard for human life" and that his "ratification of such conduct is abhorrent" and "not only flouts accountability" but also "undermines the integrity of our justice system." Id. at 246.

The supervisory officials in Howard and Peatross knew that their subordinates had engaged in recent and persistent patterns of specific conduct that involved the same type of conduct that violated the plaintiffs' constitutional rights. To the

contrary, Petitioners allegedly knew only of a second-hand assertion of possible sexual misconduct by Friar that had occurred more than 30 years earlier,[17] a vague report that Friar had engaged in "improper conduct towards young female children," and a report that Friar had engaged in conduct that was neither illegal nor unconstitutional. Unlike the recent and persistent pattern of constitutional violations of which the supervisory officials in Howard and Peatross had actual knowledge, "isolated or 'sporadic' incidents" decades apart do not demonstrate such a strong likelihood of future harm that the failure to take precautions constitutes deliberate indifference. Howard, 695 Fed. Appx. at 113-14; see Doe v. Warren Consol. Sch., 93 Fed. Appx. 812, 819-21 (6th Cir. 2004) (finding that the defendant principal possessed sufficient information that the subordinate teacher posed an imminent danger to students because he had knowledge of the subordinate teacher's sexual misconduct, which was recent and persistent as opposed to sporadic).

Additionally, a report of unspecified "improper conduct towards young female children" is not the type of specific information that the supervisory officials possessed in Howard and Peatross—it is not even notice of a constitutional violation

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[17] Respondents allege that Petitioners should have investigated Friar based on the report of the unidentified reserve officer. (2d Am. Compl., RE 52 , Page ID # 523.) An investigation of Friar's termination from the SCSO more than 30 years earlier, however, would have revealed that he was terminated for the reasons stated in the SCSO public records: "Friar was not conducting his Sheriff's Dept. business properly in taking offense reports and in transporting prisoners and sto-ping [sic] at a females [sic] residence. DISPOSITION: TERMINATED." (City Mot. to Dismiss Ex. 1, RE 55-1, Page ID # 555.) An investigation would not have verified the unidentified reserve officer's accounting of Friar's termination from the SCSO nor would it have revealed anything that could have led to the discovery of Friar's alleged sexual abuse of the Minor Children more than 30 years later.

or sexual abuse. See Gebser, 524 U.S. at 291 (finding that a complaint from students' parents that a teacher had made "inappropriate comments" was "plainly insufficient" to alert a school official to the possibility that the teacher was sexually involved with a student); Flaherty, 623 F.3d at 586 (concluding that "potential accounts of unspecified 'inappropriate behavior' from unidentified individuals did not notify [the defendant supervisor] of sexual misconduct"). Unlike the specific instances of similar abusive and unconstitutional conduct reported to the defendant officials in Howard and Peatross, the report that Friar had taken pictures of minor children at the YMCA did not alert Petitioners to illegal or unconstitutional conduct by Friar. Further, unlike the supervisory officials in Howard and Peatross, who personally engaged in active conduct that led to the violations of the plaintiffs' constitutional rights, Respondents do not allege any active, personal involvement by Petitioners but, rather, allege failures to act—failures to investigate, arrest, and terminate Friar[18]—which the Sixth Circuit has held are insufficient to state a claim for "supervisory liability." Summers v. Leis, 368 F.3d 881, 888 (6th Cir. 2004) (recognizing that "supervisory liability" cannot "be based upon the mere failure to act"); Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999) (recognizing that "liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act'"); Salehpour v. Univ. of Tenn., 159 F.3d 199, 206 (6th Cir. 1998) (recognizing that "supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act").

[18] (2d Am. Compl., RE 52, Page ID # 514-15, 530, 531.)

The specific information of recent and persistent unconstitutional conduct that the defendant supervisors in Howard and Peatross possessed and their active, personal involvement in the subordinate's unconstitutional conduct are not remotely similar to the isolated, sporadic, nonspecific, and dissimilar information that Petitioners allegedly possessed and Petitioners' alleged inaction. Accordingly, Howard and Peatross would not have made it clear to every reasonable officer that not acting on a statement regarding possible remote sexual misconduct, a vague report of unspecified misconduct, and a report of conduct that was not illegal or unconstitutional violated minor children's substantive due process rights to bodily integrity. Wesby, 138 S. Ct. at 589; al-Kidd, 563 U.S. at 741. In other words, Howard and Peatross did not place the constitutionality of Petitioners' challenged conduct beyond debate. Wesby, 138 S. Ct. at 589; al-Kidd, 563 U.S. at 741.

Even if Howard and Peatross did involve similar circumstances to those before Petitioners, Petitioners would nonetheless be entitled to qualified immunity. This Court has recognized that, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." Wilson v. Layne, 526 U.S. 603, 618 (1999); accord Reichle, 566 U.S. at 669-70; see Ziglar, 137 S. Ct. at 1868 (finding that, [w]hen the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability"). Even if Howard and Peatross did involve similar circumstances to those before Petitioners, both cases would be in conflict with Jojola,

Gooden, and Doe "A", and the law governing Petitioners' challenged conduct could not be clearly established.

## III. THE SIXTH CIRCUIT'S FAILURE TO FOLLOW THIS COURT'S QUALIFIED IMMUNITY PRECEDENT WAS SO EGREGIOUS THAT SUMMARY REVERSAL IS APPROPRIATE.

Damages suits against government officials entail significant social costs, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Harlow, 457 U.S. at 814; see Anderson v. Creighton, 483 U.S. 635, 638 (1987) (recognizing that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"). Damages suits also give rise to "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Harlow, 457 U.S. at 814 (alteration in original). Qualified immunity counterbalances these substantial social costs by shielding public officials "from civil damages liability as long as their actions could reasonably have been thought consistent with the right they are alleged to have violated." Anderson, 483 U.S. at 638.

"Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." City and County of San Francisco, Cal. v. Sheehan, 575 U.S. 600, 135 S. Ct. 1765, 1774 n.3 (2015) (internal citations omitted); see City of Escondido v. Emmons,

139 S. Ct. 500, 502, 504 (2019) (summarily reversing and vacating the Ninth Circuit's denial of qualified immunity to two officers); Kisela, 138 S. Ct. at 1154-55 (summarily reversing the Ninth Circuit's denial of qualified immunity); Wesby, 138 S. Ct. at 593 (reversing the D.C. Circuit's denial of qualified immunity); White, 137 S. Ct. at 552-53 (summarily reversing the Tenth Circuit's denial of qualified immunity); Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (summarily reversing the Fifth Circuit's denial of qualified immunity); Taylor, 575 U.S. 822, 135 S. Ct. at 2045 (summarily reversing the Third Circuit's denial of qualified immunity); Carroll, 574 U.S. at 20 (summarily reversing the Third Circuit's denial of qualified immunity); Plumhoff, 572 U.S. at 781 (reversing the Sixth Circuit's denial of qualified immunity); Wood, 572 U.S. at 748-49 (reversing the Ninth Circuit's denial of qualified immunity); Stanton v. Sims, 571 U.S. 3, 10-11 (2013) (summarily reversing the Ninth Circuit's denial of qualified immunity); Reichle, 566 U.S. at 670 (reversing the Tenth Circuit's denial of qualified immunity); Ryburn v. Huff, 565 U.S. 469, 477 (2012) (summarily reversing the Ninth Circuit's denial of qualified immunity); Brosseau, 543 U.S. at 201 (summarily reversing the Ninth Circuit's denial of qualified immunity). When a lower court clearly misapprehends the qualified immunity standard, the Court may exercise its authority to summarily reverse the lower court's decision. See Brosseau, 543 U.S. at 198 n.3 (stating that the Court was exercising its "summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard"). Indeed, the "Court routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' . . .

." Kisela, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); see, e.g. Emmons, 139 S. Ct. at 502, 504 (summarily reversing denial of qualified immunity); Kisela, 138 S. Ct. at 1154-55 (same); White, 137 S. Ct. at 552-53 (same); Mullenix, 136 S. Ct. at 312 (same); Taylor, 575 U.S. 822, 135 S. Ct. at 2045 (same); Carroll, 574 U.S. at 20 (same); Stanton, 571 U.S. at 10-11 (same); Ryburn, 565 U.S. at 477 (same); Brosseau, 543 U.S. at 201 (same). Since 2012, the Court has summarily reversed circuit courts of appeals' denials of qualified immunity on at least eight occasions. See Emmons, 139 S. Ct. at 502, 504; Kisela, 138 S. Ct. at 1154-55; White, 137 S. Ct. at 552-53; Mullenix, 136 S. Ct. at 312; Taylor, 575 U.S. 822, 135 S. Ct. at 2045; Carroll, 574 U.S. at 20; Stanton, 571 U.S. at 10-11; Ryburn, 565 U.S. at 477; cf. Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016) (recognizing that "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law"). This case warrants the Court exercising its discretion to summarily reverse the Sixth Circuit's decision because the Sixth Circuit did not simply misapply a properly stated rule of law; it wholly failed to perform the analysis dictated by the Court's precedent and, in so doing, erroneously deprived Petitioners of the qualified immunity to which they are entitled.

## CONCLUSION

The Petition for Writ of Certiorari should be granted, and the decision of the Sixth Circuit to deny qualified immunity to Petitioners should be summarily reversed.

Respectfully submitted,

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# APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0084n.06

Nos. 18-6111/6112/6113/6115

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

GINNY HUMPHREY, as parent and legal guardian of minor child, O.H.; ANGEL GIBSON, as parent and legal guardian of minor child, B.W.; DEBBIE ALLARD, as parent and legal guardian of minor child, B.S.; BARRY MARTINDELL, as parent and legal guardian of minor children, A.M. and C.M.,

Plaintiffs-Appellants,

v.

RICKIE FRIAR, individually and in his official capacity, et al.,

Defendants,

CHIEFS RAY DOUGLAS, RITA STANBACK AND FRANK TENNANT, individually and in official capacity as Chiefs of the Millington Police Department; MAYORS RICHARD HODGES, LINDA L. CARTER AND TERRY JONES, individually and in official capacity as Mayors of the City of Millington; CITY OF MILLINGTON, TENNESSEE,

Defendants-Appellees.

**FILED**
Feb 04, 2020
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Before: KETHLEDGE, BUSH, and NALBANDIAN, Circuit Judges.

KETHLEDGE, Circuit Judge. A reserve officer for the Millington Police Department sexually abused several children. The parents of four of his victims brought suit under 42 U.S.C. § 1983 against the City of Millington, three of its chiefs of police, and three of its mayors. The district court dismissed the parents' complaint for failure to state a claim. This appeal followed.

With one exception, we affirm for substantially the reasons stated by the district court in its notably careful and thorough opinion. The exception is that we respectfully disagree with the court's dismissal of the claims for supervisory liability against Chiefs Stanback and Tennant. Specifically, both chiefs allegedly received the following reports: a report from O.H.'s stepmother that she thought, based on Friar's interaction with her daughter, that Friar was a pedophile; a report from the parent of a YMCA employee, alleging that Friar had photographed children in their bathing suits at the pool; and especially the repeated reports from a reserve officer who allegedly told Stanback and Tennant that Friar had been fired by another department for "sexual misconduct with young girls" and that the officer himself had observed Friar engage in "improper conduct towards young female children while on-duty." These reports plausibly gave Stanback and Tennant reason to know that Friar was likely to abuse young children if given the chance. And the chiefs' alleged failure to take any action whatsoever in response to these repeated reports, while retaining Friar as a reserve officer, plausibly amounted to deliberate indifference to or acquiescence in the abuse that followed. *See, e.g.*, *Doe v. City of Roseville*, 296 F.3d 431, 439 (6th Cir. 2002). We further think that the relevant law made sufficiently clear, for purposes of denying qualified immunity at this stage of the case, that the actions and omissions of these two defendants violated the plaintiffs' constitutional rights as alleged in the claims of supervisory liability. *See, e.g.*, *Peatross v. City of Memphis*, 818 F.3d 233, 243 (6th Cir. 2016); *Howard v. Knox County*, 695 F. App'x 107, 116 (6th Cir. 2017).

The district court's judgment is affirmed, except we reverse the district court's dismissal of the claims against Stanback and Tennant for supervisory liability; and we remand the case to the district court for further proceedings consistent with this opinion.

# APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

| | |
|---|---|
| GINNY HUMPHREY, as Parent and Legal Guardian of Minor Child, O.H.,<br>Plaintiffs,<br>v.<br>RICKIE FRIAR, et al.,<br>Defendants,<br>and<br>ANGEL GIPSON, as Parent and Legal Guardian of Minor Child, B.W.,<br>Plaintiffs,<br>v.<br>RICKIE FRIAR, et al.,<br>Defendants,<br>and<br>DEBBIE ALLARD, as Parent and Legal Guardian of Minor Child, B.S.,<br>Plaintiffs,<br>v.<br>RICKIE FRIAR, et al.,<br>Defendants,<br>and<br>BARRY MARTINDELL, as Parent and Legal Guardian of Minor Children, A.M. and C.M.,<br>Plaintiffs,<br>v.<br>RICKIE FRIAR, et al.,<br>Defendants. | No. 2:17-cv-02741-SHL-dkv<br>No. 2:17-cv-02756-SHL-cgc<br>No. 2:17-cv-02757-SHL-cgc<br>No. 2:17-cv-02802-SHL-tmp |

**ORDER GRANTING CITY OF MILLINGTON'S AND**

**DEFENDANTS RAY DOUGLAS, RITA STANBACK, FRANK TENNANT, RICHARD HODGES, LINDA L. CARTER AND TERRY JONES' MOTIONS TO DISMISS**

Before the Court are Defendants' Motions to Dismiss, filed February 9, 2018. (Case No. 17-1241, ECF No. 55; Case No. 17-2756, ECF No. 52; Case No. 17-2757, ECF No. 53; Case No. 17-2802, ECF No. 48.)[1] In their Motions, Defendants City of Millington Police Department Chiefs Ray Douglas, Rita Stanback and Frank Tennant ("Chiefs"); Defendants City of Millington Mayors Linda Carter, Richard Hodges and Terry Jones ("Mayors") (collectively, "Individual Defendants"); and Defendant City of Millington ("Millington") (collectively, "Defendants") argue that Plaintiffs Ginny Humphrey ("Humphrey"), Angel Gipson ("Gipson"), Debbie Allard ("Allard") and Barry Martindell ("Martindell") (collectively, "Plaintiffs") have failed to establish that Defendant Rickie Friar ("Friar") acted "under color of state law" when he sexually abused their minor children, an essential element of their § 1983 claims against him. Defendants also argue that Plaintiffs' Complaints fail to allege sufficient facts to plausibly state either a cause of action against Millington for municipal liability pursuant to § 1983, or against the Individual Defendants for supervisory liability under § 1983, in part because the Individual Defendants are entitled to qualified immunity from Plaintiffs' claims. Finally, Defendants argue that Tennessee recognizes no private right of action to enforce provisions of the Tennessee Constitution that Plaintiffs raise in their Complaints, and that the Tennessee Governmental Tort Liability Act exempts Millington and the Individual Defendants from liability for Friar's tortious actions, which causes of action the Plaintiffs plead in the alternative.

[1] At the status conference held on June 14, 2018, the Court noted that these four cases would be consolidated at least through discovery. (See, e.g., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 83.) As such, this Order constitutes the Court's ruling on the Motions to Dismiss pending in all four cases.

Plaintiffs responded to the Motions, (Case No. 17-1241, ECF No. 64; Case No. 17-2756, ECF No. 61; Case No. 17-2757, ECF No. 62; Case No. 17-2802, ECF No. 57), and Defendants replied, (Case No. 17-1241, ECF Nos. 68, 69; Case No. 17-2756, ECF No. 65, 66; Case No. 17-2757, ECF No. 66, 67; Case No. 17-2802, ECF No. 61, 62). For reasons described herein, the Defendants' Motions to Dismiss are hereby **GRANTED**.

## BACKGROUND

The following facts are taken from Plaintiffs' Complaints and accepted as true for the purpose of these Motions:

These cases arise out of Friar's sexual exploitation and abuse of children. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at 1.)[2] Friar was employed as a Reserve Police Officer in the City of Millington Police Department ("MPD") when he befriended Plaintiffs' families and—eventually entrusted with recreational outings and overnight childcare—sexually exploited and abused their minor children. (Id. at ¶¶ 12, 19, 20.) Each of the Plaintiffs in these four cases represents one or more of the minor children whom Friar abused.

Friar first met Plaintiffs Humphrey and her minor daughter, O.H., in 2013 at a neighborhood gathering. (Id. at ¶ 35.) During that gathering, Friar took pictures of neighborhood children while they were handcuffed in the back of an

MPD squad car. (Id.) A few days afterward, he visited Humphrey's home and several other homes in the neighborhood, distributing copies of the photos to the children's parents. (Id.) During this tour, Friar was wearing his MPD uniform and was accompanied by another MPD

[2] Plaintiffs' Complaints are substantially similar. For ease of reference, unless otherwise indicated, the Court generally cites only Humphrey's Second Amended Complaint.

officer. (Id.) Friar spoke with parents and children and introduced himself as "a veteran law enforcement officer." (Id.)

Friar first met Plaintiff Gipson's ex-husband and their daughter, B.W., in 2013 while swimming at the YMCA of Millington ("YMCA"). (Pl. Gipson's Second Am. Compl., Case No. 2:17-cv-02756-SHL-cgc, ECF No. 49 at ¶ 35.) Gipson alleges that Friar also visited her ex-husband's neighborhood and the children who lived there, took their photos in a police cruiser, and visited the families in the neighborhood to distribute copies of the photos with a fellow officer. (Id. at ¶ 36.)[3]

Over time, Friar developed personal relationships with Plaintiffs. For example, "[a]fter gaining [Humphrey]'s trust," he began to buy gifts for Humphrey and O.H., gave them money, and, at some point, bought Humphrey a car. (Id. at ¶ 38.) Friar pursued a friendship with B.W.'s father, and, "[s]oon, the two men were friends and spending time together at the YMCA pool during the visitation time that [Gipson's] ex-husband exercised with B.W." (Pl. Gipson's Second Am. Compl., Case No. 2:17-cv-02756-SHL-cgc, ECF No. 49 at ¶ 35.) Friar met B.S., C.M. and A.M. through their friendships with the other victims. (Pl. Allard's Second Am. Compl., Case No. 2:17-cv-02757-SHL-cgc, ECF No. 50 at ¶¶ 31, 35; Pl. Martindell's Second Am. Compl., Case No. 2:17-cv-02802-SHL-tmp, ECF No. 45 at ¶¶ 31, 36.)

Eventually, Friar offered to babysit for the families. "Friar held himself out in the neighborhood as a grandfather figure . . . . Over time, [the] minor children were invited to spend the night with Friar at his home." (See, e.g., Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 39.)

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[3] It is unclear whether this visit was the same occasion mentioned in Humphrey's Second Amended Complaint.

It was while "babysitting" that Friar sexually assaulted and exploited the children. (See, e.g., id. at ¶ 40.) Plaintiffs allege that Friar "maintained a large arsenal of weapons at his home, including MPD police gear, which he kept out in plain sight . . . to intimidate [the] minor victims into performing sexual acts." (See, e.g., id. at ¶ 42.) Humphrey adds that he "used a City of Millington Police car and handcuffs, and uniform issued by the MPD, to intimidate" her and her daughter. (Id. at ¶ 43.) Allard alleges that Friar "made various threats to frighten B.S. into performing sexual acts based on his authority as a law enforcement officer." (Pl. Allard's Second Am. Compl, Case No. 2:17-cv-02757-SHL-cgc, ECF No. 50 at ¶ 45.) And Martindell alleges that Friar "chased C.M. and another victim throughout his home and frightened the young girls while playing a game he called, 'Cops.'" (Pl. Martindell's Second Am. Compl., Case No. 2:17-cv-02802-SHL-tmp, ECF No. 45 at ¶¶ 41.)

Plaintiffs also allege that Friar exploited his position in other ways. Humphrey, for example, alleges that, in 2013, Friar leveraged his position as a Reserve Officer to avoid being ticketed for allowing O.H. to drive his vehicle while sitting in his lap. (See, e.g., Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 47.)[4] Plaintiffs allege that Friar "took children to the firing range and other places that he was granted access based on his law enforcement authority." (See, e.g., id. at ¶ 34.) Martindell alleges that his grandchildren, C.M. and A.M., "spent time with Friar while he performed his 'official duties' as an MPD police officer, such as directing traffic for festivals and city events." (Pl. Martindell's Second Am. Compl., Case No. 2:17-cv-02757-SHL-tmp, ECF No. 45 at ¶ 34.)

[4] B.W. was also in the vehicle. (Pl. Gipson's Second Am. Compl., Case No. 2:17-cv-02756-SHL-cgc, ECF No. 49 at ¶ 45.)

Plaintiffs further allege that Friar "used his position as a Millington Reserve Police Officer to gain access to the YMCA," where he had been stationed by the City of Millington, to take "inappropriate pictures of O.H. and other minor children in the YMCA pool."[5] (See, e.g., Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 49, 50, 55.) Plaintiffs contend that Friar "falsified documents at the YMCA and purposely gave inaccurate information to YMCA staff in order to bring children, who were unrelated to him, to the YMCA facility, in violation of YMCA policy."[6] (See, e.g., id. at ¶ 52.) Plaintiffs simultaneously allege that the YMCA allowed Friar to violate its policy "because of his status as an MPD reserve officer." (See, e.g., id. at ¶ 53.)

In 2014, Michelle Brown, Humphrey's stepmother, called the MPD and requested a background check on Friar, "to assuage her suspicions of possible pedophilia." (Id. at ¶ 64.) She was told that "MPD records did not reveal any misconduct." (Id. at ¶¶ 64, 65.)

In 2015, however, a federal grand jury indicted Friar for knowingly transporting a minor across state lines with the intent to engage in sexual activity, production of child pornography and possession of a computer containing child pornography. (Id. at ¶ 28.) The following year, he entered a guilty plea and was sentenced to twenty-six years in federal prison, to run concurrently with his sentences for rape of a child and aggravated sexual battery under Tennessee state law. (Id. at ¶¶ 28, 29.)

Plaintiffs complain that Friar's "proclivity [for] improper sexual contact toward females," whom they allege were minors, should have been apparent to Millington. Plaintiffs cite the "public record" of Friar's termination from the Shelby County Sheriff's Office, which Plaintiffs'

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[5] This allegation is pled "upon information and belief." (Id.)

[6] Again, this allegation is pled "upon information and belief." (Id.)

counsel obtained prior to filing their Complaints.[7] According to Plaintiffs, this "easily accessible" record indicates that Friar was terminated for "improper sexual conduct" and "misconduct of a sexual nature" with "female prisoners" between August 1974 and October 1981. (Id. at ¶¶ 11, 12(b)(1), 15, 18.)[8] Plaintiffs further cite incomplete hiring records they received in response to a records requests to Millington, including unsigned, potentially inaccurate applications and un-notarized forms, and they allege that the MPD failed to collect documentation required under Tennessee law and Tennessee Peace Officer Standards and Training Commission ("POST") regulations. (Id. at ¶¶ 12, 14, 16.)[9] In addition, an application

[7] "[A]s a general rule, matters outside the pleadings may not be considered in ruling on a 12(b)(6) motion to dismiss unless the motion is converted to one for summary judgment." In re Fair Finance Co., 834 F.3d 651, 656 n.1 (6th Cir. 2016). However, one exception to this general rule involves documents that are "referred to in the pleadings" and are "integral to the claims" or "central to the claims." Id.; Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008). External matters are "central to the claims" when a plaintiff incorporates them by reference into the complaint and quotes from them extensively. In re Fair Finance Co., 834 F.3d at 656 n.1. Another exception is that the Court may consider "public records." Bassett, 528 F.3d at 430; cf. McLaughlin v. CNX Gas Co., 639 F. App'x 296, 298–99 (6th Cirt. 2016) ("Likewise, we may consider matters of public record in deciding a motion for judgment on the pleadings."). This sort of information may "fill in the contours of Plaintiffs' Complaint without refuting it." Steinberg v. Fed'l Home Loan Mortg. Corp., 901 F. Supp. 2d 945, 951 (E.D. Mich. 2012).

[8] The Parties disagree about the nature of Friar's employment record prior to his service with the MPD. Specifically, Defendants dispute that the public record of Friar's termination from the Shelby County Sheriff's Office has anything "to do with allegations of sexual assault, much less sexual assault or abuse of minors." (Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 597; Ex. 1 to Defs.' Answer, id., ECF No. 29-1 at PageID 220 ("Rick Friar was not conducting his Sheriff's Dept. business properly in taking offense reports and in transporting prisoners and sto-ping [sic] at a females [sic] residence. DISPOSITION: TERMINATED.").) Nonetheless, for the purpose of resolving the instant motions, the Court will disregard Defendants' allegations that contradict Plaintiff's factual assertions. Cf. Theunissen, 935 F.2d at 1459 (discussing the standard for dismissal pursuant to Fed. R. Civ. P. 12(b)(2)).

[9] Documentation that POST regulations require includes "completed" applications, fingerprints, a physical examination, a psychological examination, and "a thorough investigation" of the applicant's moral character. (Id. at ¶ 14.) However, Plaintiffs' Complaints also suggest that at least some of this documentation may have been collected. (See, e.g., id. at ¶ 12 (noting that MPD has produced records of Defendant Stanback's request to the Tennessee

submitted to the MPD in 2007 suggested that Friar may have been terminated from his prior employment. (Id. at ¶ 12(b)(5)(a).) Plaintiffs assert that these documents "raise questions regarding the record keeping of the City of Millington and the MPD" and the steps taken "to ensure that Friar met the minimum qualifications to serve as a reserve [officer]." (Id. at ¶ 13.)

Plaintiffs further claim that, pursuant to Tenn. Code Ann. § 38-8-101 et seq., the Mayors and Chiefs had a legal duty to ensure that Friar underwent eighty hours of POST-compliant training; that, pursuant to POST regulations, they should have "paired [Friar] with a field training officer or certified officer" until he completed this eighty-hour training regimen; and that they failed collectively in this regard. (Id. at ¶¶ 14–19.)[10] Based on these facts, Plaintiffs conclude that Millington and the Individual Defendants acted "with deliberate indifference," to both "the rights of the citizens of" Millington and Millington's "obligations to properly hire, investigate, train, and supervise its officers" by hiring Friar, who then sexually abused their children. (Id. at ¶¶ 15, 19.)

Additionally, Plaintiffs allege that Millington and the Individual Defendants were aware of Friar's previous sexual exploits, and that they should have immediately investigated and fired him on the basis of that knowledge. Specifically, Plaintiffs contend that another MPD reserve officer heard from a former Chief Deputy at the Shelby County Sheriff's Office that Friar was terminated for "sexual misconduct with young girls." (Id. at ¶ 22.)[11] The unnamed reserve

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Bureau of Investigation for a background check of Friar, Friar's fingerprint card and his psychological evaluations).)

[10] Plaintiffs separately acknowledge, however, that public records revealed "a document . . . which avers that [Friar] completed 40 hours of Millington Reserve In-Service Training in 2010, 2011, 2012, 2013 and 2014" and "[v]arious training certificates." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 12(a)(6), 12(b)(13).)

[11] Defendants characterize these statements as hearsay. (ECF No. 55-2 at PageID 586; ECF No. 56-2 at PageID 623, 625.) "Whether the allegations in the complaint are based on

officer allegedly reported this information to Defendant Stanback, and the unnamed officer "continued to advise" her "on numerous occasions" of both what he had heard from the Chief Deputy as well as "his own personal observations of Friar's improper conduct towards young female children while on-duty." (Id. at ¶¶ 22, 23.)[12] Beyond this general characterization of the unnamed reserve officer's "personal observations," however, Plaintiffs do not define the conduct alleged in those reports. The unnamed reserve officer also expressed his concerns to Defendant Tennant, who succeed Defendant Stanback, and "ultimately reduced [his complaints] to writing" for Millington City Manager Ed Haley ("CM Haley"). (Id. at ¶¶ 25, 26.)[13] Moreover, a YMCA pool employee "told his parents" about Friar's "improper actions" and "inappropriate conduct" at the YMCA, and "[t]hereafter, Friar's actions were reported directly to the MPD." (Id. ¶ 58–59.) However, Plaintiffs also do not specify when either the unnamed reserve officer or the YMCA made these reports. (See generally id.)

Plaintiffs nevertheless conclude, based on the foregoing, that the Mayors "possessed sufficient information, including that of an eye witness [sic], to prevent" Friar from perpetrating sexual abuse on their minor children. (Id. ¶ 62.) They allege that, despite being "put on notice . . . as to crimes being perpetrated upon" the victims, and having "actual/or constructive knowledge of Friar's inappropriate actions," including "prior notice of the reckless, willful and wanton, deliberate and/or intentional actions of . . . Friar," Defendants nevertheless failed to investigate

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hearsay is not relevant to a motion under Rule 12(b)(6)." Polar Molecular Corp. v Amway Corp., No. 1:07-CV-40, 2007 WL 3473112, at *4 (W.D. Mich. Nov. 14, 2007).

[12] The unnamed reserve officer also advised Defendant Stanback of other allegedly illegal activity unrelated to the instant complaint. (Id. at ¶ 23.)

[13] Plaintiffs allege that other members of the department may have expressed similar concerns, "[u]pon information and belief." (Id. at ¶ 27.)

these reports and to "prevent Friar from causing further harm." (Id. at ¶¶ 59–62, 66.) Plaintiffs add that the Mayors failed altogether to "determine if an offense was committed; affect an arrest of the accused" or "[take] steps to . . . correct abuses of authority, or discourage the unlawful use of authority." (Id. at ¶¶ 63, 66.)

In addition to merely failing to remediate Friar's alleged misdeeds despite knowledge of them, Plaintiffs allege that Millington and the Individual Defendants effectively "encouraged" Friar's sexual abuse by assigning him to duty posts "where he would be in routine contact with minor children." Plaintiffs contend that these assignments helped to create a perfect storm, enabling Friar to gain Millington families' trust, particularly "single mothers without adequate financial means," and sexually exploit their children. (Id. at ¶¶ 32–34.)

Based on these allegations, Plaintiffs brought causes of action under § 1983 against Friar, Millington and the Individual Defendants in both their official and individual capacities.[14] Furthermore, Plaintiffs bring causes of action under state law, in the alternative. Counts I of the Complaints allege that Friar violated § 1983 when he sexually abused Plaintiffs' minor children. (Id. at PageID 532–33.) Counts II allege that Millington and the Individual Defendants are liable to the Plaintiffs under § 1983. (Id. at PageID 533–39.) Counts III claim that Friar violated Article I, Sections 7, 8 and 35 of the Tennessee Constitution; Counts IV allege that Millington is likewise liable to Plaintiffs under this same theory. (Id. at PageID 539–40.) Then, Counts V of

[14] Defendants argue, and Plaintiffs concede, that "official capacity claims against the Individual Defendants are redundant and tantamount to clams [sic] against [Millington] and are due to be dismissed." (Def. City's Mot. to Dismiss, Case No. 2:17-cv-02741, ECF No. 55 at ¶ 6; Pls.' Joint Mem. in Opp. to Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741, ECF No. 64-1 at PageID 978.) Indeed, "[a] suit against an individual in his official capacity is the equivalent of a suit against the governmental entity." Brindley v. Memphis, No. 17-cv-2849-SHM-dkv, 2018 WL 3420819, at *8 n.6 (W.D. Tenn. July 13, 2018) (quoting Matthews v. Jones, 35 F.3d 1046, 1049 (6th Cir. 1994)) (internal quotation marks omitted). The Court thus construes Plaintiffs' Complaints to allege claims for relief against (a) Millington and (b) the Individual Defendants in their individual capacities, and the Court evaluates these motions accordingly.

the Complaints allege that Millington and the Individual Defendants are jointly and severally liable for Defendant Friar's actions and omissions under a panoply of tort theories, including "assault . . . battery, false arrest, false imprisonment, negligence, negligent infliction of emotional distress, [and] intentional infliction of emotional distress." (Id. at PageID 540–41.)

## STANDARDS OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of the rule is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). While Rule 8 does not require detailed factual allegations, a pleading must include more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and should nudge a plaintiff's claims "across the line from conceivable to plausible." Twombly, 550 U.S. at 570. "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." Iqbal, 556 U.S. at 678.[15]

[15] Plaintiffs ask the Court to apply a relaxed standard here. The case on which they principally rely, Petty v. County of Franklin, suggested that motions to dismiss § 1983 claims are subject to special scrutiny and should ordinarily be denied unless no set of facts consistent with the allegations would entitle the plaintiff to relief. See 478 F.3d 341, 348 (6th Cir. 2007); see also Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (establishing the "no set of facts" standard), abrogated by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Plaintiffs argue that "numerous cases [] have found that allegations far less detailed than those in Plaintiffs' Complaint . . . survived a Motion to Dismiss." (Pls.' Joint Mem. in Opp. to Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 973–77.) Petty, however, pre-dates the Supreme Court's landmark decisions in Twombly and Iqbal and has been expressly disavowed as inconsistent with these "more recent and precedentially superior decisions." Bailey v. Ann Arbor, 860 F.3d 382, 388–89 (6th Cir. 2017). Plaintiffs respond by relying on Estate of Romain v. City of Grosse Point Farms, which collects opinions from other Sixth Circuit district courts who have followed Petty when resolving Rule 12(b)(6) motions, notwithstanding Twombly and Iqbal. See No. 14-12289, 2015 WL 1276278, at *17 (E.D. Mich. Mar. 18, 2015 (citing Stack v. Karnes, 750 F. Supp. 2d 829, 899 (S.D. Ohio 2010); Medley v. City of Detroit, No. 07-15046,

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." DirecTV, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007). Courts also generally disregard factual allegations made by the party seeking dismissal that contradict the plaintiff's assertions. Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991). While courts accept as true the factual allegations in the complaint when evaluating a motion to dismiss, they "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (internal quotation marks and citation omitted). Where this inquiry demonstrates, in toto, that "the well-pleaded facts [] permit the court to infer more than the mere possibility of misconduct," the complaint will survive a motion to dismiss. See Iqbal, 556 U.S. at 679.

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2008 WL 4279360, at *7–8 (E.D. Mich. Sept. 6, 2008)). Plaintiffs thus invite the Court to apply relaxed pleading standards to resolve this motion. While plausibility plays out differently in different factual settings, the Court is obligated to follow that standard, given Twombly and Iqbal. Accordingly, Plaintiffs must support their claims with factual allegations sufficient to raise their rights to relief "above the speculative level" to survive these motions. Twombly, 550 U.S. at 555.

Also pending before the Court are Plaintiffs' motions seeking discovery from Millington and the Individual Defendants before the Court considers Defendants' Motions to Dismiss. (Case No. 2:17-cv-02741-SHL-dkv, ECF No. 63; Case No. 2:17-cv-02756-SHL-cgc, ECF No. 60; Case No. 2:17-cv-02757-SHL-cgc, ECF No. 61; Case No. 2:17-cv-02802-SHL-tmp, ECF No. 56.) Plaintiffs style these motions as a "Joint Rule 56(d) Motion to Delay Consideration of Motion for Summary Judgment until Appropriate Discovery Can Be Completed." Rule 56 does not apply to motions to dismiss, see generally Fed. R. Civ. P. 56, so the Court construes Plaintiffs' motions as requesting discovery ahead of this Order. However, under the standards set forth above, Plaintiffs are not entitled to any discovery if the allegations in the Complaints, taken as true, are insufficient to plausibly establish their rights to relief. See Iqbal, 556 U.S. at 678–79. Therefore, given the Court's ruling in this Order, those motions are **DENIED**.

## ANALYSIS

The issue before the Court is not whether Plaintiffs have been grievously injured—perhaps no question could have a more obvious answer. Rather, the Court is presented with Plaintiffs' civil rights claims against Defendants, to which the Court must faithfully apply familiar principles of federal jurisprudence. Section 1983 authorizes private parties to enforce their federal constitutional rights against municipalities, government officials and other defendants acting "under color of state law." 42 U.S.C. § 1983. To prevail on a § 1983 claim, a plaintiff generally must demonstrate (1) a deprivation of a constitutional right (2) by a person acting "under color of state law." Id. The Court begins by analyzing Defendants' arguments for dismissal of the 1983 claims against Friar, Millington and the Individual Defendants before turning to an examination of the arguments for dismissal of the state law claims.

### I. Section 1983 Claim against Friar

At the outset, Defendants appear to concede that Friar's heinous acts of sexual abuse and exploitation violated Plaintiffs' minor children's constitutional rights. Millington and the Individual Defendants challenge only the notion that Friar acted under color of state law before arguing for dismissal of the claims brought against them. (See generally Mem. of Law in Supp. of Def. Millington's Mot. to Dimiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 589–601.) However, if the other elements of the cause of action are not met, the claim may still be dismissed because "[t]he parties themselves may not stipulate to legal conclusions." Neuens v. City of Columbus, 303 F.3d 667, 671 (6th Cir. 2002).

Examining the "deprivation of constitutional right" element first, even though Defendants appear to have conceded this point, substantive due process does guarantee "a clearly established [individual] right . . . to personal security and to bodily integrity." Doe v. Claiborne Cty., 103 F.3d 495, 507 (6th Cir. 1996). Moreover, "[i]f the 'right to bodily integrity' means anything, it

certainly encompasses the right not to be sexually assaulted under color of law. . . . no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause." Id. To support this claim against Friar, Plaintiffs allege that he "forced O.H. to touch his penis and watch him masturbate"; "gave O.H. access to his iPad which contained material including sexually explicit photos of himself and his other victims"; "coerce[d] O.H. to undress and shower with him at his home"; and "took pictures of O.H. in the nude and in various stages of undress." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 41, 44–46.) Therefore, Plaintiffs' allegations are sufficient to establish the first element at this stage of the litigation.[16]

Defendants do challenge the "under color of state law" requirement under Section 1983, characterizing Friar's conduct as "purely personal and private." (See, e.g., Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 595.) They cite numerous cases in which courts have determined that defendants were not acting under color of state law when pursuing private interests, arguing that the lack of state action dooms Plaintiffs' Complaints against all Defendants. (Id. at PageID 596; id., ECF No. 56-2 at PageID 613–15.)

[16] However, as for the allegation that Friar took "inappropriate pictures" of the minor children "in violation of YMCA policy," and that his "status as an MPD reserve officer" enabled him to falsify documents "in order to bring children, who were unrelated to him, to the YMCA," which made this form of abuse possible, these allegations do not form the basis of a constitutional violation. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-02741-SHL-dkv, ECF No. 52 at ¶¶ 52–53, 55.) Defendants point out that these actions "violate[] neither the federal constitution [sic] nor state law," and they are correct. (See, e.g., id., ECF No. 55-2 at PageID 598 n.9.) While the Constitution protects individuals from sexual abuse perpetrated by anyone acting under color of state law, photographing Plaintiffs' minor children in public and giving false information to YMCA staff to gain access to the facility while the Plaintiffs' minor children were with him are not constitutional violations. Plaintiffs cite no authority to the contrary, and the Court finds none.

Plaintiffs disagree, however, arguing that off-duty officers act under color of state law when they "utilize" police authority in the course of private conduct and when they use their positions to foster trust with victims. (Pls.' Joint Mem. of Law in Opp. to Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-2 at PageID 997.) In support of their claims, Plaintiffs contend that off-duty manifestations of authority may constitute state action. See, e.g., Stengal v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) (concluding that an off-duty, out-of-uniform police officer in a barroom altercation acted under color of state law when he injured the plaintiffs because, in part, he used mace and a service weapon that his department had issued to him during the scuffle). They also argue that the "tender years" of the minor victims is a "critical fact" that supports a finding that Friar acted "under color of state law" because "Plaintiffs' minor children could not differentiate between Friar as a police officer versus a citizen" under the circumstances. (Pls.' Joint Mem. of Law in Opp. to Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-2 at PageID 995–96.)

Acting "under color of law" occurs when officers "undertake to perform their official duties," but not when they act "in the ambit of their personal pursuits." Screws v. United States, 325 U.S. 91, 111 (1945). While many situations fall into one category or the other, there are also many § 1983 suits that fall into the gray area between these two poles. Whether the wrongdoer could have behaved the way that he did without the authority of his office, whether he was "aided by" his position and whether the action was "made possible" by his position are all relevant considerations. See Waters v. City of Morristown, 242 F.3d 353, 359 (6th Cir. 2001) (citing, inter alia, West v. Adkins, 487 U.S. 42, 49–50 (1988)).

In addition, coercion based on police authority may be sufficient to create § 1983 liability. A victim's knowledge that a defendant is a police officer alone may not be enough to "convert the actions [an officer] took in the pursuit of his private interests into action taken under

color of state law," Roe v. Humke, 128 F.3d 1213, 1217 (8th Cir. 1997),[17] but courts have suggested that an officer may be liable under § 1983 when he takes affirmative steps to intimidate a victim or compel their cooperation by invoking his status as a police officer. See id. at 1218 (Arnold, C.J., dissenting) (finding officer's attempt to intimidate plaintiff from patrol car significant); see also Pickard v. City of Gerard, 70 F. Supp. 2d 802, 806 (N.D. Ohio 1999) (invocation of police authority sufficient to convert "purely private action" into action under color of state law); Linthicum v. Johnson, No. 1:02-cv-480, 2006 WL 1489616, *25 (S.D. Ohio May 26, 2006) (finding "mental intimidation" and "mental coercion" significant). Cf. Mooneyhan, 1997 WL 685423, at *5 (6th Cir. Oct. 29, 1997) (finding that officer "did not resort to any authority as a police officer" significant); Wilborn, 2011 WL 5517184, at *7 (W.D. Tenn. July 29, 2011) (finding that actor did not use his authority to coerce plaintiff significant).

Here, Plaintiffs' allegations, other than those involving the YMCA, are sufficient to withstand Defendants' motions to dismiss. Plaintiffs allege that Friar used his status as a police officer and his MPD police gear to intimidate them. Allard specifically alleges that Friar made

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[17] For this reason, the Court finds less compelling Plaintiffs' arguments that Friar was able to befriend the victims, and subsequently violate their constitutional rights, solely because he was employed as a reserve police officer. (See, e.g., Pls.' Joint Mem. of Law in Opp. to Defs.' Mots. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-2 at PageID 996–97.) See also Burris v. Thorpe, 166 F. App'x 799, 802 (6th Cir. 2006) (although plaintiff "may have been attracted to [the defendant officer] in part because he was a police officer," their long-term relationship weighed against a finding that the officer acted "under color of state law"); Waters, 242 F.3d 353 ("Because of the close personal relationship [between the parties] . . . , he would have been in the same position to harass and abuse [the plaintiff] even if he had not been a city alderman."); Mooneyhan v. Hawkins, No. 96-6135, 1997 WL 685423, at *4–5 (6th Cir. Oct. 29, 1997) (defendant "would have been in the same position had he not been a police officer" due to his ten-month friendship with victim, despite the initial suggestion that "she could trust him"); Wilborn v. Payne, No. 09-2545, 2011 WL 5517184, at *6 (W.D. Tenn. July 29, 2011) (facts suggesting that the parties "were not strangers and were perhaps even friends" weighed against a finding that the defendant acted under color of state law); Harmon v. Grizzel, No. 1:03-cv-169, 2005 WL 1106975, *7 (S.D. Ohio Apr. 21, 2005) (finding no state action where an officer "used his personal relationship" to lure plaintiff into a vulnerable position).

threats to B.S. "based on his authority as a law enforcement officer." (Pl. Allard's Second Am. Compl., Case No. 2:17-cv-02757-SHL-cgc, ECF No. 50 at ¶ 41.) Moreover, Humphrey alleges that Friar displayed his weapons and MPD police gear "to intimidate [O.H.] and his other minor victims into performing sexual acts." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-cgc, ECF No. 52 at ¶ 42.) Plaintiffs thus plausibly allege that Friar acted under color of state law when he sexually abused their minor children.

Although these facts fall within the "gray area" between state action and private pursuits, the allegations of the Complaints push Plaintiffs' claims against Friar "across the line from conceivable to plausible" and are sufficient to "unlock the doors of discovery." Twombly, 550 U.S. at 570; Iqbal, 556 U.S. at 678. While the "under color of state law" determination has been characterized as a question of law, Neuens v. City of Columbus, 303 F.3d 667, 670 (6th Cir. 2002), development of the record is often necessary to properly resolve the legal inquiry. Significantly, most, if not all, of the cases cited in the briefing were resolved on motions for summary judgment—not motions to dismiss. Compare Burris v. Thorpe, 166 F. App'x 799 (6th Cir. 2006) (affirming district court's grant of summary judgment to defendant-appellees); Waters v. City of Morristown, 242 F.3d 353 (6th Cir. 2001) (affirming district court's grant of summary judgment to defendant-appellees); Mooneyhan v. Hawkins, No. 96-6135, 1997 WL 685423, at *1 (6th Cir. Oct. 29, 1997) (affirming district court's grant of summary judgment to defendant-appellees); Roe v. Humke, 128 F.3d 1213 (8th Cir. 1997) (summary judgment); and Wilborn v. Payne, No. 09-2545-STA-dkv, 2011 WL 5517184, at *1 (W.D. Tenn. July 29, 2011) (granting defendant's motion for summary judgment); with Kelly v. City of Sterling Heights, No. 90-1895, 1991 WL 207548, at *1 (6th Cir. Oct. 16, 1991) (affirming district court's dismissal of plaintiffs' amended complaint).

Concluding, then, that Plaintiffs have properly alleged a § 1983 claim against Friar for sexually abusing their minor children, the Court turns next to an analysis of the claims against Millington.

**II. Section 1983 Claims against Millington**

Millington argues that Plaintiffs' Complaints "fail[] to allege specific facts that allow the Court reasonably to infer a direct causal link between a municipal policy or custom and the alleged violation of [the minor children's] constitutional rights such that the City's deliberate conduct can be deemed the moving force behind the violation." Specifically, Millington contends that Plaintiffs have not plausibly established the existence of municipal policies or customs of failing to screen, investigate complaints about, discipline, train or supervise its officers that caused Friar's abuse of Plaintiff's minor children. (Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55 at ¶¶ 3–5.) In essence, Millington contends that Plaintiffs seek to hold it liable under § 1983 merely because it employed Friar. (Id. at ¶ 2.)

Plaintiffs incorporate by reference their arguments in their Responses to Millington's Motion for Judgment on the Pleadings, (ECF Nos. 34, 49). There, they argued that municipal liability is established in five possible ways, including that: (1) there was an express or official municipal policy that directs MPD officers to violate Millington citizens' constitutional rights; (2) there was a "widespread practice [in Millington] 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"; (3) the decisions of persons with final policy-making authority create liability; (4) there was a failure to act in the face of inadequate training, supervision and hiring, and Millington's "failure to adopt policies necessary to prevent constitutional violations," is "so likely to result in the violation of constitutional rights, that the policymaker . . . can reasonably

be said to have been deliberately indifferent to the [plaintiff's rights]"; or (5) ratification of unconstitutional conduct resulted from failing to investigate or punish. (Pls.' Joint Resp. to Defs.' Mot. for J. on the Pleadings, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 49 at PageID 469.)

Plaintiffs essentially contend that, "[b]ased on a cursory review" of their Complaints, large portions of which they include verbatim in their Responses to Millington's Motion, it is self-evident that the Court should deny Millington's Motion to Dismiss on any of these theories. (Pls.' Joint Resp. in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64 at PageID 969.) Plaintiffs rely on Conley's "no set of facts" pleading standard[18] and a trio of district court cases to suggest that their pleading burden here is low, while inversely inviting the Court to subject Millington's Motion to Dismiss to careful scrutiny because these are civil rights cases. (Id. at PageID 957–58.) See Conley, 335 U.S. at 45–46; see also Mercado v. Kingsley Area Schs./Traverse City Pub. Schs. Adult Educ. Consortium, 727 F. Supp. 335 (W.D. Mich. 1989); Mahoney v. Nat'l Org. for Women, 681 F. Supp. 129 (D. Conn. 1987); U.S. General, Inc. v. Schoeder, 400 F. Supp. 713 (D. Wis. 1975).

Plaintiffs' argument correctly references the five ways in which municipal liability may be established. A § 1983 plaintiff can establish such liability with evidence of: (1) a "policy statement, ordinance, regulation, or decision officially adopted and promulgated" by a municipality's local governing body that gives rise to the constitutional violation, Monell, 436 U.S. at 690; (2) a municipal "'custom' even though such a custom has not received formal approval through . . . official decisionmaking channels" that causes the constitutional injury, id. at 691; (3) a municipality's ratification of an unconstitutional act by the municipality's failure to

[18] Plaintiffs are in error. The Complaints must satisfy the Twombly/Iqbal plausibility pleading standard to withstand Millington's Motion to Dismiss. See supra at 11 n.15.

investigate the act, despite actual or constructive knowledge of it, see Leach v. Shelby Cty. Sheriff, 891 F.2d 1241, 1247–48 (6th Cir. 1989); (4) a municipal policy of inadequate training or supervision that yields a rights violation, City of Canton, 489 U.S. at 389–90; or (5) a municipality's inadequate screening of employment applicants that has a direct link to the plaintiff's constitutional harm, see Brown, 520 U.S. at 411–12.

The level of culpability required for municipal liability claims under these theories is much greater than ordinary negligence. Virtually every § 1983 plaintiff "will be able to point to something the city 'could have done' to prevent" the harm giving rise to his or her claim. City of Canton, 489 U.S. at 392 (citing Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) (plurality opinion)). However, § 1983 plaintiffs seeking to impose municipal liability must establish "deliberate indifference," a "stringent standard of fault" that requires § 1983 plaintiffs to show that "a municipal actor disregarded a known or obvious consequence of his action." Brown, 520 U.S. at 410. Although deliberate indifference does not require "direct participation in or encouragement of" unconstitutional or illegal conduct, it requires a showing of an affirmative, "deliberate or conscious" choice of, as to some theories, a final decision-maker or policy-maker for the municipality to be liable. Canton, 489 U.S. at 389 (quoting Pembaur, 475 U.S. at 483–84 (internal quotation marks omitted)); Praprotnik, 485 U.S. at 127 (discussing Pembaur); Essex v. Cty. of Livingston, 518 F. App'x 351, 355 (6th Cir. 2013) (citing Heyerman v. Cty. of Calhoun, 680 F.3d 642, 648 (6th Cir. 2012)). Specifically, as to training, supervision and other policy issues, a plaintiff must demonstrate that a municipality acted with "'deliberate indifference' to the rights of its inhabitants," City of Canton, 489 U.S. at 389, by showing "'a deliberate choice to

follow a course of action [that] is made from among various alternatives' by city policymakers," id. (quoting Pembaur, 475 U.S. at 483–84).[19]

The Court analyzes Plaintiffs' claims against the backdrop of the five municipal liability theories on which they rely.

**A. Official Policy or Legislative Enactment**

Millington argues that Plaintiffs' allegations, even taken as true, do not plausibly establish that Millington has "a policy of allowing sexual assaults upon minors by its officers." (Def. Millington's Mem. of Law in Supp. of Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 597.) Plaintiffs counter essentially that it is self-evident, based on the allegations in their Complaints, that Millington is liable under this theory: "A cursory review of the Complaint makes it clear that Plaintiffs have made the appropriate allegations to assert a

[19] Regarding the decision-maker issue, Plaintiffs allege that all of the Individual Defendants were "final decision maker[s]" for Millington. (See, e.g., Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 3, 4.) However, federal courts determine who is a decision-maker (or policy-maker) by reference to state law—whether there was "a legislative enactment [conferring authority to make policy] or . . . [delegation of such authority] by an official who possesses such authority"—and a final policy-maker or decision-maker is one whose "discretionary decisions are [un]constrained by policies not of that official's making." Praprotnik, 485 U.S. at 124, 127 (discussing Pembaur, 475 U.S. at 481–84). Although the Court need not accept Plaintiffs' legal conclusions as facts for purposes of resolving the instant motion, Iqbal, 556 U.S. at 678, the Mayors, without doubt, were and are final decision-makers, and thus policy-makers for Millington. See 2012 Tenn. Priv. Acts ch. 58 (Charter for the City of Millington, Tenn. art. IV, § 4.10) (Mayors are executive heads of Millington); 2012 Tenn. Priv. Acts ch. 58 (Charter for the City of Millington, Tenn. art. IV, § 4.01) (Mayors are members of Millington's governing body).

However, there is some question as to whether the Chiefs were final decision-makers. The City Manager and Public Safety Officer both have express statutory authority related to hiring, firing and training. See City of Millington, Tenn. Muni. Code, tit. 4, ch. 1, § 4-103 (2017); City of Millington, Tenn. Muni. Code, tit. 6, ch. 1, § 6-102 (2017). Because the City Manager and Public Safety Director have express statutory authority over personnel matters that supersedes hiring, firing and training decisions at the departmental level, there is a question as to whether the Chiefs are final decision-makers. However, given the Court's resolution of these issues, this question need not be decided.

claim for municipal liability against the City of Millington to survive its Motion to Dismiss." (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. for J. on the Pleadings, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 49 at PageID 471.) They insist that their allegations identify a number of municipal policies that violated Plaintiffs' minor children's constitutional rights, and that they bear no additional burden without discovery. (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 978.)

The Court disagrees. To state a claim for municipal liability under § 1983 pursuant to this theory, a plaintiff must demonstrate that a "decision[] of [the municipality's] duly constituted legislative body" or "policies 'officially adopted or established through the decision-making channels'" resulted in a deprivation of constitutional rights. Brown, 520 U.S. at 403; Sweat v. Butler, 90 F. Supp. 3d 773, 780 (W.D. Tenn. 2015) (quoting Doe, 103 F.3d at 507)). Plaintiffs have not alleged any facts that any legislative enactment, ordinance or other officially adopted policy of Millington plausibly led to, caused or resulted in Friar's sexual abuse of the victims. To the contrary, Millington's municipal code requires police officers and reserve police officers to "preserve law and order within the city." City of Millington, Tenn. Muni. Code, tit. 6, ch. 1, §§ 6-202, 6-208 (2017). The ordinance does not command reserve policemen to summarily sexually abuse minor children. See id.

Accordingly, Plaintiffs' Complaints do not plausibly state a municipal liability claim for relief pursuant to this theory.

**B. Unofficial Policy or Custom of Tolerating Constitutional Violations**

Here again, Millington argues that Plaintiffs' allegations, even taken as true, do not plausibly establish that Millington has "a policy of allowing sexual assaults upon minors by its officers." (Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 597.) Specifically, Millington posits that Plaintiffs'

Complaints fail to plausibly establish "the existence of a clear and persistent pattern of sexual abuse by Friar or other Millington employees [such that Mayors had] notice or constructive notice" of a widespread constitutional problem to which it would be deliberately indifferent to tacitly approve or ignore. (Id. at PageID 599.) Indeed, Millington maintains that Plaintiffs "do[] not allege any facts describing [Mayors'] observations [or knowledge] of Friar sexually abusing any minor" sufficient to plausibly conclude that any of them even had notice of a widespread pattern of abuses in the MPD. (Id. at PageID 600.)

Millington also argues that, even if the Mayors had knowledge of what led to Friar's termination from Shelby County, Plaintiffs' allegations would not establish that it was highly likely that Friar would sexually abuse their minor children in Millington. (Id. at PageID 597.) There is nothing in the Complaints, argues Millington, to suggest that it was "plainly obvious" that Friar would abuse the Plaintiffs' children, or that Millington was deliberately indifferent to a "known or obvious risk." (Id. at PageID 597–98.)

Plaintiffs counter that they have set forth sufficient facts to demonstrate that Millington has customs or policies of inadequate screening, training and supervision of police officers that manifested from the Individual Defendants' deliberate indifference and caused Plaintiffs' minor children's injuries. (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 974–75.) They contend that Friar's conduct occurring at all evidences the inadequacy of MPD's reserve officer training because Friar's sexual abuse of Plaintiffs' minor children was an obvious risk of his job, as indicated by his employment history, and therefore the Individual Defendants were deliberately indifferent to the children's rights by ignoring the risk. (See id. at PageID 974.) Moreover, Plaintiffs rely on Brown's discussion of City of Canton, 520 U.S. at 409 (citing 489 U.S. at 390 and n.10), for the proposition that "there is no need to prove a widespread pattern of improper behavior." (Pls.'

Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 974.)

Even in the absence of an official or enacted policy, a § 1983 plaintiff may establish municipal liability with a showing that an informal, yet city-sanctioned, policy or custom of tolerating rights violations caused the harm alleged. Under this theory of municipal liability pursuant to § 1983, "customs" include "persistent and widespread . . . practices of [municipal] officials" that, "[a]lthough not authorized by written law," nevertheless "could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." Monell, 436 U.S. at 691 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970)) (emphasis added) (internal quotation marks omitted). To survive a motion to dismiss, § 1983 plaintiffs must establish a pattern of claims similar to theirs when invoking this theory. See, e.g., Leach, 891 F.2d at 1248 (finding evidence of a municipal custom or policy from "numerous similar incidents" in the Shelby County Jail of failing to provide adequate medical care to fourteen paraplegic or otherwise infirm inmates (emphasis added)).

An isolated act of a final policymaker in the particular area of municipal government in which the rights violation occurs can give rise to a finding of an unconstitutional custom or policy. Brown, 520 U.S. at 409 (discussing Canton, 489 U.S. at 390 and n.10). But certain "unjustified" acts of subordinates, "without more," will not substantiate such a finding. Praprotnik, 485 U.S. at 123 (discussing, inter alia, Pembaur 475 U.S. at 480; Tuttle, 471 U.S. at 821, 830–31 & n.5 (Brennan, J., concurring); Owen v. City of Independence, 445 U.S. 622, 633, 655 & n.39 (1980)). Plaintiffs thus misread Brown, which provides that "a single violation of federal rights" can create municipal liability if it is "accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." 520 U.S. at 409 (emphasis added). That is, to rely only on Friar's

crimes against their minor children and survive the motion to dismiss, Plaintiffs would need to allege sufficient facts to show both (a) that reserve police officers babysitting Millington's children was a "recurring situation" presenting an "obvious potential" of sexual abuse of minors such that (b) Millington's inactivity in addressing the risk with training on the subject would amount to deliberate indifference to the minors' rights. Plaintiffs' Complaints, tragic though their stories are, fail to make such a showing.

The Complaints fail to allege facts that plausibly support the proposition that Millington adopted or embraced any persistent or widespread unconstitutional practices such that Friar's sexual abuse of Plaintiffs' minor children would be considered standard operating procedure in Millington. Plaintiffs fail to assert facts that plausibly establish a pattern of MPD inadequately investigating similar claims from which the Court could infer a de facto policy of city-sanctioned sexual abuse of minor children. Instead, Plaintiffs complain of the unjustified acts of a single municipal employee: Rickie Friar. This is not sufficient to state a claim against Millington as a whole.

Moreover, the Complaints fail to establish that Millington or the Individual Defendants were even aware of Friar's crimes against Plaintiff's children. Plaintiffs allege that CM Haley had knowledge of Friar's conduct when Friar worked for the Shelby County Sheriff's Department. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 26.) But the conduct in Shelby County did not cause the injuries giving rise to these Complaints, nor does it reflect a widespread pattern of misconduct at MPD over which any of the Individual Defendants had authority to remedy, even if they knew about it. Defendants Stanback

and Tennant[20] knew about Friar's misdeeds in Shelby County, but that conduct could not have predicted these acts.

These allegations are therefore insufficient to state a municipal liability claim under the "unofficial policy or custom" theory.

**C. Ratification of or Inaction Toward Known Unconstitutional Acts**

Millington argues that Plaintiffs have not established a custom or policy of allowing its police officers to perpetrate sexual assaults on the city's minors. (Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 597.) Millington states that Plaintiffs must establish "the existence of a clear and persistent pattern of sexual abuse by Friar or other Millington employees" under this theory, but contends that Plaintiffs cannot do so. (Id. at PageID 600–01.)

Plaintiffs argue in response that the factual allegations in their Complaints have established a custom or policy of "failing to discipline," which subsequently caused their minor children's injuries. (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 975–78.) Furthermore, they again insist that they need not show more than they have without discovery because they believe the Twombly/Iqbal pleading standard does not apply to them. (Id.)

Under this theory, a plaintiff must show:

> (1) the existence of a clear and persistent pattern of sexual abuse by [municipal] employees;
>
> (2) notice or constructive notice on the part of the [final decision-maker];
>
> (3) the [final decision-maker's] tacit approval of the unconstitutional conduct, such that their deliberate indifference can be said to amount to an official policy of inaction; and

[20] As previously noted, there is a question as to whether they are final decision-makers. Supra at 21 n.19.

> (4) that the [final decision-maker's] custom was the "moving force" or direct causal link in the constitutional deprivation.

Doe v. Claiborne Cty., 103 F.3d 495, 508 (6th Cir. 1996) (citing, inter alia, City of Canton, 489 U.S. at 388–89). As the Court discussed previously, the Mayors were final decision-makers, and thus policy-makers, for the purpose of this analysis, but there is some question as to whether the Chiefs were also final decision-makers. See supra at 21 n.19.

Far from alleging that Millington tacitly approved Friar's sex-abuse conduct while he was an MPD employee, Plaintiffs allege that all of the Individual Defendants failed altogether to "determine if an offense was committed; affect an arrest of the accused" or "[take] steps to . . . correct abuses of authority, or discourage the unlawful use of authority." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 63, 66.) At first blush, wholesale failure to investigate Friar's misconduct while he was an MPD reserve police officer seems at the very least inadequate, if not deliberately indifferent.

But Plaintiffs do not allege facts that suggest, above a merely speculative level, that any of the Individual Defendants knew or should have known of Friar's illegal, unconstitutional conduct as an MPD reserve officer. Plaintiffs allege that an unnamed MPD reserve officer reported Friar's alleged Shelby County conduct, and his own personal observations of Friar's "improper conduct towards young female children while on-duty," which Plaintiffs do not describe beyond this level of generality, to Defendants Stanback and Tennant, (Id. ¶ 22–25), and that the unnamed reserve officer lodged a written complaint with CM Haley, (Id. ¶ 26). They also allege that a YMCA pool employee "told his parents" about Friar's "improper actions" and "inappropriate conduct" at the YMCA—Friar "used his position as a Millington Reserve Police Officer to gain access to the YMCA," where the MPD had stationed him, to take "inappropriate pictures of O.H. and other minor children in the YMCA pool" and "falsified documents at the

YMCA and purposely gave inaccurate information to YMCA staff in order to bring children, who were unrelated to him, to the YMCA facility, in violation of YMCA policy"—and "[t]hereafter, Friar's actions were reported directly to the MPD" (Id. ¶¶ 49–50, 52, 55, 57–59).[21] Plaintiffs thus conclude that the Individual Defendants were "put on notice . . . as to crimes being perpetrated upon" the victims and "actual/or constructive knowledge of Friar's inappropriate actions," including "prior notice of the reckless, willful and wanton, deliberate and/or intentional actions of . . . Friar." (Id. ¶¶ 60–61, 66.) In summary, these allegations, taken as true for purposes of resolving the instant motion, amount to the Individual Defendants having knowledge of Friar's misconduct (a) when he was employed by the Shelby County Sheriff's Department, and (b) when he was working a duty post at the YMCA as an MPD reserve officer, but that knowledge included few specifics and involved behavior very different than that engaged in here.

Plaintiffs summarize their allegations differently. Specifically, Plaintiffs conclude, based on the foregoing, that the Individual Defendants "possessed sufficient information, including that of an eye witness [sic] [the YMCA employee who allegedly personally observed Friar's "inappropriate" conduct at the YMCA], to prevent" Friar from perpetrating sexual abuse on their minor children. (Id. ¶ 62.) This is a non sequitur. At most, the Individual Defendants had actual or constructive knowledge of allegations against Friar regarding his very different conduct when he was a Shelby County Deputy Sheriff and that Friar had photographed the children in a public place, or violated YMCA policies, neither of which is a violation of the minor children's constitutional rights. See supra at 14 n.16. Plaintiffs thus cannot logically argue that the

[21] Even accepting these allegations as true, Plaintiffs cite no authority, and the Court finds none, for the proposition that the Individual Defendants are final decision-makers with respect to YMCA policies, or that they have any authority to enforce violations thereof.

Individual Defendants subsequently ratified or tacitly approved Friar's Millington crimes by failing to investigate them. Indeed, the Complaints allege no facts to plausibly substantiate that anyone reported the Millington crimes to the Individual Defendants in the first place.

Plaintiffs do allege that the Individual Defendants had notice of Friar's abuses as a reserve police officer for Millington by virtue of a phone call from Michelle Brown, one of Plaintiffs' stepmothers, to MPD "on or around March of 2014," asking MPD to investigate Friar's background "for any misconduct to assuage her suspicions of possible pedophilia." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 64–65.) A Lieutenant Coleman performed the background check, which bore no fruit. (Id.) The full content of Michelle Brown's telephone call—specifically, whether she explicitly reported that Friar had in fact sexually abused O.H., such that notice of the abuse could be attributed to the Individual Defendants as final policy-makers, and thus to Millington, or whether she expressed merely vague suspicions that Friar was a bad actor, which would not plausibly constitute notice of the abuse to the Mayors, and thus to Millington—is not apparent on the face of Plaintiffs' Complaints. Moreover, it is not clear whether Lieutenant Coleman's background check "was so inadequate as to constitute a ratification of" Friar's sexual abuse of O.H. that would be attributable to the Mayors as final policymakers for Millington. Leach, 891 F.2d at 1248.

Without more, Plaintiffs have not plausibly stated that anyone reported Friar's sexual abuse of their minor children to the Individual Defendants as final decision-makers, or that any of the Individual Defendants later approved or ratified Friar's heinous conduct in deliberate indifference to the children's substantive due process rights, either of which would otherwise be attributable to Millington under § 1983. Plaintiffs have thus also failed to state a claim against Millington under § 1983 pursuant to the ratification theory of municipal liability.

**D. Inadequate Training or Supervision**

Millington argues that Plaintiffs fail to show Millington's deliberate indifference to the rights of its citizens by demonstrating "prior instances of unconstitutional conduct demonstrating that the employer ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury," training that was so "reckless or grossly negligent" that Friar's crimes were "almost inevitable or would properly be characterized as substantially certain to occur," or a complete failure to train Millington police officers altogether. (Pls.' Joint Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 598–99.) See Savoie v. Martin, 673 F.3d 488, 494–95 (6th Cir. 2012); see also Slusher v. Carson, 540 F.3d 449, 457 (6th Cir. 2008) (quoting City of Canton, 489 U.S. at 388); Hayes v. Jefferson Cty., 668 F.2d 869, 874 (6th Cir. 1982). Millington contends that the Complaints contain "no factual allegation[s] that there was a systemic failure to train its officers, nor is there any factual allegation that the City ignored a history of child abuse by officers such that the City would be deemed to have demonstrated deliberate indifference to the inadequacy of its employees' training." (Mem. of Law in Supp. of Def. City's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 599.) By focusing exclusively on Friar's past conduct, Millington argues that Plaintiffs' allegations do not plausibly establish the existence of a "systemic failure to train [Millington's] officers" or that Millington "ignored a history of child abuse by its officers such that the City could be deemed to have demonstrated deliberate indifference." (Id.) In addition, Millington argues by analogy that sexual abuse of children is so obviously wrong that Millington's failure to train Friar about it, if any, could not have been the moving force behind Friar's crimes. (Id. at PageID 599–600.) See Campbell v. Anderson Cty., 695 F. Supp. 764, 774 (E.D. Tenn. 2010) (involving alleged rape of female inmates in a county jail).

Millington concedes that perhaps Friar did not receive satisfactory training for his job as a reserve police officer with MPD; nevertheless, it argues that Plaintiffs cannot survive the motions to dismiss without more. (Id. at PageID 599.) See City of Canton, 489 U.S. at 390–91.

Plaintiffs counter that they have demonstrated that Friar's unconstitutional conduct was such an obvious risk of employing him that Millington was deliberately indifferent for not training him against, or supervising him for, incidence of sexual assault of minors, and this failure to train or supervise caused Plaintiffs' minor children's injuries. (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 974–75.) Plaintiffs argue that Millington failed to ensure that Friar underwent eighty hours of reserve officer training, or pair him with a field training officer or certified officer until he completed this eighty-hour training regimen, despite having notice of Friar's Shelby County conduct. Again, Plaintiffs invoke Petty and its progeny for the proposition that "numerous cases have found that allegations far less detailed than those in Plaintiff's Complaints . . . survived a Motion to Dismiss." (Id. at PageID 975–78.)

To establish a municipal liability claim pursuant to § 1983 under this theory, a plaintiff must establish that "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." Ellis v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006) (citing Russo v. City of Cincinnati, 953 F.2d 1036, 1046 (6th Cir. 1992)) (emphasis added).[22] The issue is whether, "in light of the duties assigned to

[22] Failure-to-train liability focuses on the substance of training, not on the form. Connick v. Thompson, 563 U.S. at 51, 68 (2011); cf. City of Canton, 489 U.S. at 391 ("And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable."). Simply alleging that "additional training would have been helpful" is "not enough." Connick, 563 U.S. at 68. "[P]rov[ing] that an injury . . . could have been avoided if an [employee] had had better or more training,

specific officers or employees[,] the need for more or different training is so obvious, and the inadequacy so likely to result in a violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Canton, 489 U.S. at 390 (emphasis added). For example,

> city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious[]" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Id. at 390 n.10.

Plaintiffs' Complaints fail to state a plausible municipal liability claim for three principal reasons. First, Friar was not working as a reserve police officer for Millington when the crimes occurred; babysitting minor children was not within the purview of his official police duties.[23] While Friar's training was lacking, these inadequacies cannot support a claim that his "training or supervision was inadequate" for babysitting minor children while off-duty. Millington did not assign Friar to the task of babysitting like a municipality assigns police officers to seize fleeing felons, which may require the use of deadly force, and Plaintiffs' allegations thus fail to plausibly establish that the need to train Friar to not sexually abuse children was obvious.

Second, Plaintiffs do not address the substance of the eighty hours of POST-compliant training with any factual assertions, which means they necessarily fail to allege facts sufficient to

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sufficient to equip him to avoid the particular injury-causing conduct" will not give rise to municipal liability under a failure-to-train theory. City of Canton, 489 U.S. at 391.

[23] "A reserve policemen [sic] is defined as any person whose primary responsibility is to support the full-time police officer in the prevention and detection of crime, apprehension of offenders, [and] assisting in the prosecution of the offenders with specifically assigned duties and/or job description . . . ." City of Millington, Tenn. Muni. Code, tit. 6, ch. 2, § 6-207 (2017).

plausibly establish that Millington's failure to ensure that Friar underwent this training caused Friar's sexual abuse of Plaintiffs' minor children. Plaintiffs' claims also fail to plausibly establish that the substance of the limited training that they acknowledge Friar did receive[24] was so inadequate that more or different training would be required. Furthermore, "[r]efraining from [sexually abusing minor children] is so obvious that even if [Millington] were silent about such conduct, it would not give rise to a constitutional violation" on Millington's part. Campbell, 695 F. Supp. 2d at 774. Simply alleging that Friar did not have all the training he was required to have for his work as a reserve police officer for Millington does not satisfy the rigorous standards of culpability and causation that § 1983 jurisprudence commands.

Additionally, Plaintiffs' Complaints do not allege any facts plausibly showing that the Mayors were aware of a pattern of sexual abuse within MPD, or that they subsequently failed to respond to such awareness by not implementing a more rigorous reserve officer training program that addresses the illegality of sexual abuse of minor children under color of state law when a reserve police officer is off-duty. This vacuum of factual allegations is particularly relevant in the context of City of Canton's single-instance species of the failure-to-train theory. Unlike the need to train police on the constitutional limits on the use of deadly force when pursuing fleeing felons because of the likelihood of violations of those limits in the heat of pursuit, Plaintiffs have not alleged any other instances of sexual abuse perpetrated by MPD reserve police officers while babysitting off-duty, much less rampant or recurrent instances that would give the Individual Defendants notice that there was obvious potential for sexual abuse of minor children if they did

[24] Plaintiffs separately acknowledge, however, that public records revealed "a document . . . which avers that [Friar] completed 40 hours of Millington Reserve In-Service Training in 2010, 2011, 2012, 2013 and 2014" and "[v]arious training certificates." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶¶ 12(a)(6), 12(b)(13).)

not ensure that Friar specifically underwent eighty hours of POST-compliant reserve officer training. To the contrary, the only instances of sexual abuse Plaintiffs allege, gravely horrific though they are, are those pertaining to their own minor children, all perpetrated by one reserve officer: Rickie Friar.

Third, Plaintiffs disguise a legal conclusion as a factual allegation when asserting that Millington acted with deliberate indifference. Specifically, Plaintiffs submit that the Mayors "took affirmative acts with deliberate indifference and engaged in intentional conduct with respect to the . . . supervising . . . [of] Defendants [sic] Friar." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 83.) But they do not allege facts to plausibly establish what these affirmative acts were or that Friar's lack of training was the result of a deliberate choice on the part of any of the Mayors. This is the very type of "unadorned, the-defendant-unlawfully-harmed-me" accusation that fails to satisfy Rule 8's plausibility pleading standard and constitutes, at best, "formulaic recitation of [an] element[] of a cause of action." Iqbal, 556 U.S. at 678. This approach does not satisfy the plausibility-pleading threshold that Rule 8 requires a plaintiff to meet before the Court will unlock the doors of discovery.

In light of these insufficient allegations, the Court finds no basis for allowing Plaintiffs to proceed against Millington under this theory.

**E. Failure to Screen**

Millington argues that Plaintiffs, in alleging that the Individual Defendants failed to perform the same public records request that Plaintiffs' counsel performed before filing the Complaints, have not stated a plausible claim that it acted with deliberate indifference to Plaintiffs' rights in disregarding a known or obvious risk that Friar would perpetrate sex crimes on their children. (Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 597–98.) Millington further posits that "[t]he fact

that Friar committed a crime years later does not demonstrate that the City . . . disregarded a 'known or obvious risk' that Friar would sexually abuse minors." (Id. at PageID 598.) "Plaintiff[s]," Millington continues, "do[] not provide any facts displaying a connection between prior incidents of misconduct and the harm suffered in this case." (Id. at PageID 597.)

Plaintiffs counter that they have demonstrated that Friar's unconstitutional conduct was such an obvious risk of employing him that Millington was deliberately indifferent for not screening his employment history for incidences of sexual assault of minors, and this failure to screen caused Plaintiffs' minor children's injuries. (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 974–75.) Again, Plaintiffs invoke Petty and its progeny for the proposition that the Complaints should be held to a lesser standard. (Id. at PageID 975–78.)

"Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause." Brown, 520 U.S. at 415 (emphasis added). "Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury." Id. at 410. While failing to closely screen (or screen at all) for bad actors "may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly[,] . . . that is only a generalized showing of risk." Id. This general possibility of future constitutional harm "cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation." Id. at 410–11. "It is insufficient for Plaintiffs to rely 'on the mere probability that any officer inadequately screened will inflict any constitutional injury.'" Butler, 90 F. Supp. 3d at 783 (quoting Brown, 520 U.S. at 412). As the Supreme Court

reasoned in Brown, "a full screening of an applicant's background might reveal no cause for concern at all," so someone who fails to screen that applicant's background "cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury." 520 U.S. at 411.

Therefore, a § 1983 plaintiff pursuing this theory against a municipality must show that "this officer was highly likely to inflict the particular injury suffered by the plaintiff," id. at 412 (emphasis in original), and that a final decision-maker was deliberately indifferent to the risk, id. at 410. "The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." Id. at 412. A § 1983 plaintiff must establish that "adequate scrutiny of [the employee's] background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire [him] would be the deprivation of a third party's federally protected right." Id. at 411 (emphasis added). "[G]enerally alleging pre-employment 'improper and illegal conduct' does not make Monell liability plausible." Butler, 90 F. Supp. 3d at 784.

Plaintiffs' allegations fail to meet the standards applicable to this theory. Plaintiffs allege that public records indicate that Shelby County terminated Friar for "improper sexual conduct" and "misconduct of a sexual nature" with "female prisoners" between August 1974 and October 1981. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dk, ECF No. 52 at ¶¶ 11, 12(b)(1), 15, 18.) Even taking Plaintiffs' view of the content of the public record as true, it fails to plausibly substantiate the presence of an obvious risk that Friar would sexually abuse Plaintiffs' minor children approximately thirty years later. To the contrary, Plaintiffs' allegations on this point strike the Court as, at most, expressing a generalized risk, a mere possibility, of future constitutional harm. Brown, 520 U.S. at 410. Although the connection seems obvious to the Plaintiffs—"Friar's past behavior . . . made his misconduct, sexual abuse, and exploitation of

[the victims] . . . a foreseeable and predictable consequence." (See, e.g., Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 20 (emphasis added))—the Court cannot make the leap with them to the conclusion that it was plausibly "highly likely" that Friar would sexually abuse Plaintiffs' minor children approximately three decades later, Brown, 520 U.S. at 412, or that a reasonable employer would not have hired him because the "plainly obvious consequence" of doing so would be violations of Plaintiffs' children's constitutional rights, id. at 411. Plaintiffs, in other words, have not alleged specific facts that demonstrate a "strong" connection between Friar's past misconduct and his subsequent crimes against Plaintiffs' minor children. Id. at 412.

Plaintiffs' allegations concerning the unnamed reserve officer's reports to Defendants Stanback and Tennant and the YMCA's report to MPD likewise do not nudge Plaintiffs' claims over the line because they are simply irrelevant to the failure-to-screen claim. By the time the unnamed reserve officer made these reports to Defendants Stanback and Tennant, or the YMCA complained to MPD, the MPD had already hired Friar. (See Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 22 ("Despite this information, Friar continued to serve as a MPD reserve officer." (emphasis added)).) None of the Defendants could screen Friar's background before hiring him based on verbal reports they received only after they hired him.

While the Court accepts Plaintiffs' allegations of Millington's record-keeping shortcomings as true for purposes of resolving the instant motions, these allegations also do not state a plausible failure-to-screen claim. Whether Millington or MPD kept records in accordance with best (or even better) practices is irrelevant to the analysis of a failure-to-screen claim. The relevant inquiry is whether Millington would conclude, based on adequate scrutiny of Friar's record, that hiring him would result in the plainly obvious consequence that Friar would

perpetrate sexual abuse on Plaintiffs' minor children. See Brown, 520 U.S. at 411. Rule 8 does not require detailed allegations to survive a motion to dismiss for failure to state a claim, but vague musings about "questions" that Friar's human resources file raise do not elevate the Plaintiffs' right to relief under § 1983 above the speculative level. Moreover, that Friar "may have been terminated from prior employment" likewise does not lead to the conclusion (despite Plaintiffs' contention to the contrary) that Defendants, with deliberate indifference to Plaintiffs' children's constitutional rights, evidenced by failing to adequately scrutinize Friar's employment record, disregarded a plainly obvious risk that he would perpetrate sexual abuse on Plaintiffs' children around thirty years later if the MPD hired him as a reserve police officer.

Because Plaintiffs' allegations are also insufficient to state a cause of action under this theory of municipal liability, the Court finds no basis for allowing Plaintiffs to proceed to discovery against Millington.

**F. Conclusion**

For the foregoing reasons, Plaintiffs have failed to allege sufficient facts to plausibly establish their municipal liability claims pursuant to § 1983 against Millington. As such, Defendants' Motion to Dismiss is **GRANTED** as to Millington, and those claims are **DISMISSED**.

## III. Section 1983 Claims against Individual Defendants

The Individual Defendants argue that Plaintiffs have not alleged facts to plausibly demonstrate that any of them violated the minor children's clearly established rights by hiring Friar without adequately screening his background, failing to train him, or failing to supervise him, the theories upon which Plaintiffs are proceeding. Therefore, the Individual Defendants conclude that they are entitled to qualified immunity from all of these claims, and they invite the Court to dismiss them. (Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF

No. 56 at PageID 605, 617–26.) First, the Individual Defendants argue that Plaintiffs effectively concede that Defendants Stanback, Tennant, Carter and Jones cannot be liable for failing to screen Friar's background because, accepting the allegations in the Complaints as true, none of them held their offices when the MPD hired Friar in 2007 or 2010. (Mem. of Law in Supp. of Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 56-2 at PageID 618–19.) With respect to Defendants Douglas and Hodges, the Individual Defendants incorporate by reference Millington's arguments in its Memorandum of Law Supporting its Motion to Dismiss, and thus argue that Plaintiffs "cannot state a plausible claim" that either of them violated the minor children's rights by hiring Friar.

Additionally, the Individual Defendants argue that Plaintiffs conflate supervisory liability with municipal liability in alleging their failure-to-train claims. The Individual Defendants contend that Plaintiffs must plausibly establish that they "encouraged Friar's sexual assault . . . or in some other way directly participated in it." (Id. at 619–22.) According to the Individual Defendants, even if Plaintiffs could establish that any of them failed to train Friar against sexually abusing children, such training would be unnecessary because sexually abusing children is so obviously wrong that it needs no preventive training. (Id. at PageID 621–22.) Therefore, the Individual Defendants conclude that they are entitled to qualified immunity as to the failure-to-train allegations because Plaintiffs cannot plausibly establish claims that any of the Individual Defendants personally or individually violated the minor children's rights. (Id. at 622.)

Finally, regarding Plaintiffs' failure-to-supervise claims, the Individual Defendants again argue that Defendants Hodges, Carter, and Douglas did not hold their positions when Friar first met Humphrey and O.H., and thus they cannot be held liable for failing to supervise him when his conduct occurred after they no longer had authority to supervise him. (Id. at 622.)

As to all claims against Defendants Stanback, Tennant and Jones, the Individual Defendants again contend that Plaintiffs fail to demonstrate that any of these Defendants actively encouraged or participated in Friar's crimes. Rather, they argue that Plaintiffs' entire theory of liability is premised on the Individual Defendants' right to control Friar and their failures to act, neither of which, they argue, is sufficient for § 1983 purposes. (Id. at 622–23.) They specifically argue that Plaintiffs fail to allege sufficient facts to establish that Defendants Stanback, Tennant and Jones had notice of Friar's Millington crimes such that their failure to act would constitute deliberate indifference. Even taking as true the reports of the unnamed reserve officers or YMCA employees as to Friar's Shelby County and YMCA conduct, the Individual Defendants argue that Plaintiffs have not shown that anyone reported Friar's Millington crimes to Defendants Stanback, Tennant or Jones. (Id. at 623–24.) According to these Defendants, the substance of the alleged reports—respectively, Friar's termination from Shelby County, the photographing of Plaintiffs' minor children and violations of YMCA policies—did not make it "apparent to them that Friar was highly likely to sexually assault minor children." (Id. at 624.) Because Plaintiffs fail to plausibly establish that Defendants Stanback, Tennant and Jones knew about Friar's Millington crimes based on reports of unrelated conduct, they conclude that all three are entitled to qualified immunity. (Id. at 626.)

Plaintiffs counter that the Individual Defendants personally enforced every MPD policy that Plaintiffs challenge in their Complaints; therefore, they argue, they are entitled to get to a jury, which will then determine whether the alleged policies are "affirmatively linked" to the minor children's constitutional injuries. (Pls.' Joint Mem. of Law in Opp. to Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-SHL-dkv, ECF No. 64-2 at PageID 999–1000.) Plaintiffs rely on Peatross v. City of Memphis, 818 F.3d 233, 241–42 (6th Cir. 2016), for the proposition that the word "active" in the phrase "active unconstitutional behavior" means that they must demonstrate

only that the Individual Defendants "at least implicitly authorized, approved, or knowingly acquiesced" in Friar's Millington crimes for supervisory liability purposes, as opposed to showing that any of the Individual Defendants "physically put [their] hands on" the minor children or were "physically . . . present" for Friar's conduct. On this basis, Plaintiffs argue that they have pled enough facts in the Complaints to withstand the Individual Defendants' motion. (Id. at 1000–02.)

In response to the Individual Defendants' qualified immunity arguments, Plaintiffs identify seven discrete constitutional rights in their Complaints that they allege the Individual Defendants violated. Then, instead of demonstrating that these rights are clearly established, Plaintiffs rely on cases which they believe alleviate them from the burden of doing so. They then repeat those portions of the Complaints that espouse the allegations of violations of these rights, insist that "it is without argument" that the Individual Defendants "implicitly authorized, approved, or knowingly acquiesced in" Friar's Millington crimes and ask the Court to deny the Individual Defendants' qualified immunity claims. (Id. at 1002–06.)

The Court turns next to an analysis of Plaintiffs' supervisory liability claims and the Individual Defendants' qualified immunity arguments.

**A. Individual Supervisory Liability**

Like municipal liability, individual supervisory liability cannot be premised on respondeat superior. See Monroe, 463 U.S. at 694 n.58 ("By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control[,] without any control or direction having been exercised[,] and without any failure to supervise[,] is not enough to support § 1983 liability."). Rather, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." Id. at 677 (emphasis added). A supervisor's negligence, or even recklessness, with regard to a subordinate's unconstitutional

conduct is insufficient to create supervisory § 1983 liability; a plaintiff must establish that a supervisory official was deliberately indifferent to a plaintiff's rights. Doe v. Magoffin Cty. Fiscal Court, 174 F. App'x 962, 969–70 (6th Cir. 2006).

Even demonstrating that a supervisory official was aware of misconduct and failed to take action "is insufficient to impose liability on supervisory personnel under § 1983." Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999) (quoting Poe v. Haydon, 853 F.2d 418, 429 (6th Cir. 1982)) (internal quotation marks and citations omitted). Rather, "liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'" Id. (emphasis added) (quoting Salehpour v. Univ. of Tennessee, 159 F.3d 199, 206 (6th Cir. 1998), cert. denied, 526 U.S. 1115 (1999)). At the very least, a § 1983 plaintiff pursuing relief against individual municipal defendants must demonstrate that the officials "implicitly authorized, approved, or knowingly acquiesced to the unconstitutional conduct of the offending officers." Id. As such, the failure to supervise, control or train is not actionable against an individual municipal supervisor unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it." Id.; accord Magoffin Cty., 174 F. App'x at 970 (quoting McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 470 (6th Cir. 2006)).

As a threshold matter, Defendants Stanback, Tennant, Carter and Jones cannot be liable for failing to screen Friar's background because, accepting the allegations in the Complaints as true, none of them held their offices when the MPD hired Friar in 2007 or 2010. Moreover, Defendants Hodges, Carter and Douglas did not hold their positions when Friar first met Humphrey and O.H., and thus they cannot be held liable for failing to supervise him when they were no longer in the position to do so. Accordingly, these claims as to these Defendants are hereby **DISMISSED**.

As to the remaining claims and Individual Defendants, the Court accepts as true that, based on public records and statements of the unnamed reserve officer, the Individual Defendants were aware of personnel records, allegations against Friar regarding his Shelby County conduct and vague allegations of "improper conduct . . . while on-duty" in Millington. The Court also accepts that Michelle Brown asked MPD to conduct a background check on Friar "to assuage her suspicions of pedophilia." But none of these assumptions plausibly establish that any of the Individual Defendants knew that Friar had sexually abused Plaintiffs' minor children, or could have known that he would do so—much less that the Individual Defendants authorized, approved, knowingly acquiesced, encouraged or participated directly in Friar's crimes.

First, as for the allegations of workplace misconduct from three decades previous, such allegations would not lead anyone to conclude that an investigation of sexual abuse of minors needs to occur. See supra at 28 ("This is a non sequitur."). Michelle Brown's call to MPD, while raising questions, did not include any specific allegation to be investigated. The background check she requested, if it did not occur, would not have uncovered Friar's actions.

In essence, the Individual Defendants could not have authorized, approved, knowingly acquiesced, encouraged or participated directly in Friar's Millington crimes if they were completely unaware that they were happening. Moreover, even if the Individual Defendants were directly aware of Friar's Millington crimes, their failure to remediate by investigating, terminating or otherwise reporting Friar to other authorities, while disturbing if it occurred, does not amount to a constitutional violation within the meaning of § 1983 under the law of the Sixth Circuit. See Shehee, 199 F.3d at 300 (citing Salehpour, 159 F.3d at 206).

In light of these insufficient allegations, the Court finds no basis for allowing Plaintiffs to proceed against the Individual Defendants under § 1983's supervisory liability theory.

**B. Qualified Immunity**

The Individual Defendants also argue that they are entitled to qualified immunity because Plaintiffs' Complaints do not plausibly establish that any of them violated the minor children's clearly established constitutional rights.[25] Plaintiffs counter that they have identified seven discrete rights that the Individual Defendants violated in personally carrying out Millington's policies, and they dispute that they need to provide authority to show that the rights are clearly established.

The doctrine of qualified immunity protects municipal officials performing discretionary functions from individual liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Higgason v. Stephens, 288 F.3d 868, 876 (6th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted). The policy underlying the doctrine of qualified immunity is to ensure that public officials can discharge their duties without fear of "potentially disabling threats of liability" for damages. Barnes v. Wright, 449 F.3d 709, 715 (6th Cir. 2006) (quoting Elder v. Holloway, 510 U.S. 510, 514 (1994)) (internal quotation marks omitted). The doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 229 (1991).

The Sixth Circuit follows a three-part test to determine whether public officials are entitled to qualified immunity:

> First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient

[25] The Court will address the Individual Defendants' qualified immunity argument, as an alternative to its conclusion on the issue of supervisory liability.

> evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Williams v. Mehra, 186 F.3d 685, 691 (6th Cir. 1999) (citing Dickerson v. McClellan, 101 F.3d 1151, 1157–58 (6th Cir. 1996)).

Once a defendant raises the qualified immunity defense, the plaintiff bears the burden of overcoming it by showing "with particularity that a defendant himself has violated some clearly established statutory or constitutional right" by reference to "a case with a similar fact pattern that would have given 'fair and clear warning to [officials]' about what the law requires," unless the case involves "novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002) (discussing United States v. Lanier, 520 U.S. 259 (1997)); Arrington-Bey v. City of Bedford Heights, 858 F..3d 988, 993 (6th Cir. 2017)); Harris v. City of Cleveland, 7 F. App'x 452, 457 (6th Cir. 2001) (emphasis in original). District courts must "zoom in close enough to ensure the right is appropriately defined . . . [b]ut not too close." Martin v. City of Broadview Heights, 712 F.3d 951, 960 (6th Cir. 2013) (quoting Hagans v. Franklin Cty. Sheriff's Office, 695 F.3d 505, 508 (6th Cir. 2012)). For example, it is error "to define the right too broadly (as the right to be free of excessive force)," but it is also error "to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." Hagans, 695 F.3d at 508–09. Still, the plaintiff must invoke some authority demonstrating that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Plaintiffs fail to make such a showing and overcome their burden with respect to the Individual Defendants' qualified immunity claims. Although the Court acknowledges that Plaintiffs have stated a plausible claim that Friar violated Plaintiffs' minor children's clearly established substantive due process rights to bodily integrity, Plaintiffs fail to show that the

Individual Defendants violated those rights, or any others. Plaintiffs describe in their Response seven discrete rights that they allege the Individual Defendants violated:

> 1) Freedom from unconstitutional and unreasonable seizure and abuse; 2) Freedom from sexual abuse at the hands of a law enforcement officer; 3) Freedom from illegal and unconstitutional orders by a law enforcement official; 4) Freedom from unreasonable invasion of privacy and bodily integrity; 5) Freedom from arbitrary governmental activity which shocks the conscious [sic] of a civilized society for conduct during entire event; 6) Interference with right to familial association; and 7) Freedom from abuse by an authority figure acting under color of state law.

In support of the proposition that these rights are "clearly established," Plaintiffs merely re-allege their conclusions in Paragraph 82 of the Amended Complaints and provide the Court with slightly more than two pages of citations that they interpret to mean that they are absolved of their burden to show either that analogous cases exist or that their cases contain novel facts. (See Pls.' Joint Mem. of Law in Opp. to Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-2 at PageID 1002–06.) This is insufficient to overcome the Individual Defendants' qualified immunity claims. While Plaintiffs have demonstrated the clearly established constitutional right violated by Friar, the Court finds that they have not done so as to the Individual Defendants.

**C. Conclusion**

For the foregoing reasons, Plaintiffs have failed to allege sufficient facts to plausibly establish their supervisory liability claims pursuant to § 1983 against the Individual Defendants. Moreover, even if there were sufficient facts alleged, the Individual Defendants would not be subject to suit, given their qualified immunity. As such, Defendants' Motion to Dismiss is **GRANTED** as to the Individual Defendants, and those claims are **DISMISSED**.

## IV. State Law Claims

### A. Tennessee Constitutional Claims

Counts IV of the Complaints allege that Millington is liable to Plaintiffs for violations Article I, Sections 7, 8 and 35 of the Tennessee Constitution. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at PageID 539–40.) Millington and the Individual Defendants submit that Tennessee law does not recognize a private right of action for state constitutional violations. See Cline v. Rogers, 87 F.3d 176, 179–80 (6th Cir. 1996); Bowden Bldg. Corp. v. Tenn. Real Estate Comm'n, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999) (citing Lee v. Ladd, 834 S.W.2d 323, 324 (Tenn. Ct. App. 2012), app. denied). (Mem. of Law in Supp. of Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 601; Mem. of Law in Supp. of Indiv. Defs.' Mot. to Dismiss, id., ECF No. 56-2 at PageID 626.)

Plaintiffs do not contradict Defendants' authorities, except to argue that the cases on which Defendants rely are factually distinct from the instant cases, and Plaintiffs ask the Court to imply a right of action under the Tennessee Constitution in the same way the U.S. Supreme Court implied a right of action under the Fourth Amendment to the federal Constitution in Bivens v. Six Unknown Named Defendants of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). (Pls.' Joint Mem of Law in Opp. to Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-2 at PageID 1008–10.)

Setting aside the federalism concerns that Plaintiffs' request raises, "the Tennessee courts have not extended the rationale of Bivens to give a state cause of action" under the Tennessee Constitution. Cline, 87 F.3d at 180 (quoting Lee, 834 S.W.2d at 325); cf. Bowen, 15 S.W.3d at 446. Therefore, the Court finds that Plaintiffs have not stated a plausible cause of action under the Tennessee Constitution. Plaintiffs' state constitutional claims are hereby **DISMISSED**.

**B. Tennessee Tort Claims**

Counts V of the Complaints allege that Millington and the Individual Defendants are jointly and severally liable for Defendant Friar's actions and omissions under a panoply of tort theories, including "assault . . . battery, false arrest, false imprisonment, negligence, negligent infliction of emotional distress, [and] intentional infliction of emotional distress." (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at PageID 540–41.)[26]

Millington posits that Plaintiffs' state-law claims fail because the Tennessee Governmental Tort Liability Act's ("TGTLA") plain language, "discretionary function" exception and "civil rights" exception to waiver of immunity bar these claims. (Mem. of Law in Supp. of Def. City's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 55-2 at PageID 601–02.) See Tenn. Code Ann. § 29-20-205(1)–(2); Johnson v. City of Memphis, 617 F.3d 864, 872 (6th Cir. 2010); Peatross v. City of Memphis, No. 2:14-cv-2343-SHL-cgc, 2015 WL 13021901, at *8 (W.D. Tenn. Mar. 12, 2015); Lundy v. Knox Cty., No. 3:13-CV-588-TAV-HBG, 2014 WL 1491235, at *3–4 (E.D. Tenn. Apr. 15, 2014); Dillingham v. Millsaps, 809 F.

[26] Plaintiffs separately allege that Millington and the Individual Defendants "had an affirmative and legal duty to properly investigate any sexual abuse of minors and report such crimes to the Department of Children's Services, but failed to do so. All Defendants, excluding Friar, failed to determine if an offense was committed; affect an arrest of the accused; and determine if other crimes may have been committed by Defendant Friar, despite being put on notice of his actions." (Id. at ¶ 63.) It is not clear whether Plaintiffs contend that this statement describes a discrete cause of action against Millington and the Individual Defendants or whether it is meant to support their negligence claims, the latter of which they formally allege in Counts V. Nonetheless, as discussed supra at 28 & 43, the Court does not find it plausible, based on constructive knowledge of a workplace violation in another jurisdiction almost thirty years ago, or Michelle Brown's or the YMCA employee's parents' calls to MPD, that Defendants had constructive or actual knowledge of Friar's present-day sexual crimes in Millington. Therefore, to the extent the Plaintiffs allege this theory as a distinct cause of action, the Court finds no allegations in the Complaints to plausibly state a claim.

Supp. 2d 820, 852 (E.D. Tenn. 2011); Carpenter v. Doe, No. 10-2425-STA, 2010 WL 4922640, at *11 (W.D. Tenn. Nov. 29, 2010).

Moreover, the Individual Defendants argue that Plaintiffs cannot state a prima facie state-law negligence claim against any of them under any theory because "a supervisory government official does not owe a duty in his individual capacity to perform his official duties." (Mem. of Law in Supp. of Indiv. Defs.' Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 56-2 at PageID 627–28.) See Schalk v. City of Memphis, No. 14-cv-2220-SHL-tmp, 2015 U.S. Dist. LEXIS 184281, at *8–9 & n.2 (W.D. Tenn. Nov. 9, 2015); Dillingham, 809 F. Supp. 2d at 856; Harvey v. Evans, Nos. 3:04-CV-193, 3:04-CV-241, 2007 WL 701049, at *3 (E.D. Tenn. Mar. 2, 2007); Doe v. May, No. E2003-1642-COA-R3-CV, 2004 WL 1459402, at *5 (Tenn. Ct. App. June 29, 2004). Because Plaintiffs cannot establish that any of the Individual Defendants owed a duty of care to them or their children, the Individual Defendants argue that the Plaintiffs necessarily cannot plausibly establish any of their negligence-related theories. See Hurd v. Flores, 221 S.W.3d 14, 21 (Tenn. Ct. App. 2006) (quoting Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993)).

Plaintiffs respond, first, by arguing that "the law [surrounding interpretation of the TGTLA] is in a state flux [sic] as to exactly which Defendant may be liable or immune for each specific tort." Relying on Sallee v. Barrett and Baines v. Wilson Cty., they argue that the TGTLA imposes liability on either a municipality or its employees, but not both. See 171 S.W.3d 822, 826 (Tenn. 2005); 86 S.W.3d 575, 583 n.5 (Tenn. Ct. App. 2002). Therefore, Plaintiffs believe that "it would be premature to dismiss any state law torts against either the Individual Defendants or the City of Millington at this stage." Moreover, Plaintiffs ask the Court to resolve any doubts about which immunities apply to whom in their favor, and they insist that allowing them to proceed on these theories will not increase the costs of litigation because "they

are all intertwined with the federal constitutional claims which will necessitate a trial." (Pls.' Joint Mem. of Law in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 979–80.)

Plaintiffs also argue that the TGTLA's "civil rights" exception does not preclude their state-law tort claims, which they plead in the alternative in the event their federal claims fail. See Brown v. City of Memphis, 440 F. Supp. 2d 868, 874–75 (W.D. Tenn. 2006); Alexander v. Beale St. Blues Co., 108 F. Supp. 2d 934, 947–49 (W.D. Tenn. 1999). They contend that Rule 8 does not force them to choose between filing a § 1983 claim or a TGTLA claim, and that neither Tennessee General Assembly intended such a result, see Tenn. Code Ann. § 29-20-103, nor have the courts of Tennessee accepted such an argument. If they do prevail on their § 1983 claims, Plaintiffs concede that their state-law claims should disappear, but in the event that they cannot prevail on their federal theories, they argue that they are nonetheless entitled to attempt to recover on their tort theories, which have lower burdens of production and persuasion. (Pls.' Joint Mem. in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 981–88.)

Finally, Plaintiffs argue that the TGTLA does not immunize Millington from liability for intentional tort claims against Friar, specifically assault and battery, "if the municipality was negligent in some manner that allowed the [tortious] employee to commit the assault and battery." (Pls.' Joint Mem. in Opp. to Def. Millington's Mot. to Dismiss, Case No. 2:17-cv-02741-SHL-dkv, ECF No. 64-1 at PageID 985–86.) See, e.g., Limbaugh v. Coffee Cty., 59 S.W.3d 73, 81 (Tenn. 2001); see also Massey v. Hess, No. 1:05-CV-249, 2007 WL 2725890, at *16 (E.D. Tenn. Sept. 17, 2007); Tate v. Wenger, 2006 U.S. Dist. LEXIS 37253, at *49–51 (W.D. Tenn. May 26, 2006); Sawyer v. City of Memphis, No. 03-2261B, 2006 U.S. Dist. LEXIS 10928, at *10 (W.D. Tenn. Feb. 16, 2006).

The TGTLA provides, in pertinent part, that:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:
>
> (1) The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; [and]
>
> (2) False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights . . . .

Tenn. Code Ann. § 29-20-205(1)–(2) (emphasis added). Several terms used in this provision have been defined by the courts. The Tennessee Supreme Court has interpreted the TGLTA's immunity waiver exception for "infliction of mental anguish" to mean "intentional infliction of emotional distress." Sallee v. Barrett, 171 S.W.3d 822, 828–29 (Tenn. 2005). "TGTLA's 'civil rights' exception has been construed to include claims arising under 42 U.S.C. § 1983 and the United States Constitution." Johnson, 617 F.3d at 872 (citing Hale v. Randolph, No. 1:02-CV-334, 2004 WL 1854179, at *17 (E.D. Tenn. Jan. 30, 2004)). "The question one must ask" when applying that provision "is whether the essence of the suit remains a civil rights violation." Peatross, 2015 WL 13021901, at *7 (citing Campbell, 695 F. Supp. 2d at 778 (E.D. Tenn. 2010)). When a case is, at its heart, a civil rights case, "sovereign immunity continues to apply in those circumstances." Johnson, 617 F.3d at 872.

As for what constitutes a "discretionary function," the exception applies to "planning rather than operational functions," including "[t]he sorts of determinations [a municipality] must make in how it screens, hires, trains and supervises its employees, and how it goes about investigating and disciplining them for any misdeeds." Peatross, 2015 WL 13021901, at *8

(discussing Bowers v. City of Chattanooga, 826 S.W.2d 427, 431 (Tenn. 1992); Doe v. Coffee Cty. Bd. of Educ., 852 S.W.2d 899, 907 (Tenn. Ct. App. 1992)).

Plaintiffs allege that Millington and the Individual Defendants are jointly and severally liable for Friar's conduct under theories of assault, battery, false arrest, false imprisonment, negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. The Court holds that the text of TGTLA itself specifically bars Plaintiffs' claims for false arrest, false imprisonment, and intentional infliction of emotional distress. Those claims are therefore **DISMISSED**.

Moreover, the Court finds that this case is, at its core, a civil rights case. The allegations themselves describe a constitutional violation through action under color of state law. That is an alleged civil rights violation, regardless of what label is applied, which Plaintiffs can only pursue through § 1983. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731 (1989). Additionally, in over eight pages—nearly a quarter of their Complaints—Plaintiffs summarize the bases for their § 1983 claims against Friar, Millington and the Individual Defendants. Conversely, only three pages—less than half the number of pages spent on their federal theories—allege their state law claims. Plaintiffs describe their state-law claims throughout the briefing as "in the alternative." The Court infers that Plaintiffs intend for this case to go forward on a § 1983 theory. Accordingly, Millington and the Individual Defendants are immune from suit on the remaining negligence and negligent infliction of emotional distress claims because Plaintiffs are barred by the TGTLA's "civil rights" exception to waiver of immunity. Those claims are thus hereby **DISMISSED**.

Plaintiffs can state claims for Friar's assault and battery if they plausibly establish that the Individual Defendants acted negligently. See, e.g., Massey, 2007 WL 2725890, at *16 (removing immunity for "negligence claims based on allegations of assault"). In Tennessee, to

state a prima facie case of negligence, a plaintiff must demonstrate, inter alia, that the defendant owed a duty of care to the plaintiff. See Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993). However, supervisory officials in Tennessee owe no duty of care to individual citizens to discharge their official duties; rather, municipal supervisors owe a duty of care to the public at large by virtue of their official status. See, e.g., Doe v. May, 2004 WL 1459402, at *5. Moreover, the TGTLA affords statutory immunity for failing to exercise discretionary functions, Tenn. Code Ann. § 29-20-205(1), and, as noted above, the Individual Defendants are immune under the "civil rights" exemption to TGTLA's waiver of immunity. Plaintiffs' Complaints thus cannot allege any facts to plausibly establish that the Individual Defendants owed any of them, or their minor children, a duty of care to screen, train, investigate, reprimand or terminate Friar.

For these reasons, Plaintiffs' Complaints do not state plausible claims under Tennessee tort law. Accordingly, their claims against Millington and the Individual Defendants are hereby **DISMISSED**.

**C. Punitive Damages**

Finally, Plaintiffs seek punitive damages from Friar and the Individual Defendants. (Pl. Humphrey's Second Am. Compl., Case No. 2:17-cv-02741-SHL-dkv, ECF No. 52 at ¶ 107.) The Individual Defendants make no specific argument against Plaintiffs' claims for punitive damages. However, the Court, having dismissed Plaintiffs' state law claims, finds no basis to impose punitive damages on the Individual Defendants. Without compensatory damages, there can be no punitive damages. See Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). Accordingly, Plaintiffs' claims for punitive damages against the Individual Defendants are hereby **DISMISSED**. The claim for punitive damages against Friar remains.

## CONCLUSION

The Court finds that Plaintiffs have pled sufficient facts to plausibly establish both that Friar acted under color of state law when he sexually assaulted Plaintiffs' minor children, and that his crimes violated their substantive due process rights to bodily integrity. Nevertheless, because Plaintiffs' factual allegations are insufficient to plausibly make out causes of action against Millington or the Individual Defendants above the speculative level, Defendants' Motions to Dismiss Plaintiffs' § 1983 claims and state-law claims against Millington and the Individual Defendants are **GRANTED**, and those claims are **DISMISSED**. As a result, Plaintiffs' motions to obtain discovery from Millington and the Individual Defendants are **DENIED AS MOOT**.

**IT IS SO ORDERED,** this 28th day of September, 2018.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

# APPENDIX C

Nos. 18-6111/6112/6113/6115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Mar 11, 2020
DEBORAH S. HUNT, Clerk

GINNY HUMPHREY, AS PARENT AND LEGAL GUARDIAN OF MINOR CHILD, O.H., ET AL.

Plaintiffs-Appellants,

v.

RICKIE FRIAR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Defendants,

CHIEFS RAY DOUGLAS, RITA STANBACK AND FRANK TENNANT, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS CHIEFS OF THE MILLINGTON POLICE DEPARTMENT;

Defendants-Appellees.

O R D E R

**BEFORE:** KETHLEDGE, BUSH, and NALBANDIAN, Circuit Judges.

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

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: March 11, 2020

Mr. William J. Wyatt
Harris Shelton Hanover Walsh
6060 Primacy Parkway
Suite 100
Memphis, TN 38119

Re: Case No. 18-6111/18-6112/18-6113/18-6115, *Ginny Humphrey v. Rickie Friar, et al*
Originating Case No. : 2:17-cv-02741

Dear Mr. Wyatt,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Andrew Cronin Clarke
Mr. Howard Brett Manis
Mr. Edward J. McKenney Jr.

Enclosure