No. _____

In the Supreme Court of the United States

JILL DILLARD, *et al.*,
Petitioners,

v.

KATHY O'KELLEY, *et al.*
Respondents.

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 17-3284
No. 17-3287

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

Kathy O'Kelley; Ernest Cate;
Rick Hoyt, in their individual and official capacities

Defendants - Appellants

Appeals from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: January 14, 2020
Filed: June 15, 2020

Before SMITH, Chief Judge, LOKEN, COLLOTON, GRUENDER, BENTON, KELLY, ERICKSON, GRASZ, STRAS, and KOBES, Circuit Judges, *En Banc*.

LOKEN, Circuit Judge, with whom COLLOTON, GRUENDER, BENTON, ERICKSON, STRAS, and KOBES, Circuit Judges, join.

Jill Dillard, Jessa Seewald, Jinger Vuolo, and Joy Duggar ("Plaintiffs") rose to prominence as members of the cast of "19 Kids and Counting," a television show about Jim Bob Duggar, his wife Michelle, and their nineteen children in Washington

County, Arkansas. In 2015, the City of Springdale Police Department ("SPD") and the Washington County Sheriff's Office ("WCSO"), responding to a tabloid's request under the Arkansas Freedom of Information Act ("FOIA"), Ark. Code § 25-19-101 *et seq.*, released redacted copies of reports of a 2006 investigation into sexual misconduct by the Duggars' oldest child, Josh Duggar, which included interviews of Plaintiffs, who were minors at the time. Despite redactions, social media users identified Plaintiffs as the victims of Josh's reported sexual abuse. The resulting negative publicity brought about the show's demise, and then, this lawsuit.

Plaintiffs sued the City, the County, and several of their employees, asserting claims under 42 U.S.C. § 1983 and the Arkansas Civil Rights Act, along with state law tort claims for the tort of outrage and invasion of privacy. As relevant here, Plaintiffs alleged that Springdale Police Chief Kathy O'Kelley, Springdale City Attorney Ernest Cate, and WCSO Enforcement Major Rick Hoyt ("individual defendants" or "Defendants") violated Plaintiffs' Fourteenth Amendment rights to informational privacy by disclosing the redacted reports to the media. The district court denied the individual defendants' motions to dismiss the § 1983 claims based on qualified immunity and the state law claims based on official immunity under Ark. Code § 21-9-301.[1] Defendants appealed; a panel of this court affirmed. We granted Defendants' petition for rehearing *en banc* of the panel's qualified immunity ruling. Reviewing *de novo*, we conclude that the asserted due process right to informational privacy was not clearly established and therefore reverse the denial of qualified immunity. Lyons v. Vaught, 781 F.3d 958, 960 (8th Cir. 2015) (jurisdiction and standard of review). We otherwise reinstate the panel opinion.

[1]The district court dismissed official capacity claims against the individual defendants, claims against the City and County, and, in a separate Order, all claims against the tabloid's publishers.

I. Factual Allegations

Plaintiffs' Complaint alleges that on December 7, 2006, the Arkansas State Police ("ASP") Child Abuse Hotline received an anonymous tip that Josh Duggar had molested his younger sisters Jill, Jessa, Jinger, and Joy, along with another unnamed individual, at various times in 2002 and 2003. SPD opened an investigation and requested an "agency assist" from WCSO. An ASP investigator questioned Plaintiffs about the assaults; they were promised their answers would remain confidential. A WCSO detective interviewed Jim Bob and Michelle Duggar, who acknowledged the allegations and identified the victims, location, and frequency of Josh's sexual misconduct. WCSO documented the Duggar interview in an Incident Report; SPD summarized both the Duggar and sibling interviews in an Offense Report. Based on the interviews, SPD submitted an affidavit to the Washington County Family in Need of Services Division and the Washington County Prosecutor's Office. No criminal charges were filed, nor were the allegations made public.

The Complaint further alleges that on May 15, 2015, a tabloid called *In Touch Weekly* submitted FOIA requests to the SPD and the WCSO, seeking files related to Jim Bob Duggar, Michelle Duggar, Josh Duggar, and multiple addresses. The request stated that *In Touch* had reason to believe the agencies had filed reports regarding the sexual assaults. The Arkansas FOIA required a response by May 20. On May 19, before SPD or WCSO responded, *In Touch Weekly* published an online article titled, "'19 Kids and Counting' Son Named in Underage Sex Probe." The article stated that "multiple sources who have seen the police report and are familiar with the case" told the tabloid that police had investigated an alleged sexual assault. "Josh was brought into the Arkansas State Police by his father," after Jim Bob "caught [Josh] leaving a young girl's bedroom and 'learned something inappropriate happened.'" "Rumors about Josh have swirled for years," the article continued; "*In Touch's* investigation has uncovered the secret he has been hiding."

According to the Complaint, appellants O'Kelley and Cate "directed, oversaw, and approved" SPD's FOIA response. Officials suspected that employees were leaking details of the investigation to the media; O'Kelley worried that her department would "soon end up in the tabloids" and become the target of "worldwide media attention." Without seeking guidance from the Arkansas Municipal League or the City's child services department, O'Kelley and Cate decided to release a redacted Offense Report in response to the FOIA request and "rushed to prepare" the report. Appellant Hoyt "organized, oversaw, and approved" WSCO's redactions, while County Attorney Steve Zega "oversaw, counseled, and approved" the release of the report. On the evening of the May 20 deadline, O'Kelley received the redacted SPD Offense Report and sent it to *In Touch Weekly* and a local news organization. The next day, Hoyt and Zega directed WCSO employees to mail the redacted Incident Report to *In Touch Weekly*.

The redactions did not prevent identification of Plaintiffs as four of Josh's victims. Both reports included Jim Bob and Michelle Duggar's names, their current and former addresses, and "other personal details" about each individual victim. The Offense Report contained "full descriptions" of the victim interviews, and the Complaint alleges that Plaintiffs were "obviously identifiable." The Incident Report "expressly identified one of Josh's victims as his then 5-year-old sister." In response to a request from Cate, the Arkansas Municipal League advised that Arkansas law prohibited disclosing the identity of sex crime victims. O'Kelley then asked *In Touch Weekly* to refrain from using Jim Bob and Michelle Duggar's names and accept a different version of the SPD report. Instead, the tabloid published the original Offense Report with an article titled, "Bombshell Duggar Police Report: Jim Bob Duggar Didn't Report Son Josh's Alleged Sex Offenses For More Than A Year," and reporting that "explosive new information is contained in a Springdale, Ark. police report obtained by *In Touch* magazine." The article revealed details of the sexual assaults, including that some occurred while the victims were sleeping, one victim was fourteen at the time, and the victims forgave Josh after he apologized.

The Complaint alleges a "public backlash" against the disclosures. Based on interview details, social media users identified Plaintiffs as the victims. Some commentators expressed sympathy, others "chastised [Plaintiffs'] personal decision to forgive their brother," while others "reveled in the *ad hoc* disclosure of the lurid details" and subjected Plaintiffs to "spiteful and harsh comments and harassment." In response to Joy Duggar's motion, a state court judge ordered the Offense Report expunged from the public record, ordered all copies destroyed, and ruled that interviews and information about the sexual assaults were not subject to FOIA disclosure. Undeterred, *In Touch Weekly* continued to post copies of the Offense Report and expanded its coverage of the scandal. A June 3 article highlighted a "new report . . . from the Washington County Sheriff's Office," which had "fewer redactions" and "show[ed] the extent of Josh's abuse." A June 15 article quoted an "insider" as saying, "The four Duggar girls 'forgave' Josh for his sins, but that's not how you get over sexual abuse." The Complaint alleges that publicizing their trauma subjected Plaintiffs and their families "to extreme mental anguish and emotional distress."

II. The Federal Constitutional Claims

A. The issue presented by this interlocutory appeal is whether individual Defendants O'Kelley, Cate, and Hoyt are entitled to qualified immunity from Plaintiffs' § 1983 damage claims. Qualified immunity shields public officials from liability for civil damages if their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson v. Callahan, 555 U.S. 223, 232 (2009). To defeat a motion to dismiss based on qualified immunity, Plaintiffs must "plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was

'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quotation omitted).

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quotation omitted). Thus, "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Id. (quotation omitted). The Supreme Court "has repeatedly told courts . . . not to define clearly established law at a high level of generality." Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (quotation omitted). Rather, we look for a controlling case or "a robust consensus of cases of persuasive authority." Al-Kidd, 563 U.S. at 741-42 (quotation omitted). There need not be a prior case directly on point, but "existing precedent must have placed the statutory or constitutional question beyond debate." Id. at 741.

B. This case presents these recurring qualified immunity issues in an unusual context. Often, controlling precedent establishes that an alleged constitutional right exists, but its parameters are "inapplicable or too remote," or their application to the facts is unclear. See, e.g., Kisela, 138 S. Ct. at 1153. In other cases, the right's parameters are unclear because there is no controlling case, and courts in other jurisdictions may be "sharply divided" on the issue. See, e.g., Stanton v. Sims, 571 U.S. 3, 6 (2013). Here, by contrast, a Supreme Court decision raises the threshold question whether the right Defendants are alleged to have violated even exists.

In Whalen v. Roe, the Supreme Court stated that its prior cases "sometimes characterized as protecting 'privacy' have in fact involved . . . the individual interest in avoiding disclosure of personal matters." 429 U.S. 589, 598-99 (1977) (footnote omitted). The Court then upheld a New York statute requiring the State Department of Health to collect records identifying persons who acquired certain prescription

drugs, concluding that "this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment." Id. at 606. The Court cautioned:

> We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data -- whether intentional or unintentional -- or by a system that did not contain comparable security provisions.

Id. at 605-06. That same year, the Court decided Nixon v. Administrator of General Services, which noted its decision in Whalen, weighed "any intrusion [on privacy] . . . against the public interest," and held that the Presidential Recordings and Materials Preservation Act "does not unconstitutionally invade [former President Nixon's] right of privacy." 433 U.S. 425, 457-58 (1977).

Despite the Court's inconclusive acknowledgment of a constitutional right it held not violated, a majority of the courts of appeals interpreted Whalen and Nixon as recognizing a constitutional right to the privacy of medical, sexual, financial, and other categories of highly personal information, grounded in the Fourteenth Amendment right to substantive due process. See Wolfe v. Schaefer, 619 F.3d 782, 785 (7th Cir. 2010) (collecting cases). Panels of this court followed suit. As we said in affirming the *denial* of relief in Alexander v. Peffer, "In Whalen . . . the Supreme Court determined that one component of the protection of the right to privacy embodied in the fourteenth amendment is an individual's interest in avoiding disclosures of personal matters." 993 F.2d 1348, 1349 (8th Cir. 1993).

More than thirty years after Whalen and Nixon, the Supreme Court returned to the issue in NASA v. Nelson, 562 U.S. 134 (2011). It again rejected a constitutional privacy challenge, this time to mandatory background checks for contractors at NASA's Jet Propulsion Laboratory. See id. at 159. The Court declined to provide a "definitive answer" to whether there is a constitutional right to informational

privacy, because the government as petitioner had not presented the issue for decision and it was not briefed and argued. See id. at 147 n.10. Rather, the majority concluded, "*[a]s was our approach in Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance." Id. at 147 (emphasis added). Two Justices took issue with this approach, arguing that "[a] federal constitutional right to 'informational privacy' does not exist," and it was "unfathomable" why Whalen and Nixon's "passing, barely explained reference to . . . an unenumerated right that they held to be not applicable . . . should be afforded *stare decisis* weight." Id. at 160, 164 (Scalia, J., concurring in the judgment).

Although Nelson left the issue unresolved, it confirmed that our court and other circuits erred in reading inconclusive statements in Whalen and Nixon as Supreme Court recognition of a substantive due process right to informational privacy. In this case, at oral argument before our *en banc* court, Defendants urged us to hold that the alleged right does not exist. But they did not raise this issue in the district court, before the panel, or in their petition for rehearing *en banc*. Nor did Plaintiffs address the issue prior to responding at oral argument. In similar circumstances, seven Supreme Court Justices declined to decide this constitutional issue in Nelson, observing that, "Particularly in cases like this one, where we have only the scarce and open-ended guideposts of substantive due process to show us the way, the Court has repeatedly recognized the benefits of proceeding with caution." Id. at 147 n.10 (cleaned up). The Court in Nelson opted to "assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in Whalen and Nixon." Id. at 138. However, even if the right is assumed to exist, in reviewing the denial of qualified immunity, Nelson raises an essential question: whether a right the Supreme Court has only assumed may exist, and this court has never held to be violated, can be a clearly established constitutional right.

C. Although Whalen and Nixon did not involve alleged wrongful disclosures of private information, a number of our pre-Nelson decisions extended their interpretation of those decisions to disclosures of "inherently private" information that is "either a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996), quoting Peffer, 993 F.2d at 1350 (alteration omitted). However, although we considered a wide variety of disclosures, in each case we concluded that the alleged right had not been violated. See Cooksey v. Boyer, 289 F.3d 513, 517 (8th Cir. 2002) (disclosure of police chief's treatment for stress); Riley v. St. Louis Cty. of Mo., 153 F.3d 627, 631 (8th Cir. 1998) (release of photo of son's body following suicide), cert. denied, 525 U.S. 1178 (1999); Eagle, 88 F.3d at 624-27 (disclosure of guilty plea already in public domain); Wade v. Goodwin, 843 F.2d 1150, 1151 n.2, 1153 (8th Cir.) (disclosure of list of "survivalists" denoting membership in organizations like the Ku Klux Klan), cert. denied, 488 U.S. 854 (1988). Indeed, in Eagle, we reversed the denial of qualified immunity, noting "that the exact boundaries of this right are, to say the least, unclear." 88 F.3d at 625. To the extent these cases read Whalen and Nixon as recognizing the right to informational privacy, Nelson makes clear they were wrong to do so. The disclosures in this case occurred years after the decision in Nelson, and we have not revisited the issue. The resulting legal uncertainty surely means the alleged constitutional right to informational privacy is not "beyond debate" in the Eighth Circuit. Al-Kidd, 563 U.S. at 741.

The Supreme Court applied this principle in Reichle v. Howards, where plaintiffs asserted an alleged First Amendment right to be free of retaliatory arrest, despite probable cause to arrest, arguing two Tenth Circuit cases clearly established a right the Supreme Court had never recognized. 566 U.S. 658, 664-66 (2012). The Court reversed the denial of qualified immunity, concluding the Tenth Circuit cases did not clearly establish the right at issue because an intervening Supreme Court decision had abrogated one and cast significant doubt on the other. See id. at 666-70.

"As we have previously observed," the Court explained, "[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." Id. at 669-70 (quotation omitted). Under Reichle, therefore, the uncertain status of the right to informational privacy means that Defendants are entitled to qualified immunity. If a right does not clearly exist, it cannot be clearly established.

III. The State Law Claims

Defendants' interlocutory appeal also challenged the district court's denial of qualified and statutory immunity from Plaintiffs' state law tort claims. The panel agreed that we review state law claims on interlocutory appeal to determine if the district court "properly denied a state entity or its agent immunity from suit." The panel concluded, based on its analysis of the Arkansas official immunity statute, Ark. Code § 21-9-301(a), that Defendants "are not entitled to statutory or qualified immunity on [Plaintiffs'] state law claims at this stage of the proceedings."

As they conceded at oral argument, Defendants petitioned for rehearing *en banc* only of the panel's denial of qualified immunity from Plaintiffs' § 1983 federal constitutional claims. Accordingly, Section II.B. of the panel opinion is reinstated. See Szabla v. City of Brooklyn Park, MN, 437 F.3d 1289 (8th Cir. 2006) (order reinstating panel opinion as to issues not raised in the petition for rehearing *en banc*). The district court of course remains free to revisit its initial ruling on the immunity issue, or any other aspect of the state law claims, at a later stage of the proceedings.

IV. Conclusion

For the foregoing reasons, the order of the district court dated September 29, 2017, is affirmed in part and reversed in part, and the case is remanded for proceedings not inconsistent with this opinion.

COLLOTON, Circuit Judge, concurring.

I join the opinion of the court and submit these observations in response to the separate opinions that follow. Both opinions take the view that court decisions *rejecting* a plaintiff's claim of constitutional right can clearly establish a constitutional right for the benefit of a future plaintiff. The court properly declines to adopt that reasoning.

The judicial power under Article III of the Constitution is limited to resolving cases and controversies. When a court holds that a plaintiff's allegations do not establish a violation of a constitutional right, the case is resolved. The judges have no authority to bind other judges in the future to rule that some other plaintiff presenting some other set of facts would demonstrate a violation of the Constitution. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821). So when panels of this court in *Alexander v. Peffer*, 993 F.2d 1348 (8th Cir. 1993), *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996), and *Cooksey v. Boyer*, 289 F.3d 513 (8th Cir. 2002), determined that there was no violation of a constitutional right, they could not in dicta create or recognize a clearly established right for purposes of applying the doctrine of qualified immunity in a future case. Judges do not increase their power by uttering dictum with an air of certitude.

"A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring). If there is no decision that a constitutional right exists, then the right is not clearly established, and officials do not have fair notice about it. In the context of qualified

immunity, therefore, "clearly established law comes from holdings, not dicta," *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019), with the likely exception of decisions that declare a constitutional violation in a concrete case before granting qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (discussing "development of constitutional precedent" through the discretionary first step of qualified immunity analysis).

This case leaves undisturbed our precedent that a prior *holding* of the Eighth Circuit is sufficient to recognize a clearly established right. *E.g.*, *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020); *cf. City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity). But in discerning a clearly established substantive due process right to informational privacy, the panel decision in this case mistakenly attributed the force of binding law to dicta in *Peffer*, *Eagle*, and *Cooksey*. *See Dillard v. City of Springdale*, 930 F.3d 935, 943-44 (8th Cir. 2019). Whether some other disclosure of information that amounted to a "shocking degradation" or "egregious humiliation" would have implicated the concept of substantive due process was unnecessary to the decision or result in those cases. It was sufficient for this court in *Peffer*, *Eagle*, and *Cooksey* to assume without deciding that a disclosure of matters more personal would violate the Constitution, just as it was sufficient for the Supreme Court to do so in *Whalen v. Roe*, 429 U.S. 589, 599, 605 (1977), and *NASA v. Nelson*, 562 U.S. 134, 147 (2011). Such an assumption does not clearly establish a constitutional right. *See Nelson*, 562 U.S. at 147 n.10.

Decisions of four other circuits denying qualified immunity in this context relied on precedent of that circuit deciding in an actual case that a constitutional right to informational privacy existed and was sufficiently pleaded or proved. *See Sealed Plaintiff No. 1 v. Farber*, 212 F. App'x 42, 43 (2d Cir. 2007) (citing *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)); *Anderson v. Blake*, 469 F.3d 910, 914

(10th Cir. 2006) (citing *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387-88 (10th Cir. 1995)); *Sterling v. Borough of Minersville,* 232 F.3d 190, 192 (3d Cir. 2000) (citing *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000), and *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 118 (3d Cir. 1987)); *James v. City of Douglas*, 941 F.2d 1539, 1540-41 (11th Cir. 1991) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981)). Whatever the merit of those underlying constitutional rulings, *cf. Nelson*, 562 U.S. at 147 & n.10; *id*. at 159-68 (Scalia, J., concurring in the judgment), the qualified immunity decisions do not support the view that a prior decision *rejecting* a plaintiff's claim of right can create a clearly established right. *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000), did rely on dicta from prior decisions of that court, so it was likely incorrect on this view, as there should be no exception even for Posnerian dicta. *See id*. at 956-57 (citing *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995)).[2]

The larger point about the misuse and misunderstanding of judicial dicta was well stated by Judge Leval in his Madison Lecture from October 2005. The thesis can be recounted succinctly:

> We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding—in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided.

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[2]In a different context, this court in *Putnam v. Keller*, 332 F.3d 541, 547 (8th Cir. 2003), misdescribed an aspect of *Coleman v. Reed*, 147 F.3d 751 (8th Cir. 1998), as a "holding," but the denial of qualified immunity in *Putnam* was grounded in an actual holding of this court in *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895, 899-902 (8th Cir. 1994).

Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1250 (2006). Given the conflicting views exhibited in this case about how binding law is decreed, and how clearly established rights are recognized, the Leval thesis and Chief Justice Marshall's teaching in *Cohens* warrant the renewed attention of the court.

GRASZ, Circuit Judge, with whom SMITH, Chief Judge, joins, concurring in part and concurring in the result.

The constitutional right to informational privacy in the Eighth Circuit is dead.[3] Some believe it never lived. In any event, in this age of digital information, where the government may possess massive amounts of personal data, the protection of twenty-two million people from wrongful disclosure of intimately private information by government officials now lies squarely in the hands of the state legislatures in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.[4] Perhaps that is where it belonged from the start, given that the federal constitution is silent on the matter and the United States Supreme Court has yet to conclude that a constitutional right to informational privacy exits. See NASA v. Nelson, 562 U.S. 134, 138 (2011) ("We assume, *without deciding*, that the Constitution protects a right to [informational] privacy . . . .") (emphasis added).

While the demise of informational privacy as a constitutional right in this circuit may be appropriate, we should at least recognize this was not an academic

[3]Although a litigant might, in theory, still attempt a facial challenge to a statute or regulation, or seek to enjoin the prospective release of information, the retroactive enforcement of any right to informational privacy under 42 U.S.C. § 1983 is now effectively precluded.

[4]The protection of informational privacy is now left to the state legislatures in the absence of any relevant state constitutional provisions.

exercise to the plaintiffs. The court has concluded that the Arkansas public officials here, who are alleged to have callously revealed intimate and humiliating personal information of young sexual assault victims to a tabloid under highly suspicious circumstances, are exempt from liability because of qualified immunity.[5] Ante at 10. The court does so, in part, based on the proposition that a constitutional right not definitively recognized by the Supreme Court cannot be "clearly established" for purposes of qualified immunity analysis. Ante at 9–10. While this reasoning may have facial appeal, it is simply not true that a right established in circuit precedent cannot be "clearly established" for purposes of qualified immunity even in the absence of definitive Supreme Court precedent. Indeed, many other circuit courts would likely be quite surprised by this holding.[6] Regardless, today's decision means future litigants have no recourse in this circuit under 42 U.S.C. § 1983 for informational privacy violations.

I remain of the view that the panel below was bound to follow this court's opinions in Cooksey v. Boyer, 289 F.3d 513, 515–16 (8th Cir. 2002), Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996), and Alexander v. Peffer, 993 F.2d 1348, 1350 (8th Cir. 1993), in which we recognized and narrowly defined the right to

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[5]Like informational privacy, qualified immunity is a textually invisible right.

[6]Several of our sister circuits have denied qualified immunity while finding the right to informational privacy was clearly established. See Anderson v. Blake, 469 F.3d 910, 912, 917 (10th Cir. 2006) (video of rape victim's assault disclosed by police officer); Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000) (threat to disclose arrestee's sexual orientation); Denius v. Dunlap, 209 F.3d 944, 956–57 (7th Cir. 2000) (medical information of a teacher); James v. City of Douglas, *Georgia*, 941 F.2d 1539, 1540–41 (11th Cir. 1991) (police officer viewed and allowed other people to view video of informant and suspect engaging in sexual activity). Other circuits have recognized the right and found violations. See Tucson Woman's Clinic v. Eden, 379 F.3d 531, 551 (9th Cir. 2004) (medical records); Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing the constitutional right to confidentiality of a HIV diagnosis).

informational privacy.[7] However, I agree with the en banc court that the foundation

[7]The initial concurring opinion does not alter this view by calling the recognition of informational privacy in these cases "dicta." To be sure, the general propositions and maxims about judicial power and dicta presented in the initial concurring opinion are not subject to question. But their asserted application in the present context is. First of all, whether a case or controversy exists to support the exercise of judicial power under Article III is a threshold issue. I fail to see how this is affected by whether a constitutional right is clearly established for purposes of granting qualified immunity. Qualified immunity does not dissolve the claim or deprive the court of judicial power. It is an affirmative defense. Second, there is no dispute that obiter dictum is not binding law. "Obiter dictum" is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ." *Obiter Dictum*, Black's Law Dictionary (11th ed. 2019); accord Sanzone v. Mercy Health, 954 F.3d 1031, 1039 (8th Cir. 2020) (using the same definition to define dicta). However, the notion that recognition of a constitutional right, analytical framework, or legal test is per se dicta in a case where a violation of a constitutional right is not found to have been successfully alleged sweeps too broadly. See Seminole Tribe of Florida v. Florida, 517 U.S. 43 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). In my view, a court must apply some legal standard to determine whether a purported constitutional right was violated. The legal standard applied is not "beyond the case." It is essential to its determination. In this regard, I am aware of no precedent standing for the proposition that the legal standard employed by an appellate court is not part of its holding unless it *also* finds that a violation of that standard has occurred. Consider, for example, Terry v. Ohio, 392 U.S. 1, 27–30 (1968), in which the Court concluded the Fourth Amendment protected against police frisks absent reasonable suspicion, while simultaneously finding the officer did not violate the Fourth Amendment. Or consider Strickland v. Washington, 466 U.S. 668, 687–701 (1984), in which the Court set forth the legal standard for ineffective assistance of counsel, yet found the legal representation in question did not violate the defendant's Sixth Amendment rights. See also Putnam v. Keller, 332 F.3d 541, 547 (8th Cir. 2003) (affirming denial of qualified immunity based on the standard articulated in Coleman v. Reed, 147 F.3d 751, 755 (8th Cir. 1998), in which we found no violation of a constitutional right). In the present case, the first four federal judges to review the plaintiffs' claims all read our circuit's precedent as recognizing the right

of those cases is gone. And today's decision has effectively negated them. Ante at 9 ("To the extent these cases read Whalen and Nixon as recognizing the right to informational privacy . . . they were wrong to do so."). With no right to informational privacy recognized in this circuit, the appellants cannot, as a matter of law, prevail against the assertion of qualified immunity. They must instead look to state law for relief.

KELLY, Circuit Judge, concurring in part and dissenting in part.

In 2006, Plaintiffs provided private and intimate details regarding their childhood sexual abuse to government officials under a promise of confidentiality. More than eight years later, government officials broke that promise and disclosed this sensitive information to a tabloid without Plaintiffs' consent. Because I believe this violated Plaintiffs' clearly established right to privacy, I respectfully dissent.

The issue in this appeal is whether a reasonable government official in the Eighth Circuit would have understood that disclosing to a tabloid private information regarding childhood sexual abuse would violate the constitutional right to privacy. See Anderson v. Creighton, 483 U.S. 635, 640 (1987). This raises two basic questions: (1) whether this court's caselaw, prior to NASA v. Nelson, 562 U.S. 134 (2011), provided fair notice that publicly disclosing this information would violate the constitutional right to privacy; and (2) if so, whether a government official could have reasonably believed that Nelson had undermined that caselaw.

I agree with the district court and the panel that our pre-Nelson caselaw clearly established that the government's disclosure of this sensitive information would violate the constitutional right to privacy. This court has repeatedly stated, in no uncertain terms, that "the right to privacy embodied in the fourteenth amendment"

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to informational privacy. They were not wrong.

protects "an individual's interest in avoiding disclosures of personal matters." Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993); see also Cooksey v. Boyer, 289 F.3d 513, 515 (8th Cir. 2002); Riley v. St. Louis Cty. of Mo., 153 F.3d 627, 631 (8th Cir. 1998); Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996); Wade v. Goodwin, 843 F.2d 1150, 1153 (8th Cir. 1988). Following other circuits, we have held that to violate an individual's constitutional right of privacy "the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." Peffer, 993 F.2d at 1350 (citing Davis v. Bucher, 853 F.2d 718, 721 (9th Cir. 1988)).

Until this case, we had not been presented with a factual scenario that satisfied this exacting standard.[8] But in my view, we had provided fair notice to government officials in the Eighth Circuit that the public disclosure of "highly personal matters representing the most intimate aspects of human affairs," that is "either a shocking degradation or an egregious humiliation . . . , or a flagrant breach of a pledge of confidentiality," violates the constitutional right to privacy. See Eagle, 88 F.3d at 625 (cleaned up). As a result, government officials in the Eighth Circuit are not entitled to qualified immunity for such disclosures. See Hope v. Pelzer, 536 U.S. 730, 741 (2002) (explaining that the clearly established test focuses on whether officials have "fair warning" that their conduct is unconstitutional).

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[8]However, we had endorsed other circuits' decisions that certain disclosures violated the right to privacy. For example, in Eagle, 88 F.3d at 625, we cited with approval Sheets v. Salt Lake Cty., 45 F.3d 1383, 1387–88 (10th Cir. 1995) (concluding that the husband of a murder victim stated a cognizable right-to-privacy claim based on the disclosure of excerpts from his wife's diary), and York v. Story, 324 F.2d 450, 455–56 (9th Cir. 1963) (deciding, 14 years before Whalen and Nixon, that photographing appellant's nude body, over her objection and for no legitimate law-enforcement purpose, and distributing the photos after telling appellant they had been destroyed, "constituted an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment").

Four judges have decided that Plaintiffs' constitutional right against the disclosure of this information was clearly established. The district court reasoned that

> taking the facts alleged in the Complaint as true, any reasonable person in the position to make these disclosures would have understood that these disclosures would be published, would cause a national scandal, would be a "shocking degradation" or "egregious humiliation" for the Plaintiffs, that the Plaintiffs had a "legitimate expectation" of confidentiality in these materials, and that disclosing these materials would therefore violate the Plaintiffs' constitutional right to privacy.

Dillard v. City of Springdale, 5:17-CV-5089, 2017 WL 4392049, at *7 (W.D. Ark. Sept. 29, 2017). A unanimous panel of this court agreed, concluding that:

> The particular facts alleged here are not near the periphery of the right to privacy but at its center. Certainly, allegations of incestuous sexual abuse implicate "the most intimate aspects of human affairs" and are "inherently private." The content and circumstances of these disclosures do not just meet the standard of "shockingly degrading or egregiously humiliating," they illustrate them. And releasing insufficiently redacted reports detailing minors' sexual abuse to a tabloid, notwithstanding promises that these reports would remain private, is "a flagrant breach of a pledge of confidentiality."

Dillard v. City of Springdale, 930 F.3d 935, 949 (8th Cir. 2019) (cleaned up).

These decisions are well-supported. Other courts have similarly concluded that a reasonable government official would have notice that the constitutional right to privacy protects against the government's disclosure of the details of sexual abuse. See Sealed Plaintiff No. 1 v. Farber, 212 F. App'x 42, 43 (2d Cir. 2007) (affirming the denial of qualified immunity and noting that "a person's status as a juvenile sex abuse victim is clearly the type of 'highly personal' information that we have long recognized as protected by the Constitution from governmental dissemination");

Anderson v. Blake, 469 F.3d 910, 914–18 (10th Cir. 2006) (affirming the denial of qualified immunity because plaintiff had a constitutionally protected privacy interest in a rape video and was not required, at the motion-to-dismiss stage, to disprove every possible compelling interest the government might assert); Bloch v. Ribar, 156 F.3d 673, 685–87 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no pen[o]logical purpose is being served" and stating that, as of September 1998, public officials in the Sixth Circuit were "on notice that such a privacy right exists"); Stafford-Pelt v. California, No. C-04-00496, 2005 WL 1457782, *8–11 (N.D. Cal. June 20, 2005) (denying qualified immunity because plaintiff had plausibly alleged that disclosing partially redacted reports detailing her allegations of sexual abuse against her half-brother violated her clearly established right to privacy). I believe our pre-Nelson precedent dictates this same result.

The question then becomes whether our precedent was undermined, such that the rule in this circuit would not have been clear to a reasonable official, by the Supreme Court's decision in Nelson. In that case, the Court "assume[d], without deciding, that the Constitution protects a privacy right of the sort mentioned in Whalen and Nixon." Nelson, 562 U.S. at 138. And it explained that, contrary to the interpretation adopted by most circuits, this was "the same approach . . . the Court took more than three decades ago in Whalen and Nixon." Id. at 147 n.10.

In the court's view, "Nelson raises an essential question: whether a right the Supreme Court has only assumed may exist, and this court has never held to be violated, can be a clearly established constitutional right." Ante at 8. Relying on Reichle v. Howards, the court answers this question in the negative, reasoning that "the uncertain status of the right to informational privacy means that Defendants are entitled to qualified immunity." See id. at 9–10 (citing Reichle, 566 U.S. 658, 664–66 (2012)). I disagree.

In Reichle, the Supreme Court decided that it was not clearly established in the Tenth Circuit that a retaliatory arrest could violate the First Amendment even if the arrest was supported by probable case. See 566 U.S. at 663. The Court reasoned that, although there was Tenth Circuit caselaw to this effect, a reasonable officer could have believed that caselaw had been abrogated by the Court's subsequent decision in Hartman v. Moore, 547 U.S. 250 (2006), which reached the opposite conclusion regarding retaliatory prosecutions. See Reichle, 566 U.S. at 663. The Court explained that most circuits had treated retaliatory arrest and prosecution claims similarly before Hartman, that it had granted certiorari in Hartman to resolve a circuit split pertaining to both retaliatory arrests and prosecutions, that much of the rationale in Hartman applied to both retaliatory arrests and prosecutions, and that several circuits had decided that Hartman's no-probable-cause requirement extended to retaliatory arrests. Id. at 667–68.

I do not agree that Nelson's effect on our right-to-privacy caselaw is similar to Hartman's effect on the Tenth Circuit's retaliatory-arrest caselaw. Unlike Hartman, which was intended to resolve a circuit split and abrogate contrary circuit authority, Nelson purported to leave the state of the law intact. See id. at 147 & n.10. The Court expressly acknowledged that, after Whalen and Nixon, different circuits had adopted different interpretations of when the disclosure of private information by government officials would violate the right to privacy, and the Court declined to decide which circuit's caselaw was correct. See Nelson, 562 U.S. at 146–47 & n.9.[9]

[9]Moreover, I do not believe our prior caselaw rested entirely on our interpretation of Whalen and Nixon. It is true that we followed most other circuits in interpreting those decisions as "recognizing a constitutional right to the privacy . . . of highly personal information, grounded in the Fourteenth Amendment." Ante at 7. But in defining the contours of the right and deciding what a plaintiff would have to show to establish a violation, we relied not on Whalen and Nixon, but on general constitutional principles and opinions from other circuits, some of which traced their roots to before Whalen and Nixon were decided. See, e.g., Eagle, 88 F.3d at 625 ("canvassing the relevant cases").

At least one other circuit has stated that Nelson does not provide courts with "any reason to take the opportunity to revisit [their] past precedents on this matter." See Lee v. City of Columbus, 636 F.3d 245, 260 n.8 (6th Cir. 2011). And other circuits have not abandoned their pre-Nelson right-to-privacy caselaw after Nelson. See Hancock v. Cty. of Rensselaer, 882 F.3d 58, 65–70 (2d Cir. 2018) (continuing to apply pre-Nelson caselaw recognizing "the right to privacy in one's personal information, including information about one's body" in the Second Circuit); Wyatt v. Fletcher, 718 F.3d 496, 506 n.14 (5th Cir. 2013) (noting that, even after Nelson, a "general right to nondisclosure of private information" was established in the Fifth Circuit); see also Leiser v. Moore, 903 F.3d 1137, 1144 (10th Cir. 2018) (assuming, without deciding, that the Tenth Circuit's pre-Nelson precedents had not been overruled). I agree with these courts that Nelson did not abrogate or overrule pre-existing circuit caselaw. And unlike in Reichle, I do not think a reasonable government official could have concluded otherwise.

Nelson did clarify that our prior caselaw was not required by Whalen and Nixon. A reasonable government official could have wondered whether, in light of that clarification, we would revisit our past decisions and change our right-to-privacy jurisprudence. But because we had not done so when the government officials made the disclosures at issue here, they could not have reasonably concluded that the law in the Eighth Circuit had been changed. And we have not been presented with an opportunity to revisit our pre-Nelson caselaw in this appeal. See ante at 8.

For these reasons, I believe the panel's opinion was correct, and I would reinstate it. To the extent the court does otherwise, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3284

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas; Kathy O'Kelley; Ernest Cate

Defendants

Rick Hoyt, in his individual and official capacities

Defendant - Appellant

Steve Zega; Bauer Publishing Company, L.P.; Bauer Magazine, L.P.; Bauer Media Group, Inc.; Bauer, Inc.; Heinrich Bauer North America, Inc.; Bauer Media Group USA, LLC; Does, 1-10

Defendants

No: 17-3287

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas

Defendants

Kathy O'Kelley, in her individual and official capacities; Ernest Cate, in his individual and official capacities

Defendants - Appellants

Rick Hoyt; Steve Zega; Bauer Publishing Company, L.P.; Bauer Magazine, L.P.; Bauer Media Group, Inc.; Bauer, Inc.; Heinrich Bauer North America, Inc.; Bauer Media Group USA, LLC; Does, 1-10

Defendants

Appeals from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:17-cv-05089-TLB)

JUDGMENT

Before SMITH, Chief Judge, STRAS, and KOBES, Circuit Judges.

These appeals from the United States District Court were originally submitted on the record of the district court, briefs of the parties and were argued by counsel.

Upon reconsideration and rehearing before the court en banc, it is hereby ordered and adjudged that the order of the district court dated September 29, 2017 is affirmed in part and reversed in part, and the case is remanded for proceedings not inconsistent with this opinion.

June 15, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Michael E. Gans

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 17-3284

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas; Kathy O'Kelley; Ernest Cate

Defendants

Rick Hoyt, in his individual and official capacities

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Defendants

No. 17-3287

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas

*Defendant*s

Kathy O'Kelley, in her individual and official capacities; Ernest Cate, in his individual and official capacities

Defendants - Appellants

Rick Hoyt; Steve Zega; Bauer Publishing Company, L.P.; Bauer Magazine, L.P.; Bauer Media Group, Inc.; Bauer, Inc.; Heinrich Bauer North America, Inc.; Bauer Media Group USA, LLC; Does, 1-10

*Defendant*s

Appeals from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: December 12, 2018
Filed: July 12, 2019

Before SMITH, Chief Judge, WOLLMAN and GRASZ, Circuit Judges.

SMITH, Chief Judge.

Plaintiff-appellees Jill Dillard, Jessa Seewald, Jinger Vuolo, and Joy Duggar allege violations of their constitutional right to privacy and of Arkansas tort law in connection with defendant-appellants' decisions to release information identifying them as victims of childhood sexual abuse. The appellees sued several parties and entities, but this appeal concerns their constitutional and tort claims against City of Springdale ("City") officials Kathy O'Kelley and Ernest Cate, and Washington County ("County") official Rick Hoyt. O'Kelley, Cate, and Hoyt (collectively, "the

officials") moved to dismiss the appellees' constitutional claims on the basis of qualified immunity and the tort claims on the bases of qualified and statutory immunity. The district court[1] denied their motion. Because we agree that the officials were not entitled to either qualified or statutory immunity, we affirm.

I. *Background*

The appellees are sisters and stars of the popular reality show *19 Kids and Counting*. The show chronicles the lives of Jim Bob and Michelle Duggar and their 19 children. In 2006, the appellees, as well as their siblings and parents, were interviewed as part of a police investigation into sexual misconduct by the appellees' brother, Josh Duggar. The appellees were under the age of 16 at the time of the alleged misconduct and at the time of the investigation. The police promised the appellees and their family that their statements would remain confidential. The family's statements were documented in reports by both the City Police Department and the County Sheriff's Department. The County prosecutor also filed a Family in Need of Services (FINS) petition pursuant to a request by the City police. No charges were ever filed against Josh.

In 2015, a tabloid publisher submitted Freedom of Information Act (FOIA) requests to the City and County to access these reports. On May 19, 2015, the tabloid published an article naming Josh as the target of an "Underage Sex Probe" and promised more details to follow. *Dillard v. City of Springdale, Ark.*, No. 5:17-cv-05089, 2017 WL 4392049, at *1 (W.D. Ark. Sept. 29, 2017). The original article identified Josh as the perpetrator and unnamed sisters—later identified as the appellees—as the victims. On May 20, the City released its report to the tabloid; the next day, the County released its report as well. O'Kelley, the City Police Chief, and Cate, the City Attorney, directed the release of the City's report, while Hoyt, an

[1]The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

officer in the County Sheriff's Office, directed the release of the County's report. The appellees describe the released City report, for example, as containing "graphic descriptions about their molestation." Compl. at 17, ¶ 58, *Dillard v. City of Springdale, Ark.*, No. 5:17-cv-05089 (W.D. Ark. May 18, 2017), ECF No. 1. Though the appellees' names were redacted, the reports contained other identifying information—such as the appellees' parents' names and the appellees' address and ages.

At the district court, the officials claimed FOIA required them to release the reports in the time and manner in which they did. However, the appellees alleged that the officials hastily and wrongfully released the reports. We read the appellees' complaint as alleging that the officials released the reports in response to pressure from the press in an effort to promote the appearance of transparency.

Following the officials' release of the reports, the tabloid published both reports, as well as several salacious articles based on the reports' content. Because of the public's prior knowledge about the Duggar family, the non-redacted details—i.e., the parents' names, the victims' ages and address—allowed readers to ascertain the appellees' exact identities. While the pre-disclosure March 19 article indicated that some of the many Duggar children had been abused, the March 20 and 21 reports confirmed these rumors and enabled the appellees to be specifically identified. A torrent of media attention followed, and the appellees claim they "were subjected to spiteful and harsh comments and harassment on the Internet and in their daily lives." Compl. at 20, ¶ 68. Joy Duggar subsequently filed a motion in state court to expunge copies of the City report from the public record; the court granted this motion on the basis that Arkansas law had prohibited their release. Nonetheless, copies of the report continued to circulate online.

The appellees then brought this suit in federal court, alleging the officials violated their constitutional and common law rights by directing the reports' release.

They sued under 42 U.S.C. § 1983 and the Arkansas Civil Rights Act (ACRA) for violations of their right to privacy and under Arkansas tort law for invasion of privacy—public disclosure of private fact; invasion of privacy—intrusion upon seclusion; and outrage.[2] The officials moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, invoking the protection of qualified immunity for the constitutional claims and qualified and statutory immunity for the tort claims. With regard to the constitutional claims, they argued the appellees had not alleged constitutional violations, or, in the alternative, that the constitutional right at issue—i.e., the right to informational privacy—was not "clearly established." The officials renew this argument on appeal, with an emphasis on the "clearly established" element. With regard to the state law claims, they argued that Ark. Code Ann. § 21-9-301 immunized them from suit and likewise renew this argument on appeal.

II. *Discussion*

A. *Constitutional Claims*

"A denial of qualified immunity is an appealable final decision only to the extent it turns on an issue of law. . . . At this early stage of the litigation, to warrant reversal, defendants must show that they are entitled to qualified immunity on the face of the complaint." *Dadd v. Anoka Cty.*, 827 F.3d 749, 754 (8th Cir. 2016) (internal quotations omitted). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (internal quotations omitted). "Like the district court, we must review the complaint most favorably to the non-moving party and may dismiss only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993) (internal quotations omitted).

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[2]The appellees also sued other parties who have since been dismissed and who are not subject to this appeal.

"The obvious function of the qualified immunity rule is to excuse an officer who makes a reasonable mistake in the exercise of his official duties." *Edwards v. Baer*, 863 F.2d 606, 607 (8th Cir. 1988). "An individual defendant is entitled to qualified immunity if his conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Estate of Walker v. Wallace*, 881 F.3d 1056, 1060 (8th Cir. 2018). This court "review[s] de novo the denial of a motion to dismiss on the basis of qualified immunity, and must consider whether the plaintiff has stated a plausible claim for violation of a constitutional or statutory right and whether the right was clearly established at the time of the alleged infraction." *Dadd*, 827 F.3d at 754–55 (internal quotations omitted). Absent either a clearly established right or a constitutional violation, qualified immunity applies. *See Estate of Walker*, 881 F.3d at 1060. We apply the same standard to claims under the Arkansas Constitution. *See Hudson v. Norris*, 227 F.3d 1047, 1054 (8th Cir. 2000) (citing *Robinson v. Langdon*, 970 S.W.2d 292, 296 (Ark. 1998)).

1. *Constitutional Violation*

"In *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (*Whalen*), the Supreme Court determined that one component of the protection of the right to privacy embodied in the [F]ourteenth [A]mendment is an individual's interest in avoiding disclosures of personal matters." *Peffer*, 993 F.2d at 1349. We have adopted that understanding of the Fourteenth Amendment, recognizing a "right to confidentiality" protecting "against public dissemination of information" concerning "highly personal matters representing the most intimate aspects of human affairs." *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (internal quotation omitted).

> To violate a person's constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information. To determine whether a particular disclosure satisfies this exacting standard, we must examine the nature

> of the material opened to public view to assess whether the person had a legitimate expectation that the information would remain confidential while in the state's possession. When the information is inherently private, it is entitled to protection.[3]

Id. (cleaned up).

Because of the "limited" nature of the right, we have repeatedly declined to deny officials qualified immunity for disclosures involving anything short of "the most intimate aspects of human affairs." *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988) (upholding finding of qualified immunity where state official identified plaintiff as a "survivalist"); *Peffer*, 993 F.2d at 1351 (finding plaintiff had not alleged a constitutional violation where city official revealed plaintiff had been rejected from the police academy); *Cooksey v. Boyer*, 289 F.3d 513, 516 (8th Cir. 2002) (affirming qualified immunity finding where mayor revealed police chief was being treated for stress). We have also declined to deny an official qualified immunity where the information disclosed was not "inherently private." *Eagle*, 88 F.3d at 625 (reversing denial of qualified immunity where officers publicized information already in the public domain); *see also Riley v. St. Louis Cty. of Mo.*, 153 F.3d 627, 631 (8th Cir.

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[3]O'Kelley and Cate claim the constitutional violation prong of this case is controlled by *Hart v. City of Little Rock*, 432 F.3d 801 (8th Cir. 2005) rather than our informational privacy precedent; they urge us to adopt standards applied therein. In *Hart*, police officers sued Little Rock for releasing files containing their addresses, social security numbers, and other sensitive information to a defense attorney, who then released those files to his incarcerated client; the officers claimed the city had endangered them by releasing their personal information to a criminal. *Id.* at 803. We analyzed the case under a "state-created danger theory," because "the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Id.* at 805. The instant case does not involve a state-created danger; therefore, *Hart* is not the applicable precedent. *Hart* is further distinguishable in that much of the information at issue in *Hart*—such as addresses and names of family members—was not inherently private.

1998) (affirming qualified immunity finding where officers released photographs of the deceased where the deceased's mother had allowed his remains to be viewed during a visitation).

The officials suggest that because we have declined to find constitutional violations in our previous informational privacy cases, we must also decline to find a violation here. We disagree. We have repeatedly recognized the existence of a right to confidentiality since the Supreme Court's pronouncement in *Whalen*. Just as we have recognized informational privacy's limits by denying its application in less-than-egregious cases, we have also defined its reach by describing the types of cases in which the right *would* proscribe official behavior. *See Goodwin*, 843 F.2d at 1153 (noting that the Constitution protects "privacy" in the context of "the most intimate aspects of human affairs"); *Peffer*, 993 F.2d at 1350 (finding right to privacy protects information that would constitute "a shocking degradation or an egregious humiliation . . . to further some specific state interest, or a flagrant breech of a pledge of confidentiality which was instrumental in obtaining the personal information"); *Eagle*, 88 F.3d at 625 (explaining that "inherently private" information is protected). Though we have explained that "protection against public dissemination of information is limited," that qualifier applies to information that is not "highly personal," does not "represent[] the most intimate aspects of human affairs," and is not "inherently private." *Eagle*, 88 F.3d at 625 (internal quotations omitted). The limitation does not swallow the right.

Government officials are entitled to protection from liability for innocuous disclosures, but we will uphold genuine constitutional limits on governmental disclosure in the appropriate circumstance. Being identified as a minor victim of sexual abuse is markedly more intrusive than being identified as a survivalist, failed police academy applicant, or over-stressed police chief. Releasing already-public information—particularly information made available by the plaintiff herself, as in

Riley—is also vastly different than disclosing information that the plaintiffs themselves jealously guarded from the public.[4]

Guided by the considerations detailed in *Peffer*, *Eagle*, and *Cooksey*, we hold that the appellees have alleged a plausible claim for the violation of a constitutional right. The appellees allege City and County law enforcement obtained information about Josh's abuse from the appellees and their family, promising them confidentiality. They allege the officials then released those law enforcement reports to the public. They allege they were minors at the time of the molestation and at the time the reports were created. They allege the reports contained graphic details of their incestuous sexual abuse. And, they allege the reports were insufficiently redacted, de facto revealing their names to the public. Finally, they allege the officials released the reports in an effort to promote the appearance of transparency. Therefore, the appellees have pleaded sufficient facts to meet *Peffer*'s "exacting standard." *See Eagle*, 88 F.3d at 625.

The information released by the officials involved "highly personal matters representing the most intimate aspect of human affair," *Eagle*, 88 F.3d at 625 (internal quotation removed), and the appellees had a legitimate expectation of privacy in that information. Not only did police promise the appellees that the

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[4]Hoyt submitted separate briefing and argues he could not have violated the appellees' right to confidentiality because he released his report after the City, meaning the information at issue was already public. However, at this stage of the litigation, "we must review the complaint most favorably to the non-moving party." *Peffer*, 993 F.2d at 1349. The appellees allege that the County report revealed information not contained in City report, and we take those allegations as true. We also hesitate to announce a rule that would allow multiple officials to violate a person's rights near-simultaneously but would only punish the "first-mover." We need not resolve this "first-in-time" issue here, however, because the appellees have alleged separate violations.

information would remain private, but Arkansas law also supported this expectation of privacy.[5] In sum, the information was inherently private and is therefore entitled

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[5]The Arkansas Code provides that

> [a] law enforcement agency shall not disclose to the public information directly or indirectly identifying the victim of a sex offense except to the extent that disclosure is:
>
> (1) Of the site of the sex offense;
>
> (2) Required by law;
>
> (3) Necessary for law enforcement purposes; or
>
> (4) Permitted by the court for good cause.

Ark. Code Ann. § 16-90-1104(b).

Section 16-90-1104(b)(2) includes an exception for disclosures required by law, but the exception is clarified by Arkansas's Child Maltreatment Act, which states that

> [a]ny data, records, reports, or documents that are created, collected, or compiled by or on behalf of the Department of Human Services, the Department of Arkansas State Police, or other entity authorized under this chapter to perform investigations or provide services to children, individuals, or families shall not be subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

Ark. Code Ann. § 12-18-104(a).

The City and County's reports were "documents" "created, collected, or compiled" by "entit[ies] authorized . . . to perform investigations or provide services to children, individuals, or families" as defined by the Act. *See id.* The County prosecutor's filing of a FINS petition in response to a City police request also

to constitutional protection. The appellees have stated a plausible claim for the violation of their constitutional right to confidentiality.

2. *Clearly Established*

The "clearly established" analysis "focus[es] . . . on whether the officer had fair notice that her conduct was unlawful . . . at the time of the conduct." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). "The right the official is alleged to have violated

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supports the status of the reports as documents to which the Child Maltreatment Act exception applies.

The interplay between the two statutes is readily discernible from their plain language. The absence of Arkansas cases actually applying the Child Maltreatment Act does not render its plain language ambiguous. None of the officials have denied that the reports were documents; that these documents were created; that they were collected or compiled by their respective law enforcement agencies; or that their agencies were authorized to investigate the allegations against Josh. As FOIA officers, the officials should reasonably have been aware of the law's requirements.

Neither is the officials' attempt to create ambiguity by referencing a change to the Juvenile Code availing. The Juvenile Code is an entirely different section of the Arkansas Code than that containing § 16-90-1104 and the Child Maltreatment Act. *See* Act of Apr. 4, 2017, No. 891, 2017 Ark. Acts 891 (amending § 9-27-309(j). The legislature amended the Juvenile Code to exempt from FOIA records of an investigation conducted when the *offender* was an adult but relating to juvenile conduct. This change does tangentially relate to the situation at issue, in that Josh Duggar was investigated as an adult for juvenile conduct. However, Josh is not a plaintiff in this suit: his sisters are. The issue here is not whether the appellants acted improperly vis a vis Josh; the issue is whether they acted improperly vis a vis his sisters. Perhaps the Arkansas legislature did amend the code to protect juvenile perpetrators like Josh. But that amendment did nothing to change the language or rationale of § 16-90-1104 or of the Child Maltreatment Act, which are intended to protect victims rather than perpetrators.

must have been clearly established in a particularized sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Capps v. Olson*, 780 F.3d 879, 885–86 (8th Cir. 2015) (cleaned up).

The contours of a right may be sufficiently clear without "a case directly on point." *Kisela*, 138 S. Ct. at 1152 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). Though we are "not to define clearly established law at a high level of generality," *id.* (internal quotations omitted), "[g]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," *Olson*, 780 F.3d at 886 *(*quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); *see also White*, 137 S. Ct. at 552 ("Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent." (cleaned up)). "[I]n an obvious case, [general] standards can clearly establish the answer, even without a body of relevant case law." *Olson*, 780 F.3d at 886 (alterations in original) (quoting *Brosseau*, 543 U.S. at 199).

The question now before us, then, is whether our law was "clearly established in a particularized sense," that the officials' alleged conduct was unconstitutional. *Olson*, 780 F.3d at 885–86 (cleaned up). Namely, we must decide whether the law provided fair notice to the appellants that releasing details of minors' sexual abuse to a tabloid in a format predictably enabling the victims' identification was not only unadvisable, but also unlawful.

We conclude that it did. Inexact boundaries are boundaries nonetheless. The particular facts alleged here are not near the periphery of the right to privacy but at its center. Certainly, allegations of incestuous sexual abuse implicate "the most

intimate aspects of human affairs" and are "inherently private." *Eagle*, 88 F.3d at 625 (internal quotations omitted). The content and circumstances of these disclosures do not just meet the standard of "shockingly degrading or egregiously humiliating," they illustrate them. *Cooksey*, 289 F.3d at 516. And releasing insufficiently redacted reports detailing minors' sexual abuse to a tabloid, notwithstanding promises that these reports would remain private, is "a flagrant breach of a pledge of confidentiality." *Id.* (cleaned up). Despite not having had an informational privacy case with these same facts, our case law "appl[ies] with obvious clarity to the specific conduct in question," *Olson*, 780 F.3d at 886 (quoting *Lanier*, 520 U.S. at 271), and the appellants' arguments to the contrary are unavailing. This is a case in which "[general] standards . . . clearly establish[ed] the answer." *Id.* (first alteration in original) (quoting *Brosseau*, 543 U.S. at 199).[6]

"[Q]ualified immunity protects officials who make bad guesses in gray areas, [and] it gives them breathing room to make reasonable but mistaken judgments." *Estate of Walker*, 881 F.3d at 1060 (internal citations omitted). Qualified immunity does not, however, protect unreasonable mistakes or plain incompetence. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Where, as here, we are not reviewing split-second, life-or-death decisions characteristic of excessive force cases, the range of reasonable judgments naturally narrows by virtue of the officials' increased opportunity for reasoned reflection. *See Brown v. City of Golden*

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[6]Arkansas law further undercuts the appellants' claim that they lacked fair notice of their alleged conduct's illegality. Statutes do not create constitutional rights, *Davis v . Scherer*, 468 U.S. 183 (1998), but they may assist in showing that those rights are clearly established by helping provide fair notice of a particular course of conduct's unlawfulness. *See Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) ("[S]tate statutes and regulations may inform our judg[]ment regarding the scope of constitutional rights . . . ."); *c.f. Small v. McCrystal*, 708 F.3d 997, 1004–05 (8th Cir. 2013). Arkansas disclosure law is especially relevant here since the officials have argued that the law, in fact, required them to disclose the reports.

Valley, 574 F.3d 491, 497 (8th Cir. 2009) (noting the fact that "there [was] nothing to indicate that [the officer] was faced with the need to make any split-second decisions" as contributing to the court's denial of qualified immunity); *see generally Awnings v. Fullerton*, 912 F.3d 1089, 1100 (8th Cir. 2019) (undertaking qualified immunity analysis in light of the "facts and circumstances confronting" the official in question).

We hold that the right of minor victims of sexual abuse not to have their identities and the details of their abuse revealed to the public was clearly established.

B. *State Law Claims*

Generally, we will only decide state law claims on interlocutory appeal if those claims are "inextricably intertwined with interlocutory appeals concerning the defense of qualified immunity." *Veneklase v. City of Fargo*, 78 F.3d 1264, 1269 (8th Cir. 1996) (internal quotation omitted). However, we will also review state law claims for the limited purpose of determining whether the district court properly denied a state entity or its agent immunity from suit, "because immunity is effectively lost if a case is erroneously permitted to go to trial." *Argonaut Great Cent. Ins. Co. v. Audrain Cty. Joint Commc'ns*, 781 F.3d 925, 929 (8th Cir. 2015) (quoting *Van Wyhe v. Reisch*, 581 F.3d 639, 647–48 (8th Cir. 2009)); *see also id.* ("The key to our jurisdiction over an interlocutory appeal addressing sovereign immunity is whether the immunity is an immunity from suit rather than a mere defense to liability." (internal quotation omitted)).

Ark. Code Ann. § 21-9-301 immunizes all political subdivisions of the state "from liability and from suit for damages except to the extent that they may be covered by liability insurance" and states that "[n]o tort action shall lie against any such political subdivision because of the acts of its agents and employees." The Arkansas Supreme Court has held and repeatedly reaffirmed that § 21-9-301 provides public officials with immunity against negligent acts but *not* against intentional torts.

See Sullivan v. Coney, 427 S.W.3d 682, 685 (2013). The district court concluded that because the appellees had alleged intentional torts, § 21-9-301 did not apply.

Though the officials argue that the district court "erroneously interpreted Arkansas state law" because "[t]he decision in *Battle* is wrong," Appellants O'Kelley's and Cate's Br. at 31, 33, their argument is without merit, as federal courts are bound by a state supreme court's interpretation of state law. *See Curtis Lumber Co., Inc. v. Louisiana Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010).

Arkansas defines intentional torts as those "involv[ing] consequences which the actor believes are substantially certain to follow his actions." *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 215 S.W.3d 596, 606 (Ark. 2005) (citing *Miller v. Ensco, Inc.*, 692 S.W.2d 615, 617 (Ark. 1985)). The appellees allege that the officials committed the intentional torts of invasion of privacy—public disclosure of private fact; invasion of privacy—intrusion upon seclusion; and outrage. According to Arkansas law, these torts involve the release of either (1) offensive information in which the plaintiff has a reasonable expectation of privacy, *see Dunlap v. McCarthy*, 678 S.W.2d 361, 364 (1984) (citing Restatement (Second) of Torts § 652 et seq. (1977)), or (2) information likely to cause the plaintiff emotional distress. *See Crockett v. Essex*, 19 S.W.3d 585, 589 (Ark. 2000). Read in the light most favorable to the appellees, the complaint alleges that the officials released the reports with either the affirmative knowledge or the substantial certainty that the information contained therein was private and that its release would be offensive or distressing to the appellees. Therefore, because the appellees have sufficiently pleaded intentional torts, the officials are not entitled to statutory or qualified immunity on the appellees' state law claims at this stage of the proceedings.

III. *Conclusion*

The judgment of the district court is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3284

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas; Kathy O'Kelley; Ernest Cate

Defendants

Rick Hoyt, in his individual and official capacities

Defendant - Appellant

Steve Zega; Bauer Publishing Company, L.P.; Bauer Magazine, L.P.; Bauer Media Group, Inc.; Bauer, Inc.; Heinrich Bauer North America, Inc.; Bauer Media Group USA, LLC; Does, 1-10

Defendants

No: 17-3287

Jill Dillard; Jessa Seewald; Jinger Vuolo; Joy Duggar

Plaintiffs - Appellees

v.

City of Springdale, Arkansas; Washington County, Arkansas

Defendants

Kathy O'Kelley, in her individual and official capacities; Ernest Cate, in his individual and official capacities

Defendants - Appellants

Rick Hoyt; Steve Zega; Bauer Publishing Company, L.P.; Bauer Magazine, L.P.; Bauer Media Group, Inc.; Bauer, Inc.; Heinrich Bauer North America, Inc.; Bauer Media Group USA, LLC; Does, 1-10

Defendants

Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:17-cv-05089-TLB)

JUDGMENT

Before SMITH, Chief Judge, WOLLMAN, and GRASZ, Circuit Judges.

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in accordance with the opinion of this Court.

July 12, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Michael E. Gans

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JILL DILLARD; JESSA SEEWALD; JINGER VUOLO; and JOY DUGGAR — **PLAINTIFFS**

V. — **CASE NO. 5:17-CV-5089**

CITY OF SPRINGDALE, ARKANSAS; WASHINGTON COUNTY, ARKANSAS; KATHY O'KELLEY, in her individual and official capacities; ERNEST CATE, in his individual and official capacities; RICK HOYT, in his individual and official capacities; STEVE ZEGA, in his official capacity; BAUER PUBLISHING COMPANY, L.P.; BAUER MAGAZINE, L.P.; BAUER MEDIA GROUP, INC.; BAUER, INC.; HEINRICH BAUER NORTH AMERICA, INC.; BAUER MEDIA GROUP USA, LLC; and DOES 1–10, inclusive — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

Currently before the Court are:

- The Motion to Dismiss (Doc. 21) and Brief in Support (Doc. 22) filed by Defendants City of Springdale ("the City"), Ernest Cate in his official and individual capacities, and Kathy O'Kelley in her official and individual capacities (collectively, "the Springdale Defendants"); the Response in Opposition (Doc. 32) filed by Plaintiffs Jill Dillard, Jessa Seewald, Jinger Vuolo, and Joy Duggar; and the Reply (Doc. 38) filed by the Springdale Defendants; and
- The Motion to Dismiss (Doc. 29) and Brief in Support (Doc. 30) filed by Defendants Washington County ("the County"), Rick Hoyt in his official and individual capacities, and Steve Zega in his official capacity (collectively, "the Washington

County Defendants"), and the Response in Opposition (Doc. 36) filed by the Plaintiffs.

For the reasons given below, both Motions are **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Plaintiffs, who are all sisters, filed this lawsuit on May 18, 2017. *See* Doc. 1, ¶ 2. In their Complaint, they allege that in December 2006, while they were all under the age of 16, they and their parents were interviewed during a police investigation ("the Investigation") involving allegations that they had been sexually assaulted by their brother, Josh Duggar. *See id.* The police investigators conducting the interviews promised all of them that their statements would remain confidential and not be publicized. *See id.* The contents of these interviews were documented in a Springdale Police Department official Offense Report, and in a Washington County Sheriff's Office official Incident Report. *See id.* Afterwards, the Washington County prosecutor's office filed a Family In Need of Services ("FINS") petition, pursuant to a request by the Springdale Police Department, but no charges were ever brought against Josh Duggar.

Nearly a decade later, while the Duggar family was starring in a national reality-television show, *see id.* at ¶¶ 51, 124, Defendants Bauer Publishing Company, L.P., Bauer Magazine, L.P., Bauer Media Group, Inc., Bauer, Inc., Heinrich Bauer North America, Inc., and Bauer Media Group USA, LLC (collectively, "the Bauer Defendants"), became aware of the aforementioned investigation, and on May 15, 2015, began submitting Freedom of Information Act ("FOIA") requests to the City and the County, seeking copies of the Offense Report and Incident Report (collectively, "the Reports")

along with any other documents relating to the Investigation, *see id.* at ¶ 4. The Bauer Defendants operate a web and print media tabloid publication called "In Touch Weekly," and on May 19, 2015, they caused an article to be published in it, naming Josh Duggar as the target of an "Underage Sex Probe," and promising more details to come in future articles. *See id.* at ¶ 51. The next day, the City released the Offense Report to In Touch Weekly, pursuant to the Bauer Defendants' FOIA request. *See id.* at ¶ 56. The day after that, the County did likewise with its Incident Report. *See id.* at ¶ 59. The individuals involved in the decision to release the Offense Report were Ms. O'Kelley (the Springdale Police Chief) and Mr. Cate (the City Attorney), *see id.* at ¶¶ 5, 56–57, and the individuals involved in the decision to release the Incident Report were Mr. Hoyt (an enforcement major at the Sheriff's office) and Mr. Zega (the County Attorney), *see id.* at ¶¶ 6, 59. In Touch Weekly published both Reports and many articles about them, *see id.* at ¶¶ 66, 72, 74, which were exposed to millions of people, *see id.* at ¶ 69. Both reports were redacted, but nevertheless contained enough unredacted information to permit readers to discover that the Plaintiffs were among Josh Duggar's victims. *See id.* at ¶¶ 58, 60.

The Plaintiffs have brought a variety of tort and constitutional claims against the Springdale Defendants, the Washington County Defendants, and the Bauer Defendants. All of the Defendants have filed Motions to Dismiss under Fed. R. Civ. P. 12(b)(6). However, this Order is concerned only with the Motions to Dismiss filed by the Springdale Defendants and the Washington County Defendants. Both of those Motions have been fully briefed, and on September 25, 2017, the Court heard oral argument on them. Accordingly, both of those Motions are ripe for decision and will be taken up below.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court must accept all of the Complaint's factual allegations as true, and construe them in the light most favorable to the plaintiff, drawing all reasonable inferences in the plaintiff's favor. *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

However, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* In other words, while "the pleading standard that Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.*

III. DISCUSSION

Before diving into the weeds of the issues raised in these Motions to Dismiss, some general observations will streamline the analysis that follows. First, there is no effective difference between a suit for damages against an employee of a public entity in her *official*

capacity and a suit for damages against the public entity itself. *See Monell v. Dept. of Social Servs. of City of N.Y.*, 436 U.S. 658, 690 n.55, 694 (1978). As a consequence, there is no effective difference between a suit for damages against one employee of a particular public entity in her official capacity and a suit for damages against a different employee of the same public entity in his official capacity; all are effectively suits for damages against the same public entity. Thus, while the Court will find it useful at times to refer to "the City official-capacity Defendants" or "the County official-capacity Defendants," the reader should understand that for all practical purposes in this Order, these phrases are simply legalese for "the City" or "the County," respectively. On the other hand, when the Court refers to a particular person as an "*individual*-capacity Defendant," then the reader should understand that the Court is referring to claims for damages that are being made against that particular person's own pocketbook—not her employer's.

Second, there are many Defendants in this case. Some of them are private-sector entities, and others are either public-sector entities or employees of public-sector entities. All of the Defendants have filed motions to dismiss. But this particular Order is *only* concerned with the motions to dismiss that have been filed by the *public*-sector entities and employees of *public*-sector entities. One consequence of that focus is that the doctrine of sovereign immunity looms large in this Opinion.

Sovereign immunity is a doctrine that is older than this country. Traditionally, it amounted to the principle that one could not sue an emperor or king in his own courts. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 767 n.6 (1999) (Souter, J., dissenting); *Seminole Tribe of Florida. v. Florida*, 517 U.S. 44, 102–03 (1996) (Souter, J., dissenting). But it is

also enshrined in the Eleventh Amendment to the United States Constitution, which "immunizes an unconsenting State from damage actions brought in federal court, except when Congress has abrogated that immunity for a particular federal cause of action." *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1438 (8th Cir. 1996). And as it has been adapted to our federal system, the doctrine has acquired a lot of subtleties and exceptions over the years. Some of those turn, for example, on whether a particular public-sector defendant is an official-capacity defendant or an individual-capacity defendant. Others turn on whether the particular claim at issue is being brought under federal or state law. Still others turn on whether an official-capacity defendant is a true arm of the state or merely an independent political subdivision. These nuances will be explored more fully below, but the Court mentions them now simply to provide context for what follows.

Finally, the Plaintiffs' claims can be conceived generally as falling into two categories: claims that their constitutional rights were violated, and claims that torts were committed. For convenience, the Court will discuss the Plaintiffs' constitutional claims first. Then the Court will turn to the Plaintiffs' tort claims.

A. Constitutional Claims

The Plaintiffs claim that the Springdale and Washington County Defendants violated their Due Process rights under the Arkansas Constitution and under the Fourteenth Amendment to the United States Constitution, by disclosing the Reports and details of the Investigation to the Bauer Defendants. The Plaintiffs bring their federal constitutional claims under the Civil Rights Act of 1871, which authorizes lawsuits against persons who, under color of law, have deprived someone of her "rights, privileges, or

immunities secured by the Constitution and laws." *See* 42 U.S.C. § 1983. The State of Arkansas has a similar statute called the Arkansas Civil Rights Act of 1993 ("ACRA"), which authorizes lawsuits against persons who, under color of law, have deprived someone of her "rights, privileges, or immunities secured by the Arkansas Constitution."[1] *See* Ark. Code Ann. § 16-123-105(a).

The reader has likely noticed the remarkable similarity of the language quoted from these two statutes. This is not an accident. Indeed, the ACRA explicitly states that "[w]hen construing this section, a court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983," though it goes on to emphasize that such federal civil rights law is only "persuasive authority" rather than binding authority. *See id.* at § 16-123-105(c).

The Plaintiffs have brought both individual-capacity and official-capacity constitutional claims. As was mentioned earlier in this Opinion, there are different types of immunity analysis that pertain to these different capacities. Furthermore, there is Arkansas law regarding immunity from claims under the Arkansas Constitution, and federal law regarding immunity from claims under the federal Constitution. However, as

[1] The Springdale Defendants argue in a footnote that the Plaintiffs' claims under the Arkansas Constitution should be dismissed because the Arkansas Constitution does not itself provide for a cause of action and the Complaint never makes any explicit reference to the ACRA. As the Court has already mentioned, the purpose of pleading is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555). All of the Springdale and Washington County Defendants (and the Plaintiffs too) have thoroughly briefed the ACRA issues in this case, such that it is plain that no one has been prejudiced by that oversight in the Complaint. The Court is not going to go through the wasteful formality of dismissing Count 5 on a technicality, allowing the Plaintiffs to amend Count 5 so as to add the words "Arkansas Civil Rights Act," and then taking up all of the arguments about the ACRA on the second round of motions to dismiss that would inevitably ensue, when those arguments can just as well be reached now.

will be explained below, it turns out that with respect to claims under the Arkansas Constitution, the Arkansas Supreme Court has interpreted the Arkansas statutes governing immunity in an identical manner to how federal law governs immunity from claims under the federal Constitution—with respect to both individual-capacity claims, as well as official-capacity claims. Thus, for analytical ease, in this Section, the Court will first address the Plaintiffs' *individual*-capacity claims under both the Arkansas and United States Constitutions, simultaneously. Then, the Court will address the Plaintiffs' *official*-capacity claims under both constitutions, again simultaneously.

1. Individual-Capacity Constitutional Claims

When a government official is sued in her individual capacity for violating someone's *federal* constitutional rights under color of law, then under the federal doctrine of qualified immunity, that official is immune from claims for damages arising from the alleged violation unless both of the following prongs are satisfied: (1) "the facts that a plaintiff has alleged . . . make out a violation of a constitutional right"; and (2) "the right at issue was clearly established at the time of the defendant's alleged misconduct." *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). When courts perform this qualified-immunity analysis, it is often preferable to consider the "violation" prong before considering the "clearly established" prong, but it is not mandatory for them to do so. *See id.* at 236.

On the other hand, when government officials are sued in their individual capacities for violating someone's *Arkansas* constitutional rights under color of law, an Arkansas statute provides that such officials "are immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions,

other than malicious acts or omissions, occurring within the course and scope of their employment." *See* Ark. Code Ann. § 19-10-305(a). But as the Eighth Circuit has observed, "the Arkansas Supreme Court has held that legal principles that govern questions of qualified immunity in federal § 1983 claims apply to claims brought under the [ACRA]." *Hudson v. Norris*, 227 F.3d 1047, 1054 (8th Cir. 2000) (citing *Robinson v. Langdon*, 333 Ark. 662 (1998) (applying Ark. Code Ann. § 19-10-305(a) to individual-capacity claims brought under the Arkansas Constitution through the ACRA)). In other words, the same two-pronged qualified immunity analysis applies to Plaintiffs' individual-capacity claims under the Arkansas Constitution as applies to their individual-capacity claims under the United States Constitution. And for purposes of this qualified immunity analysis, the contours of the Arkansas Constitution's Due Process protections must be presumed to be coextensive with those under the Fourteenth Amendment, since "[n]either party argues that the Arkansas Constitution provides a different level of protection . . . from that provided by federal law." *See id.*

The Court will start, then, with the first prong: whether the Plaintiffs have alleged adequate facts to make out a violation of a constitutional right. The right to *privacy* is the particular constitutional right that the Plaintiffs are claiming the Springdale and Washington County Defendants violated. *See* Doc. 1, ¶¶ 131, 137. The Eighth Circuit has explained that the privacy interest of confidentiality, which is the one at issue here, "concerns an individual's interest in avoiding disclosure of personal matters," and has held that to violate this particular constitutional right, "the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental

in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993). The Eighth Circuit has further explained that "[t]o determine whether a particular disclosure satisfies this exacting standard, we must examine the nature of the material opened to public view to assess whether the person had a legitimate expectation that the information would remain confidential while in the state's possession." *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996). This constitutional confidentiality protection "is limited and extends only to highly personal matters representing 'the most intimate aspects of human affairs,'" *id.* (quoting *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988)), but "[w]hen the information is inherently private, it is entitled to protection," *id.*

The Plaintiffs have brought individual-capacity claims against three Defendants: Mr. Hoyt, Mr. Cate, and Ms. O'Kelley. The Complaint alleges that the individual-capacity Defendants disclosed the Reports and details of the Investigation to the Bauer Defendants. *See* Doc. 1, ¶¶ 48, 50, 56–57, 59. The Complaint alleges that these disclosures, although redacted to some extent, nevertheless contained unredacted information that permitted readers to easily infer that the Plaintiffs were among Josh Duggar's victims, and that readers in the general public did in fact make this correct inference.[2] *See id.* at ¶¶ 58, 60, 67–68. The Complaint alleges that until these disclosures were made, the identities of Josh Duggar's victims were not publicly available. *See id.* at ¶¶ 51, 58, 60, 66–67. The Complaint alleges that members of the Duggar

[2] The Defendants contend that this allegation is merely a conclusory opinion that the Court need not accept as true for purposes of these Motions to Dismiss, but that simply is not correct. The Plaintiffs pleaded specific examples of instances where members of the general public inferred the identities of Josh Duggar's victims from the unredacted portions of the disclosed materials. *See* Doc. 1, ¶¶ 67–68. The Defendants may disagree with the veracity of those specific allegations, but that is a concrete factual dispute—not a difference of opinion.

family were already figures of national interest at the time of the disclosures, due to a reality-television series about them. *See id.* at ¶¶ 51, 69, 124. And the Complaint alleges that the embarrassing disclosures were made to a media company going by the name of "In Touch Weekly," after that company had already published an article identifying Josh Duggar as the target in an "Underage Sex Probe" and promising to publish additional articles with more details on the topic. *See id.* at ¶¶ 10, 34, 46–52.

Accepting these allegations as true, and drawing all reasonable inferences from them in the Plaintiffs' favor (as the Court must do at this stage of this case), the Court finds that the Plaintiffs have alleged facts that make out a violation of their constitutional right to privacy. It is difficult to imagine a more "shocking degradation" or "egregious humiliation" than: (1) to endure the public disclosure of the fact that one was sexually molested by one's own brother as a child; (2) for that disclosure to immediately erupt into a nationwide scandal; and (3) for that disclosure to have been made under circumstances in which the national media feeding frenzy that ensued would have been entirely predictable to any reasonable person in the position to make the disclosure in the first place. And the facts alleged in the Complaint show that the Plaintiffs had "a legitimate expectation that the information would remain confidential while in the state's possession," given that: (1) at the time they shared the facts of their victimization with police investigators, they were assured that those facts would remain confidential,[3] *see*

[3] The Defendants argue that these assurances could not have been the basis for any "flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information," because the City and the County are not who gave the assurances in the first place. Whatever the merits of that argument may be, the Court sees no need to reach it here. One method of violating someone's constitutional right to privacy is the "flagrant breach" method; another is the "shocking degradation or egregious humiliation" method. *See Alexander*, 993 F.2d at 1350. At a minimum, the Plaintiffs have pleaded

id. at ¶ 2; (2) at the time the individual-capacity Defendants made the FOIA disclosures to In Touch Weekly, an Arkansas statute explicitly stated that "[a]ny data, records, reports, or documents that are created, collected, or compiled by or on behalf of the Department of Human Services, the Department of Arkansas State Police, or other entity authorized under this chapter to perform investigations or provide services to children, individuals, or families shall not be subject to disclosure under the [FOIA],"[4] Ark. Code Ann. § 12-18-104(a); and (3) the individual-capacity Defendants did, in fact, redact at least some material pertaining to the Plaintiffs' identities, giving rise to the plausible inference that the individual-capacity Defendants *believed* the Plaintiffs had a legitimate expectation of confidentiality.

The Defendants cite *McNally v. Pulitzer Publishing Company* for the proposition that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public" or "for giving publicity to facts about the

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sufficient facts to show that the latter occurred. And regardless of whether the assurances in question were ever "breached" by the party who gave them, when those assurances are viewed within the context of the language quoted above from Ark. Code Ann. § 12-18-104(a), they suffice to show that the Plaintiffs had a "legitimate expectation" of confidentiality.

[4] The Court is not implying here that there is some equivalence between a statutory violation and a constitutional violation. Nor is the Court even necessarily saying that this statute was or was not violated. Although these parties all seem eager for the Court to make a definitive ruling at this time on whether this statute was violated, the Court believes such a ruling would be unduly hasty at the pleading stage, given that none of these parties has presented the Court with any "before" or "after" versions of the disclosed materials. Right now, the Court can only go on what is pleaded in the Complaint. Taking those allegations as true, and drawing all reasonable inferences in the Plaintiffs' favor, the Court can only observe that the Plaintiffs have pleaded sufficient facts to support an inference that the existence of this statute, perhaps in combination with the assurances of confidentiality the Plaintiffs received, provided a basis for the Plaintiffs to have a "legitimate expectation" of confidentiality regarding the facts of their victimization by Josh Duggar, and for the Defendants to believe that the Plaintiffs had such an expectation.

plaintiff's life which are matters of public record." *See* 532 F.2d 69, 78 (8th Cir. 1976) (quoting Restatement (Second) of Torts § 652D, comment c (Tent. Draft No. 13, 1967)). They then point the finger at each other as having disclosed the worst information first, and at the Bauer Defendants as having beaten all of them to the punch. The Court would make several observations on this point.

First, regardless of whatever the Springdale and Washington County Defendants may contend the facts actually are, the Court must accept the facts pleaded in the Complaint as true, and view them in the light most favorable to the Plaintiffs. And under that standard, the Complaint alleges that the identities of Josh Duggar's victims were not in the public record before the FOIA disclosures were made. *See* Doc. 1, ¶¶ 51, 58, 60, 66–67. Thus, regardless of whether the victim-identifying information came first from a City employee or County employee, it was not merely "further publicity" about *Josh Duggar*, but rather it also contained facts about all of *these Plaintiffs*' lives which were *not* matters of public record.

Second, the federal rules permit alternative pleading, which is to say that plaintiffs are allowed to plead inconsistent claims. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). In other words, if a Complaint alleges facts that would support an inference that several Defendants committed a constitutional violation, it is no defense for each of them to point the finger at the other and say that liability of one precludes liability of the other.

The Complaint alleges that the City employees disclosed the Offense Report to In Touch Weekly and a local news organization late in the evening of May 20, 2015, *see* Doc. 1 at ¶¶ 56–57, and that the County employees disclosed the Incident Report on the very next day, May 21, *see id.* at ¶ 59. It also alleges that In Touch Weekly published the City's disclosures on May 21, *see id.* at ¶ 66—the same day on which the County made its disclosures—and that it published the County's disclosures on June 3, *see id.* at ¶ 74. It also alleges that on May 21, before In Touch Weekly published the City's disclosures, the following events occurred: City employees sent the Offense Report to the Arkansas Department of Human Services ("DHS") pursuant to DHS's request to review it, *see id.* at ¶ 64, and Ms. O'Kelley called In Touch Weekly's attorney and asked him to refrain from publishing the materials he had already received and to accept a different redacted version of the Offense Report, *see id.* at ¶ 65. Finally, the Complaint also alleges that the Offense Report and the Incident Report contained different identifying information about the Plaintiffs. *See id.* at ¶¶ 58, 60. From these facts, it is a plausible inference that the County's disclosures were made earlier in the day on May 21 than when In Touch Weekly published the Offense Report, and that in any event, the County's disclosures contained more identifying information about the Plaintiffs than would have otherwise been publicly available.

In sum, the Complaint alleges sufficient facts to state a claim against each individual-capacity Defendant, when those facts are viewed in the light most favorable to the Plaintiffs with respect to each such Defendant. The first prong of the qualified-immunity analysis being satisfied, then, the Court turns to the second prong: whether the constitutional right at issue here was clearly established at the time it was violated, such

that a reasonable official would have known she was violating that right. To that point, the Court would observe that in its discussion of whether the Plaintiffs alleged a constitutional violation, every single one of the cases and statutes that the Court cited predates the alleged violation. And although the Court would at least agree with the Defendants that there are no controlling cases with facts that are strongly analogous to the facts of this case, that is not what the "clearly established" prong of qualified immunity requires. The Eighth Circuit "has taken a broad view of what constitutes clearly established law for the purposes of a qualified immunity inquiry," explaining that in the case of *Hope v. Pelzer*, 536 U.S. 730 (2002), "the Supreme Court changed the clearly established law inquiry from a hunt for prior cases with precisely the same facts to asking whether the official had fair notice her conduct was unconstitutional." *Lindsey v. City of Orrick, Mo.*, 491 F.3d 892, 902 (8th Cir. 2007) (internal quotation marks omitted). As the Court has already observed above, taking the facts alleged in the Complaint as true, any reasonable person in the position to make these disclosures would have understood that these disclosures would be published, would cause a national scandal, would be a "shocking degradation" or "egregious humiliation" for the Plaintiffs, that the Plaintiffs had a "legitimate expectation" of confidentiality in these materials, and that disclosing these materials would therefore violate the Plaintiffs' constitutional right to privacy.

Therefore, the second prong of the qualified-immunity analysis is also satisfied here. Accordingly, the Court will deny the individual-capacity Defendants' Motions to Dismiss the Plaintiffs' constitutional claims against them.

This does not necessarily mean these Defendants will be unable to successfully assert the defense of qualified immunity at some later stage of this case, when a different

legal standard is at play. It is often the case that, through discovery, the parties to a case learn that the actual facts are different in some material respect from the facts that are alleged in a complaint. If these Defendants move for summary judgment at the close of discovery on the grounds of qualified immunity, on the basis of evidence that the Court has not been permitted to consider at this early stage of proceedings, then the Court will have an obligation to perform the qualified-immunity analysis again, but taking into account the newly-offered evidence. The Court cannot prejudge at this time what the result of that analysis would be. It can only say for now that the Plaintiffs have pleaded sufficient facts in their Complaint to set out a violation of their constitutional rights by the individual-capacity Defendants that was clearly established at the time the violation occurred. Now, having disposed of the issues surrounding the Plaintiffs' individual-capacity constitutional claims, the Court will turn to the Plaintiffs' official-capacity constitutional claims.

2. Official-Capacity Constitutional Claims

The United States Supreme Court has held that although the Eleventh Amendment protects unconsenting states from liability for damages in federal courts, it does not provide such protection to counties or cities. *See Lincoln Cnty. v. Luning*, 133 U.S. 529, 530–31 (1890). The United States Supreme Court has further held 42 U.S.C. § 1983 authorizes suits for damages against official-capacity county or city defendants for deprivations of federal constitutional rights—but only when that deprivation was inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Dept. of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 & nn.54–55, 694 (1978).

Additionally, it has held that "'inadequate training' . . . could be the basis for § 1983 liability in 'limited circumstances.'" *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 407 (1997) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989)).

There is an Arkansas statute that declares generally "that all counties, [and] municipal corporations, . . . shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance," and that "[n]o tort action shall lie against any such political subdivision because of the acts of its agents and employees." *See* Ark. Code Ann. § 21-9-301. However, when applying this immunity statute to claims brought under the Arkansas Constitution through the ACRA, the Arkansas Supreme Court has simply imported from federal law the same "policy or custom" and "failure to train" standards articulated in cases like *Monell* and *Bryan County*, pursuant to the ACRA's invitation for it to do so. *See Gentry v. Robinson*, 2009 Ark. 634, at *6–*8, *12–*13, *21. Thus, and just as was the case with respect to the Plaintiffs' individual-capacity constitutional claims, the Court's immunity analysis for the Plaintiffs' official-capacity constitutional claims will be the same regardless of whether the claims are brought under the United States Constitution or the Arkansas Constitution.

The Eighth Circuit has summarized the *Monell* line of cases as follows: "Section 1983 liability for a constitutional violation may attach to a municipality if the violation resulted from (1) an official municipal policy, (2) an unofficial custom, or (3) a deliberately indifferent failure to train or supervise." *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1214 (8th Cir. 2013). The Complaint does not allege that these isolated disclosures by the City and County were part of "a pattern of unconstitutional acts committed by [their employees]," so it has failed to state an official-capacity failure-to-train claim. *See id.*

(quoting *Parrish v. Ball*, 594 F.3d 993, 1002 (8th Cir. 2010)). Similarly, it has failed to state an official-capacity unofficial-custom claim, because, again, there is nothing in the Complaint to indicate that these disclosures were anything other than isolated incidents for the City and County, rather than part of "a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Thelma D. By and Through Delores A. v. Bd. of Educ. of City of St. Louis*, 934 F.2d 929, 932–33 (8th Cir. 1991).

As for whether the constitutional violations resulted from an official municipal policy, the Complaint does not specifically identify any such policy. It certainly makes no mention of a *written* official policy. But in their briefing in opposition to the Motions to Dismiss, the Plaintiffs point out that a constitutional violation can result from an unwritten official policy if the violation was committed or ratified by a person who has "final policymaking authority" for the municipality in question. *See Atkinson*, 709 F.3d at 1214–15.

This Court must "consult two key sources to determine whether" a particular individual was "a final policymaker: (1) state and local positive law[;] and (2) state and local custom or usage having the force of law." *See id.* at 1215 (internal quotation marks omitted). Here, the Plaintiffs contend that Mr. Cate and Mr. Zega, in their capacities as City Attorney and County Attorney, respectively, held such final policymaking authority. But the only positive law Plaintiffs cite in support of this contention simply states that Mr. Cate must "advise" on "legal questions," *see* Springdale Code § 2-86, and "confer" with department heads on FOIA requests, *see* Springdale Personnel & Procedures Manual, § 3.7, and that Mr. Zega, similarly, must "furnish written opinions upon subjects of a legal

nature" and provide "legal advice" to "authorities of the County," *see* Washington County Ordinances § 2-174(2), (3). Plainly, these are not the duties of individuals with "final policymaking authority"; they are the duties of individuals who *advise* other individuals that *do* have policymaking authority. And just as the Complaint fails to plead any facts showing a pattern of unconstitutional activity, it likewise fails to plead any facts showing a pattern of Messrs. Cate and Zega exercising *de facto* final policymaking authority in the absence of positive legal authority for them to do so.

In other words, the Plaintiffs have failed to plead facts showing a viable claim against the official-capacity Defendants for a constitutional violation. Therefore, the Plaintiffs' constitutional claims for damages against the official-capacity Defendants will be dismissed without prejudice. Having disposed of all issues pertaining to the Plaintiffs' constitutional claims, the Court will now turn to the Plaintiffs' common-law tort claims.

B. Tort Claims

The Plaintiffs have brought three tort claims against various of these public-entity and public-employee Defendants. Specifically, the Plaintiffs have alleged the tort of Invasion of Privacy—Public Disclosure of Private Fact against the Springdale Defendants and the Washington County Defendants, the tort of Invasion of Privacy—Intrusion upon Seclusion against the Springdale Defendants and Mr. Hoyt in his individual and official capacities, and the tort of Outrage against the Springdale Defendants and Mr. Hoyt in his individual and official capacities.

The reader might recall from Section III.A.2 of this Opinion that Ark. Code Ann. § 21-9-301 states "that all counties, [and] municipal corporations, . . . shall be immune from liability and from suit for damages except to the extent that they may be covered by

liability insurance," and that "[n]o tort action shall lie against any such political subdivision because of the acts of its agents and employees." The Defendants argue that the plain text of this statute immunizes them from the Plaintiffs' tort claims. In a vacuum, the Defendants might have a good argument. But interpretations of Arkansas law by the Arkansas Supreme Court are binding on this Court, *see Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010), and the Arkansas Supreme Court has expressly foreclosed this argument. Specifically, in the case of *Deitsch v. Tillery*, 309 Ark. 401 (1992), the Arkansas Supreme Court observed that the appellants in that case "argue that immunity from tort liability under Ark. Code Ann. § 21-9-301 (1987 and Supp. 1991), which provides that '[no] tort action shall lie against [school districts] because of the acts of their agents and employees,' would not extend to intentional acts," *id.* at 405 (alterations in original), and then it went on to state, in terms that could not have been more clear: "Appellants are correct that Section 21-9-301 does not provide immunity for the intentional acts of school districts and their employees, only their negligent acts," *id.* at 407. And the Arkansas Supreme Court has explicitly affirmed as recently as 2016 that it "has consistently held that section 21-9-301 provides city employees with immunity from civil liability for negligent acts, but not for intentional acts," and explicitly declined to revisit that rule. *See Trammell v. Wright*, 2016 Ark. 147, at *5.

All three of the torts that the Plaintiffs allege are intentional torts, which is to say that each of those three torts requires intentional acts as a necessary element. So for each of these torts, if the Plaintiffs have pleaded sufficient facts to show the commission of the tort by a particular Defendant, then Ark. Code Ann. § 21-9-301 does not apply. And if, for any of these torts, the Plaintiffs have failed to allege sufficient facts to show the

commission of that tort, then the claim must be dismissed under Fed. R. Civ. P. 12(b)(6) regardless of what Ark. Code Ann. § 21-9-301 has to say about anything. In other words, the immunity statute at § 21-9-301 simply has no relevance to this Court's analysis of the tort claims in this case, and the Court will not discuss it any further in this Opinion. However, since the Defendants have also argued that even in the absence of immunity the Plaintiffs have failed to state a claim for any of these torts, the Court will proceed to examine the sufficiency of the Plaintiffs' pleadings as to each such tort, beginning with Invasion of Privacy—Public Disclosure of Private Fact, then turning to Invasion of Privacy—Intrusion upon Seclusion, and then finally taking up Outrage.

1. Invasion of Privacy—Public Disclosure of Private Fact

None of the parties have cited this Court to any Arkansas cases that clearly set out the elements of the tort of Invasion of Privacy—Public Disclosure of Private Fact, and this Court has so far been unable to find any such cases from its own independent research. However, the Court is confident that this tort is actionable in Arkansas courts. For one thing, in 1979 the Arkansas Supreme Court adopted the Restatement (Second) of Torts's characterization of the general tort for invasion of privacy as being actionable under four different circumstances, of which "unreasonable publicity given to the other's private life" is one. *See Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 637 (1979). For another thing, the Arkansas Model Jury Instructions ("AMI Civil") contains a set of model instructions for this same tort. *See* AMI Civil § 422. Unfortunately, the elements set out in AMI Civil § 422[5] are not identical to the elements set out in Restatement (Second) of Torts

[5] (1) the plaintiff sustained damages; (2) the defendant made a public disclosure of a fact about the plaintiff; (3) before this disclosure, the fact was not known to the public; (4) a reasonable person would find disclosure of the fact highly offensive; (5) the defendant

§ 652D—Publicity Given to Private Life,[6] though in substance they are quite similar. The Court sees no need to formally adopt either (or some other construction) as the law of the case at this time, since we are still only at the pleading stage and the question here is whether the Plaintiffs have pleaded sufficient facts to permit a reasonable inference that this tort occurred. The Court finds that they have, for the same reasons that those same facts permit a reasonable inference that their constitutional right to privacy was violated. The Court will not rehash that discussion here, but would simply reference the reader back to that portion of Section III.A.1 in this Opinion which contains it.

2. Invasion of Privacy—Intrusion upon Seclusion

Turning to Invasion of Privacy—Intrusion upon Seclusion: the Court is much less in the dark here. The Arkansas Court of Appeals has definitively stated that "[t]o prove intrusion upon seclusion, a plaintiff must establish the following elements:"

> First, that he sustained damages;
>
> Second, that the defendant intentionally intruded physically or otherwise upon plaintiff's solitude or seclusion and believed or was substantially certain that he lacked the necessary legal authority or personal permission, invitation, or valid consent to commit the intrusive act;
>
> Third, that the intrusion was of a kind that would be highly offensive to a reasonable person, as the result of conduct to which a reasonable person would strongly object;
>
> Fourth, that the plaintiff conducted himself in a manner consistent with an actual expectation of privacy; and

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knew or should have known that the disclosed fact was private; (6) the fact was not of legitimate public concern; and (7) the public disclosure of the fact proximately caused the plaintiff's damages.

[6] "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

> Fifth, that the defendant's intrusion was the proximate cause of the plaintiff's damages.

Coombs v. J.B. Hunt Transport, Inc., 2012 Ark. App. 24, at *4–*5 (citing AMI Civil § 420).

The Washington County Defendants contend that the Plaintiffs have failed to allege either "seclusion" (since it is clear from the Complaint that the Plaintiffs were already nationally famous for other reasons) or an "intrusion" thereupon by the Washington County Defendants (since, the argument goes, the Washington County Defendants did not themselves invade the Plaintiffs' privacy but rather simply mailed documents to third parties). Both of these arguments are unpersuasive.

Coombs is instructive. In that case, the plaintiff (Coombs) passed out drunk in a hotel room that he shared with a co-occupant, who then invited other coworkers of theirs in to mock, deface, and photograph the plaintiff. *See id.* at *2–*3. Coombs had no memory of these events, but learned of them later. *Id.* at *3. The Court of Appeals, in holding that Coombs had presented sufficient evidence to avoid summary judgment, stated: "Coombs clearly shared a room with a co-occupant, who had the right to enter the room and invite guests, but this does not end the inquiry. . . . [P]rotection is afforded not just for the physical realm but for a person's emotional sanctum and to safeguard the notions of civility and personal dignity." *Id.* at *5. The Court then went on to approvingly quote the California Supreme Court for the propositions that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic," that "[t]here are degrees and nuances to societal recognition of our expectations of privacy," and that "the seclusion referred to need not be absolute." *Id.* at *5–*6 (quoting *Sanders v. Am. Broad. Cos., Inc.*, 978 P.2d 67, 72 (Cal. 1999)). Or to put it differently, sharing highly embarrassing

information about someone with others who already knew (or knew of) the person but who did not know those embarrassing facts about the person can indeed constitute "intrusion" upon "seclusion."

The Springdale Defendants, on the other hand, contend that the Complaint does not allege that they "believed or [were] substantially certain that [they] lacked the necessary legal authority or personal permission" to release the Offense Report. The Court disagrees. There is no plausible reading of the Complaint that would permit an inference that any of the Defendants believed they had the Plaintiffs' "personal permission" to make these FOIA disclosures. As for their beliefs as to their legal authority, the Springdale Defendants argue that the facts in the Complaint permit an inference that they believed they were required to make these FOIA disclosures. The Court agrees that this is one plausible inference from the facts in the Complaint. But the Complaint also permits the reasonable inference that they believed they lacked the legal authority to make these FOIA disclosures, given that—as previously noted—Arkansas law already plainly stated at the time that "[a]ny data, records, reports, or documents that are created, collected, or compiled by or on behalf of the Department of Human Services, the Department of Arkansas State Police, or other entity authorized under this chapter to perform investigations or provide services to children, individuals, or families shall not be subject to disclosure under the [FOIA]."[7] Ark. Code Ann. § 12-18-104(a). And the facts in the Complaint must be viewed in the light most favorable to the Plaintiffs. *Cf. Fletcher*

[7] Once again, the Court would emphasize that it is not ruling here that the disclosures did or did not violate Ark. Code Ann. § 12-18-104(a). Rather, it is simply saying that it is reasonable to infer from the facts in the Complaint that the Springdale Defendants were aware of this statute and that they believed it applied to the materials they disclosed.

v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 876 & n.3 (2000) (holding that a jury could reasonably discredit the testimony of an employee who claimed that she believed that she had legal authority or permission to obtain confidential medical information about a former employee by using a medical release form that the other employee had filled out for a different purpose, and noting the absence of "any Arkansas authority to support this remarkably broad proposition").

3. Outrage

The Court turns finally to the tort of outrage which has the following four elements:

> (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous, beyond all possible bounds of decency, and was utterly intolerable in a civilized community; (3) the actions of the defendant were the cause of the plaintiff's distress; (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.

Rees v. Smith, 2009 Ark. 169, at *5. The Springdale Defendants argue that the Plaintiffs failed to allege that the Springdale Defendants "should have known that emotional distress was the likely result of [Josh Duggar's] conduct." The Court disagrees; as it has previously stated, when reading the Complaint in the light most favorable to the Plaintiffs, the disclosures were "made under circumstances in which the national media feeding frenzy that ensued would have been entirely predictable to any reasonable person in the position to make the disclosure in the first place." *Supra*, p. 11.

All Defendants also argue that their conduct here was not so "extreme and outrageous" as to be "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." The Court is certainly aware of and sensitive to the fact that "[t]he test for outrage is an extremely narrow test that is committed by the most heinous

conduct." *Forrest City Mach. Works, Inc. v. Mosbacher*, 312 Ark. 578, 585 (1993). But "extremely narrow" does not mean "impossible." When evaluating the egregiousness of the conduct at issue, the Court must be "[m]indful of the importance in which our society and the . . . law has held" the interest of which that conduct has run afoul. *See Travelers Ins. Co. v. Smith*, 338 Ark. 81, 92 (1999). Our society places the utmost importance on the protection of minor victims of sexual assault. Individuals who are convicted in this Court of committing sex crimes against minors consistently receive sentences that are among the harshest that this Court imposes on individuals who appear before it—and that is often the case even after varying downward from the sentencing range that is recommended by the United States Sentencing Guidelines for the offense of conviction. Furthermore, it seems likely to the Court that protecting the identities of such minor victims is one of the primary purposes of the FOIA exemption at Ark. Code Ann. § 12-18-104(a) that has already been mentioned several times in this Opinion.

The Court will remain mindful, as this case proceeds, of the high bar that must be cleared to prevail on a claim of outrage. But the Court believes that the Plaintiffs have pleaded sufficient facts to get past the pleading stage on this claim. Going forward, the devil will be in the details revealed by the discovery process.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the Springdale Defendants' Motion to Dismiss (Doc. 21) and the Washington County Defendants' Motion to Dismiss (Doc. 29) are both **GRANTED IN PART AND DENIED IN PART** as follows:

- Count 7 of the Complaint (Doc. 7) is **DISMISSED WITHOUT PREJUDICE**.

- With respect to any claims for damages that Counts 5 and 6 of the Complaint may attempt to bring against Defendants City of Springdale, Washington County, or any of their employees in their *official* capacity, those particular claims for damages in Counts 5 and 6 are also **DISMISSED WITHOUT PREJUDICE**.
- In all other respects, the Motions are **DENIED**.

IT IS SO ORDERED on this 29th day of September, 2017.

TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE