No. _____

In the Supreme Court of the United States

SHANE DAVIS,

Petitioner,

vs.

MIKE CARROLL,
WILEEN R. WEAVER,
and PAULINE RILEY,

Respondents,

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

PETITITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Though unstated in 42 U.S.C. § 1983 or the common law, qualified immunity doctrine sets forth a two-prong test for claims of qualified immunity: (i) whether the official violated a person's constitutional right, and (ii) whether the law was clearly established at the time of the violation. The first asks if the conduct was reasonable under the facts; the second asks if the conduct violated clearly established law. Though the Court has warned these inquiries are distinct, some courts bifurcate the second prong to again ask if the conduct was unreasonable, thus deciding factual reasonableness in the second prong that should be considered only in the first and inviting immunity to defendants who have knowledge of the law at the time but violate it, as long as their violation is found to have been factually reasonable. Also unclear is whether a determination of whether the law was "clearly established" is properly made as to each item of notice of the law in isolation, or under the totality of notice at the time. Two questions arise:

A.

Whether qualified immunity absolves a defendant of § 1983 liability, despite knowledge of clearly established law, unless the plaintiff shows the violation factually unreasonable?

B.

Whether determining if the law was clearly established under qualified immunity doctrine views each item of notice in isolation or must consider the totality of notice at the time?

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Shane Davis petitions the Court for issuance of the writ of certiorari to review judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's written Opinion, issued in *Shane Davis v. Mike Carroll*, 18-14558, may be found at *Davis v. Carroll*, 805 F. App'x 958 (11th Cir. 2020), and is reprinted in Appendix A. The Order of the United States District Court for the Middle District of Florida, in *Davis v. Carroll*, 8:16-cv-998-MSS-SPF, may also be accessed at 2018 WL 8370337, and is reprinted in Appendix B. The Eleventh Circuit's Order denying rehearing is reprinted in Appendix C.

JURISDICTION

This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1). The court of appeals, which had appellate jurisdiction under 28 U.S.C. § 1331, denied Davis's petition for rehearing July 26, 2020. App. C.

On March 19, 2020, this Court entered an Order extending deadlines for certiorari petitions due on or after that date until 150 days from, as relevant here, the court of appeals' order denying Davis's petition for rehearing. This petition is thus timely filed within 150 days of the court of appeals' denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

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

42 U.S.C. § 1396d(r)(1)(B)(iv) provides in part:

> (r) Early and periodic screening, diagnostic, and treatment services
> The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:
> (1) Screening services--
>
> * * *
>
> (B) which shall at a minimum include--
> (i) a comprehensive health and developmental history (including assessment of both physical and mental health development),
> (ii) a comprehensive unclothed physical exam,
> (iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,
> (iv) laboratory tests

At all times, 39.407(1), Florida Statutes (1999), provided in pertinent part:

> When any child is removed from the home and maintained in an out-of-home placement, the department is authorized to have a medical screening performed on the child without authorization from the court and without consent from a parent or legal custodian. Such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases …

INTRODUCTION

On behalf of his adopted foster child ("J.D.D."), Shane Davis filed a 42 U.S.C. § 1983 action against Florida Department of Children & Families ("DCF") officials Wileen Weaver ("Weaver") and Pauline Riley ("Riley"), alleging their deliberate indifference to the newborn J.D.D.'s serious medical need while in state custody by withholding legally required HIV testing during the six-week window in which he could have received effective treatment with antibodies, causing his obvious risk for HIV infection to progress to AIDS. J.D.D. alleged injury to his Fourteenth Amendment right to be kept free from unreasonable risk of harm while held in state custody and his right under federal Early and Periodic Screening, Diagnosis & Treatment ("EPSDT") statutes, 42 U.S.C. §§ 1396, *et seq.*, to "prompt medical assistance," and "laboratory tests," id., also noting state statutes, administrative rules, and a federal agency report gave additional fair notice.

The district court found no violation, holding the alleged conduct did not violate clearly established law and entered summary judgment to grant defendants qualified immunity. But in purporting to apply the second prong of qualified immunity analysis (whether the law was clearly established), the district court actually performed the analysis germane to the first (whether a violation occurred), deciding facts by *assuming* that hospital staff had apparently not seen a need for testing, and relying on doctor's visits *after* the six-week window for effective antibody treatment to find that the defendants had acted reasonably.

The Eleventh Circuit affirmed, as it bifurcates the second prong of the qualified immunity analysis, asking not only whether the law was clearly established at the time, but also the factual question of whether defendants' conduct was unreasonable in light of the law, which would allow courts to consider the factual unreasonableness of conduct as part of the second, "clearly established law," prong, despite this Court's warning the two prongs must remain distinct, making factual unreasonableness solely part of the first. *See Saucier v. Katz*, 533 U.S. 194, 204-06 (2001).

Also, instead of considering the multiple sources of fair notice of clearly established law, as they existed together in real time, the Eleventh Circuit, like the district court, took each item of fair notice in isolation, construed each against J.D.D. as being independently disqualifying, and rejected his assertion the items of notice should be taken in the light most favorable to him by analyzing them together in real time context, as this Court analyzed such notice in *Hope v. Pelzer.*

STATEMENT OF THE CASE

A. Deprivation of Required Laboratory Testing

J.D.D. was born April 10, 2000. One week later, defendants took him into custody from the hospital. Weaver and Riley knew records showed his mother lacked prenatal care, had 4 infants removed due to drug exposure, that he was exposed to cocaine at birth and that his mother was treated for heroin addiction and arrested for prostitution, yet withheld laboratory testing for communicable diseases. App. A at 2-4.

Seven weeks after taking him into their custody, Weaver and Riley sent J.D.D. to a foster home on June 5, 2000. The Davises adopted him in 2003 and, at age 14, he developed thrush (common in infants but rare in teens). J.D.D. was tested and diagnosed with HIV which--because left untested and untreated--had already progressed to full-blown AIDS. App. A at 4.

At deposition, Weaver stated she actually knew at the time that the law required communicable disease testing--but did not have J.D.D. tested. App. A at 3.[1]

An expert in Pediatrics and Infectious Diseases, Jay Tureen, M.D., Ph.D., opined, "if J.D.D. had been tested and treated for HIV within 6 weeks of his birth, 'it is highly unlikely he would have developed an HIV infection, and highly unlikely that his HIV infection would have progressed to AIDS.' " App. A at 4-5. Specialist Carina Rodriguez, M.D., who diagnosed J.D.D.'s HIV and has treated him since, concurred with Dr. Tureen's assessment, adding HIV-positive newborns are usually asymptomatic at birth. Id.

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[1] Q. Were you aware of the fact between April 1 of 2000 and January 1 of 2001, that such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness and communicable diseases?

A. Yes.

Q. You were aware of that back at that time?

A. Yes.

Q. You just --

A. But I don't do that.

(App. D) (Excerpt from Deposition of Wileen Weaver).

Weaver and Riley had sent J.D.D. to foster care on June 5, 2000, App. B at 8--at eight (8) weeks of life. While the panel noted (out of chronological order) that a Dr. Gonzalez saw J.D.D. but did not seek testing, App. A at 4, that occurred only *after* the six (6) week window for effective treatment with HIV antibodies.

J.D.D.'s adoptive father sued Weaver and Riley in their individual capacities under § 1983 for violating J.D.D.'s clearly established Fourteenth Amendment right to be kept safe from unreasonable risk of harm while held in state custody by withholding legally required testing for communicable disease with deliberate indifference to his serious medical need, causing his HIV to progress to AIDS. App. A at 5. J.D.D. also alleged violation of his federal statutory right to "prompt medical assistance," including "laboratory testing," under federal Early and Periodic Screening, Diagnosis & Treatment ("EPSDT") statutes, 42 U.S.C. § 1396, *et seq.* id., noting additional fair notice of communicable disease testing requirements in state law, state administrative rules in effect at the time, and a federal agency report. Id.

B. The Decisions Below

District Court

The district court granted summary judgment upon defendants' claim of qualified immunity. App. B. Though the defendants admitted knowing J.D.D. had been exposed to cocaine at birth, that his mother had lacked prenatal care and had four children removed for drug exposure, that they had a file with domestic violence reports, App. B at 6-7, noting his mother was

arrested for prostitution and treated for heroin abuse, id. at 26-28, and though evidence showed they knew of these facts because, as the district court noted, "[t]he information was repeated numerous times throughout different documents in J.D.D.'s DCF file" above their names or signatures. Id. The court found, "the limited facts known to Weaver and Riley simply do not demonstrate an obvious risk to J.D.D. of having *contracted* [sic] HIV, such that a juror could say that Weaver and Riley must have known of it," id. at 28 (emphasis added), and that, in light of these facts, it "was not obvious enough to permit a jury to find that Weaver and Riley were deliberately indifferent by failing to have him tested for the illness." Id. at 29.

Though J.D.D. alleged defendants knew the risk of withholding required communicable disease *testing* (*cf.* the risk he had "contracted" HIV), and although "children born with HIV are typically asymptomatic," App. B at 29, the court held that, to find deliberate indifference, it "would have to find that Weaver and Riley had knowledge of J.D.D.'s need for *treatment*, either because his HIV was already *diagnosed* or its *symptoms* were obvious." Id. at 37 (emphasis added).

The district court ignored Weaver's deposition testimony she had *actual* notice of the law requiring communicable disease testing at the time, App. D, concluding the *law* was not clearly established, since "the facts of the instant case are significantly different from *Taylor* [*v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987)] such that the Court cannot conclude that *Taylor* put Weaver and Riley on adequate notice that their conduct was a violation of J.D.D.'s constitutional

rights," App. B at 36, and since the EPSDT statutes (requiring "prompt" and "early" "laboratory testing") were not "sufficiently clear to put Weaver and Riley on notice that their failure to [request] HIV screening for J.D.D. violated his statutory right to medical assistance with reasonable promptness and EPSDT." Id. at 39. The district court rejected each additional item of notice (state statutes, administrative rules, and federal agency report), taking each in isolation to find the law was not clearly established. Id. at 32-45.

Court of Appeals

The Eleventh Circuit noted it had earlier held, "a foster child can state a 42 U.S.C. § 1983 cause of action under the Fourteenth Amendment if the child is injured after a state employee is deliberately indifferent to a known and substantial risk to the child of serious harm, *H.A.L. ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008) (*per curiam*) (citing *Taylor v. Ledbetter*, 818 F.2d 791, 794-96 (1987) (*en banc*))," App. A at 7, and had earlier "identified 'a federal right to reasonably prompt provision of assistance under section 1396a(a)(8)." *Doe 1-13 ex rel. Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998). App. A at 12. The panel also recognized deliberate indifference "does not require a smoking gun; a factfinder could conclude that an 'official knew of a substantial risk from the very fact that the risk was obvious.' " App. A at 8 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *see also id.* ("Whether … official had the requisite knowledge of a substantial risk is a *question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence …") (emphasis added).

Though circumstantial evidence suggested the risk was "longstanding, pervasive, well-documented, or expressly noted by … officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, [so] such evidence could be sufficient to permit a *trier of fact to find* that the defendant-official had actual knowledge of the risk," *Farmer*, 511 U.S. at 842-43, (emphasis added), the court of appeals held, "We do not view the risk as being obvious," id. at 8, wholly ignoring Weaver's deposition testimony that she had actual notice of the law requiring testing at the time, App. D, construing facts against J.D.D., and speculating about what defendants, and others (beyond the record) "would have known." Id. at 10, 14.

Though, as to the clearly established law prong of qualified immunity analysis, "the salient question" was "whether the state of the law … gave respondents fair warning that their alleged treatment of [J.D.D.] was unconstitutional," *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), and while the panel acknowledged "some federal statutory provisions will be sufficiently clear on their own to provide defendants with fair notice of their obligations under the law," App. A at 11 (quoting *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1301 (11th Cir. 1998)), the panel considered factual matters in deciding whether the law was clearly established, hypothesizing that defendants' conduct was objectively reasonable since theoretical hospital staff (outside the record) or doctors (*after* the six-week window for any effective treatment with antibodies) "did not see a need for HIV screening." App. A at 14.

While noting federal statutes required defendants provide " 'medical assistance' with 'reasonable promptness'… 42 U.S.C. § 1396a(a)(8) (2000)," which "includes early and periodic screening, such as 'laboratory tests' and other treatment 'to correct or ameliorate defects' and physical 'illnesses and conditions.' *Id.* § 1396d(r)(1)(B)(iv), (5)," App. A at 11, and that Florida statutes "authorized [DCF] to have a medical screening performed on the child without authorization from the court," which "shall be to examine the child for … communicable diseases," § 39.407(1), Fla. Stat. (1999), App. A at 13, the Eleventh Circuit concluded: "[W]e cannot say that this language put social workers on notice that they must diagnose [sic] an HIV risk and pursue screening, or else face personal financial liability." App. A at 12.

Davis petitioned for rehearing, discussing the issues presented herein, and the Eleventh Circuit denied Davis's Petition for Rehearing. App. C.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve Confusion Over Whether Lower Courts Should Inject a Consideration of Factual Reasonableness into Decisions on the Qualified Immunity Doctrine's Clearly Established Law Prong

Two questions arise when an official claims qualified immunity. First: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194,

201 (2001). The second prong of qualified immunity analysis asks whether the law creating the right was "clearly established" at the time of the violation, *Hope v. Pelzer,* 536 U.S. 730, 739 (2002), because, even under qualified immunity doctrine, officials are only "shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* "[T]he salient question ... is whether the state of the law" at the time of the incident provided the defendant fair warning that their alleged conduct was unconstitutional." *Id.,* 536 U.S. at 741. Qualified immunity is only available where the official reasonably misjudged the *law,* as opposed to the *facts*, *Saucier*, 533 U.S. at 205; *see also Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011), which is intended to ensure that officials had "fair notice" their conduct was unlawful. *See Saucier*, 533 U.S. at 202.

Thus, while the first prong of the traditional qualified immunity analysis is factual and goes to the merits of the case, the second prong is legal and assesses a defendant's claim of immunity. Under the first prong, courts and juries "slosh [their] way through the fact-bound morass of 'reasonableness' " to determine whether conduct violates the constitution. *Scott v. Harris*, 550 U.S. 372, 383 (2007). Under the second, courts confront "a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 n. 10 (1985)); *accord Ortiz v. Jordan*, 131 S.Ct. 884, 892-93 (2011); *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The two are analytically distinct, *see Saucier*, 533 U.S. at 204;

Johnson, 515 U.S. at 312. "When a court of appeals does address both prongs of qualified-immunity analysis, [this Court has] discretion to correct its errors at each step." *Ashcroft*, 563 U.S. at 735.

But rather than applying this Court's precedent distinguishing those two prongs, the Eleventh Circuit here lumped them together, injecting merits-related factual reasonableness into the purely legal second, "clearly established law," prong, as the Fifth Circuit did, for example, in a case which predated *Saucier*. In *Hare v. City of Corinth*, 135 F.3d 320 (5th Cir. 1998), the Fifth Circuit announced that the second prong "is better understood as two separate inquiries." 135 F.3d at 326. First: whether the right at issue was clearly established. Second: "whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law." *Id.* But by splitting the second prong, the Fifth Circuit in *Hare* licensed consideration of factual reasonableness as part of the qualified immunity analysis, rather than as solely relating to the merits. *Hare* found the defendants immune under the second prong based on the facts of that case, rather than on any reasonable legal misunderstanding by officials. *Id.* at 329.

Fifth Circuit decisions after *Hare* have defined the second prong of the qualified immunity analysis in that same way,[2] and the Eleventh Circuit here repeats that practice: describing what happened,

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[2] *See, e.g., Tarver v. Edna*, 410 F.3d 745, 750 (5th Cir. 2005); *Estate of Sorrells v. City of Dallas*, 45 Fed. Appx. 325, 2002 WL 1899592 at * 2 (5th Cir.), *cert. denied*, 537 U.S. 1072 (2002); and *Palmer v. Johnson*, 193 F.3d 346, 351 (5th Cir. 1999).

considering whether the defendants could reasonably have decided not to test the infant J.D.D. (as well as assuming non-record facts that unidentified hospital staff or later doctors "did not see a need" for testing. App. A at 14.). This is a misplaced first-prong analysis whether the conduct was reasonable in light of (here assumed) *facts*; not the *legal* second prong question of whether the law gave the defendants fair notice that their conduct was unlawful. In short, the Eleventh Circuit, in the present case, engaged in substantially the same analytic exercise as did the Fifth Circuit in *Hare*, which predated *Saucier's* distinction between the two prongs of qualified immunity analysis, and performed what it proceeded upon as a second-prong legal analysis, but which has all the earmarks of a first-prong, fact-based inquiry.

The Court's guidance is critical as to how, if at all, courts should determine whether the law was clearly established under its doctrine of qualified immunity.

II. The Court Should Resolve the Split Among and Within the Circuits Over How to Perform, and What May Inform, the Clearly Established Law Analysis

The decision below reveals a split among and within the circuits whether factual unreasonableness is a separate, third element that plaintiffs must prove in order to overcome a qualified immunity defense. As to the second prong, the panel eyed the statutes' clear requirement that the defendants provide J.D.D. Early and Periodic Screening, Diagnosis & Treatment, "which shall at a minimum include…laboratory tests," 42 U.S.C. § 1396d(r)(1)(B)(iv), but held that the law

was not clearly established since he did not show that defendants acted upon it unreasonably. App. A at 12 ("we cannot say that this language put [defendants] on notice that they must diagnose an HIV risk and pursue screening, or else face personal financial liability"), thus requiring not only a showing that the law was clear but was also acted upon unreasonably.[3]

The Second Circuit remains divided over whether the qualified immunity test has two or three prongs, asking, "even if the right was 'clearly established,' whether it was 'objectively reasonable' for the officer to believe the conduct at issue was lawful." *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013); *see also Bailey v. Pataki*, 708 F.3d 391, 404 n. 8 (2d Cir. 2013) ("There is some tension in our Circuit's cases as to whether the qualified immunity standard is of two or three parts, and whether the 'reasonable officer' inquiry is part of step two--the 'clearly established' prong--or whether it is a separate, third step in the analysis"); *Taravella v. Town of Walcott*, 599 F.3d 129, 136 (2d Cir. 2010) (Straub, J., dissenting) (collecting two-step and three-step decisions). Then-Circuit Judge Sotomayor noted the Second Circuit's "approach splits the single question of whether a right is 'clearly established' into two distinct steps, contrary to Supreme Court precedent," *Walczyk v. Rio*, 496 F.3d 139, 166 (2nd Cir. 2007) (Sotomayor, J., dissenting), and further noted:

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[3] Though ignored by the district court and court of appeals, Weaver stated at deposition that she actually knew at the time that the law required testing for communicable disease. App. D. It cannot, therefore, be said that Weaver made a mistake of law.

> Contrary to what our case law might suggest, the Supreme Court does not follow this "clearly established" inquiry with a second, *ad hoc* inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete.

Id. at 166-67. Indeed, some Second Circuit panels have ignored that intra-circuit conflict, instead applying the two-pronged test from *Saucier*. *See, e.g., Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013); *Russo v. City of Bridgeport*, 479 F.3d 196, 211 (2d Cir.), *cert. denied*, 552 U.S. 818 (2007). As Judge Straub pointed out in his dissent in *Taravella*, "the case law is divided, not only in our Circuit, but also in courts around the country. Several circuits have used a three-step analysis, even after the Supreme Court mandated a two-step inquiry in *Saucier*.... [C]ourts have been inconsistent in their treatment of the proper standard for qualified immunity." *Taravella*, 599 F.3d at 138 n. 2 (Straub, J., dissenting).

The Sixth Circuit is also divided, with some panels applying a three-part test, asking a third question about reasonableness akin to that employed in the Fifth and Second Circuits: "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010). Other decisions note the third question is considered "in some instances,"

leaving uncertain whether or when the test has two or three parts. *See, e.g., Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 n. 2 (6th Cir. 2013); *Hensley v. Gassman*, 693 F.3d 681, 687 n. 5 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1800 (2013). One panel called it "redundant," *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009); another objected to it as inconsistent with *Saucier*, *Dunigan v. Noble*, 390 F.3d 486, 491 n. 6 (6th Cir. 2005); a third disagreed and reaffirmed it. *Sample v. Bailey*, 409 F.3d 689, 696 n. 3 (6th Cir. 2005). Other Sixth Circuit panels have ignored any third question entirely and employ the two-pronged test in *Saucier*. *See. e.g., Kovacic v. Cuyahoga County Department of Children & Family Services*, 724 F.3d 687, 695 (6th Cir. 2013); *Morrison v. Board of Trustees of Green Township*, 583 F.3d 394, 400 (6th Cir. 2009).

The Ninth Circuit has struggled with whether to add a third prong inquiry into factual reasonableness. *See CarePartners LLC v. Lashway*, 545 F.3d 867, 876 n. 6 (9th Cir. 2008) ("We have previously expressed the qualified immunity test as both a two-step test and a three-step test"), *cert. denied*, 129 S. Ct. 2382 (2009).

The Eleventh Circuit's consideration here of the factual reasonableness of defendants' conduct in determining qualified immunity as part of the second prong creates a further split with the Ninth Circuit, which noted, "While the constitutional violation prong concerns the reasonableness of the officer's *mistake of fact,* the clearly established prong concerns the reasonableness of the officer's *mistake of law*." *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (original emphasis), *cert. denied*, 132 S. Ct. 1032 (2012); *see also LaMont v. New Jersey*, 637 F.3d

177, 185 (3d Cir. 2011) ("In short, the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.").

Some courts have maintained the distinction between the two prongs. *E.g., Estate of Escobedo v. Bender*, 600 F.3d 770, 779 n. 3 (7th Cir. 2010) (objective reasonableness relates to first prong of qualified immunity analysis, not second), *cert. denied*, 131 S. Ct. 463 (2010). The decision here, where the Eleventh Circuit asked, in effect, "Was it reasonable for Weaver to disregard the EPSDT statutes' clear requirement that she not withhold "laboratory tests?" epitomizes how subdividing the second prong to require separate proof of factual unreasonableness results in the misapplication of the traditional test for qualified immunity, creating this further circuit split.

III. The Court Should Clarify Whether Plaintiffs Must Also Demonstrate the Factual Unreasonableness of an Official's Conduct in Order to Show the Law Was Clearly Established

There are at least five reasons the Court should address uncertainty in whether to consider factual unreasonableness in deciding the clearly established law prong of the Court's qualified immunity test. First, expanding the second prong to consider factual reasonableness as a third question alters the delicate balance struck in cases creating qualified immunity at all, further hobbling recovery for constitutional violations. As then-Circuit Judge Sotomayor wrote in dissent from Second Circuit inconsistency in treating factual reasonableness as an additional third step:

> By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."

Walczyk, 496 F.3d at 168-69 (Sotomayor, J., dissenting) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

This Court has long recognized, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). But repeating the consideration of factual reasonableness in resolving the second prong gives defendants a "second bite at the immunity apple," *Walczyk*, 496 F.3d at 169, and risks immunizing unconstitutional behavior even when defendants should have known what the law required in the situation (as defendant Weaver said she *actually* did). It also places a thumb on the scale in a defendant's favor, erecting an extra, duplicative, and wholly unnecessary hurdle for the plaintiff. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting).

Second, considering factual reasonableness in analyzing immunity, instead of only with respect to the merits, frustrates development of the law.

Though *Pearson v. Callahan,* 555 U.S. 223, 237 (2009) allows courts to alter the prongs' order, proper consideration of both prongs is generally essential, as such rulings "promote clarity--and observance--of constitutional rules" in the future, just as repeatedly avoiding constitutional questions through immunity "threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). "Qualified immunity thus may frustrate the development of constitutional precedent and the promotion of law-abiding behavior." *Id.* (citations, quotations omitted). If the question of whether officials' conduct was reasonable in light of the facts is injected into the second prong, intended to resolve immunity, courts will have even less occasion to examine whether official practices comply with the Constitution. Fewer cases will develop constitutional precedent to promote lawful behavior by officials who depend on guidance from the courts. Disputes on the merits will, as here, be decided under the guise of determining immunity. The first prong, created to sort out facts and set constitutional boundaries for officials' actions, will instead be subsumed by the second prong, rendering the first prong academic.

Third, injecting factual reasonableness into the immunity prong would diminish the vital role juries play in establishing what is factually reasonable. As juries are the "conscience," or "voice," of the community, *see, e.g., Jones v. United States*, 527 U.S. 373, 382 (1999); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting), deciding whether conduct is "reasonable" is for a jury. *See, e.g.,* Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1180 (March 1991) ("Reasonableness *vel non* was a classic question of fact

for the jury … requir[ing] the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official."). " 'The very essence of [the jury] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' " *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 504 n. 8 (1957) (quoting *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944)); *see also Abraham v. Raso*, 183 F.3d 279, 289-90 (3d Cir. 1999) ("[S]ince we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared.").

Indeed, the Court's precedents beg the question whether, in this case, Weaver and Riley had sufficient knowledge of the substantial risk to J.D.D.'s life so as to be obvious to a layperson and thus unreasonable, and their refusal to act thus deliberately indifferent, as "[t]he information was repeated numerous times throughout different documents in J.D.D.'s DCF file," above their names or signatures, App. B at 27, creating a question for a trier of fact; not one of law. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). ("Whether a prison official had the requisite knowledge of a substantial risk is a *question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence … and a *factfinder* may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (emphasis added). This was a first-prong factual question; not a second-prong legal question.

But by injecting factual reasonableness into the clearly established law inquiry, the Eleventh Circuit's approach restricts juries' ability to define what should qualify as factually reasonable. Because the task of deciding whether the law was clearly established is reserved to the court, deciding factual reasonableness or obviousness under the second prong cuts juries out of assessing whether officials' actions are factually reasonable, causing the law to increasingly lack the essential input of ordinary citizens, while judges parse through questions of fact best suited to jurors.

The same is true here: the Eleventh Circuit selectively sloshed through the facts to render its own judgment that the defendants' conduct in ignoring the risk of harm by withholding the infant J.D.D.'s testing (despite actual knowledge of clearly established law) was not unreasonable, concluding, "We do not view the risk as being obvious," App. A at 8--then used that factual determination of reasonableness from the bench to make what this Court has held must be an entirely legal decision concerning qualified immunity.

Fourth, the Court should grant certiorari to bring clarity and uniformity to lower courts' treatment of qualified immunity. As the late Justice Ginsberg predicted in *Saucier,* asking courts to navigate two forms of reasonableness in qualified immunity cases "holds large potential to confuse." 533 U.S. at 210 (Ginsberg, J., concurring). The Third Circuit later echoed that danger in *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007), noting it "presents perplexing logical and practical problems," 499 F.3d at 208, although the "[c]onfusion between the threshold constitutional inquiry and the immunity inquiry is … understandable given the difficulty courts have had

in elucidating the difference between those two analytical steps," *id.* at 214--thus yielding the decision in this case, as well as the split among and within the circuits on how to define and apply the second prong of the Court's prevailing qualified immunity doctrine.

And fifth, as the Court's "qualified immunity doctrine appears to stray from the statutory text," *Baxter v. Bracey*, 140 S.Ct. 1862 (2020) (Thomas, J., dissenting), casting doubt on its faithful agency of Congress's enactment in § 1983, the questions herein, and their underlying precedents, should be revisited.[4]

Meanwhile, injecting a factual reasonableness inquiry into its "clearly established law" prong upsets the precarious balance struck by decisions creating the qualified immunity doctrine, causing a split among and within the circuits, hobbling development of the law guiding official conduct, diminishing juries' role in deciding such fact-bound questions, and frustrating clarity and uniformity in its application.

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[4] As the text of § 1983 mentions no defense or immunity, and neither existed at common law, "[t]here likely is no basis for the objective inquiry into clearly established law that [the Court's] modern cases prescribe." *Baxter v. Bracey*, 140 S. Ct. at 1862-64 (Thomas, J., dissenting from denial of certiorari). As § 1983, by its own explicitly stated terms, applies to "Every person" acting under color of state law, except a judicial officer in a specific capacity, any notion Congress meant only *some* people in *some* cases is linguistically and conceptually incorrect and arguably unfaithful to Congress's text in § 1983. *See also Smith v. United States*, 508 U.S. 223, 247, n. 4 (1993) (Scalia, J., dissenting) ("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in.").

IV. The Court Should Clarify Whether, in Determining Whether the Law Was Clearly Established, Courts Should Consider Each Item of Fair Notice in Isolation or Perform the Totality-of-Notice Analysis Applied in *Hope v. Pelzer*

Under qualified immunity doctrine, officials are only "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202; *Hope,* 536 U.S. at 746. Thus, "the salient question ... is whether *the state of the law*" at the time "gave [officials] fair warning that their alleged treatment of [plaintiff] was unconstitutional," *Hope,* 536 U.S. at 741 (emphasis added): *i.e.*, whether the official had "fair notice" of the law. *Id.* at 739.

Though a "mistake of law" may entitle an official to qualified immunity, *Saucier,* 533 U.S. at 205, Weaver stated at deposition that she *actually knew,* at the time of events, that the law required J.D.D.'s communicable disease testing, "but I don't do that," App. D, thus negating any mistake of law--and any doubt she received "fair notice." Still, the courts below simply ignored Weaver's own deposition testimony and rejected each offered corroborating item of fair notice of clearly established law in piecemeal fashion.

The courts below gave short shrift to the asserted violation of J.D.D.'s Fourteenth Amendment right to be kept free from the risk of harm in state custody,[5] and suggested his asserted federal statutory right to "laboratory tests," 42 U.S.C. § 1396d(r)(1)(B)(iv), merely "seeks to tack this statutory argument onto his constitutional one," App. A at 11, thus revealing a linear, compartmentalized, analysis of "fair notice."

Instead of viewing the multiple items of fair notice as they existed together in real time to determine "whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted," *Saucier,* 533 U.S. at 202; *Hope,* 536 U.S. at 746, the Eleventh Circuit rejected each item of fair notice (including the cited federal statute, state statutes, state administrative rules, and U.S. Dept. of Health and Human Services report) in artificial isolation, construing each against J.D.D. to find defendants'

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[5] *Taylor v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) (citing *Youngberg v. Romeo,* 457 U.S. 307, 320 (1982)). *See also H.A.L. ex rel. Lewis v. Foltz,* 551 F.3d 1227 (11th Cir. 2008):

> *Taylor* clearly established decisional law that applied, at the pertinent time, with obvious clarity to Defendants in this case … Defendants had fair warning that their conduct (doing nothing to protect the children, given the circumstances) violated clear federal law. Defendants can therefore be held personally liable for the children's injuries. On the alleged facts, no reasonable person in Defendants' place could have believed that, by doing nothing to protect the children, they could carry out their duties consistently with the Constitution.

H.A.L. ex rel. Lewis v. Foltz, 551 F.3d at 1231.

conduct did not violate his federal statutory right to "laboratory tests" for "illnesses and conditions."[6]

But the other items of fair notice--corroborating the law requiring, "at a minimum," "laboratory tests," § 1396d(r)(1)(B)(iv)--did not each exist in a vacuum. Together, they gave the defendants fair notice of the "state of the law" at the time, *Hope*, 536 U.S. at 741, and may arguably be analyzed together in real time, as the Court analyzed analogous provisions in *Hope.*

Hope held broad case precedent, an Alabama Department of Corrections rule, and a Department of Justice report *together* showed officials were on fair notice the right at issue was clearly established, prohibiting qualified immunity. 536 U.S. at 741-44. *Hope* did not take each of those provisions in piecemeal isolation and pick each apart as though they did not exist together as the then-contemporary totality of notice: "the state of the law." *Hope*, at 741.

Here, broad constitutional precedent in *Taylor,* federal statutes requiring "laboratory tests," and state statutory "medical screening performed on the child without authorization from the court," which

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[6] While the panel cited *Davis v. Scherer*, 468 U.S. 183, 194 (1984) as holding, "officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision,' " App. A at 11, the Court in *Elder v. Holloway*, 510 U.S. 510, 511 (1994), later noted, "The Court held in *Davis* only this: To defeat qualified immunity the federal right on which the claim for relief is based--rather than some other right--must be clearly established." *Id.* As the right upon which J.D.D.'s claim for relief is based is the federal statutory right to laboratory tests, *Davis v. Sherer* is inapposite.

"shall be to examine the child for injury, illness, and communicable diseases," § 39.407(1), Florida Statutes (1999) *together* gave clear, fair notice of what was legally required. Arguably, where, as here, a foster care official, like Weaver, has knowledge of an infant's documented multiple HIV risk factors, but declines to have the infant tested, as required by the law Weaver admitted having actually known at the time, App. D, "it would be clear to a reasonable officer [her] conduct was unlawful in the situation [s]he confronted." *Hope*, 536 U.S. at 746 (quoting *Saucier,* 533 U.S. at 202).

State administrative rules in effect at the time *also* gave further fair notice a child "should" be tested for HIV under at least three of its criteria, and a U.S. Department of Health and Human Services report stated, as to HIV, a decade before J.D.D.'s birth and coercive custody, "[t]he potential benefits to the foster care system and the child's health provide compelling reasons to test all at-risk children in foster care."[7]

The panel's notion that, "a state's duty to provide prompt care for known medical needs does not imply --let alone 'clearly establish'--that an individual social worker must request specific tests for an unknown medical need," App. A at 12, itself ignored that the "known medical need" was the obvious need for *legally required laboratory tests* essential to making the illness "known," and that by failing to comply with the law's requirement (which Weaver acknowledged actually knowing at the time), "it would be clear to a

[7] DHHS, *A Report on Infants and Children with HIV Infection in Foster Care* (November 14, 1989) https://aspe.hhs.gov/basic-report/report-infants-and-children-hiv-infection-foster-care

reasonable officer that [her] conduct was unlawful in the situation [s]he confronted." *Hope*, 536 U.S. at 746; *Saucier,* 533 U.S. at 202. After all, as this Court has noted, an "official cannot hide behind an excuse that [s]he was unaware of a fact or risk if that fact or risk would have been obvious," *Farmer*, 511 U.S. at 842, particularly where, as here, the official has become "unaware" solely by virtue of ignoring a known law.

Noting, " 'laboratory tests' includes screening for HIV," App. A at 12, yet ignoring Weaver's admission she actually knew communicable disease testing was legally required, the Eleventh Circuit concluded, "[W]e cannot say that this language put [defendants] on notice that they must diagnose [sic] an HIV risk and pursue screening, or else face personal financial liability," App. A at 12: a non-medical reason which places a financial cart before the constitutional horse. But the totality of notice at the time (federal statutes, state statute, administrative rules and agency report) *together* arguably gave defendants notice of J.D.D.'s right to laboratory testing, including for HIV, under the EPSDT statutes and the Fourteenth Amendment. This was the "state of the law" analysis applied in *Hope,* at 741, the clarification of which is sought here.

The Court should grant review to clarify whether lower courts determining whether the law was clearly established, should consider the law at the time under the totality-of-notice, *i.e.*, "state of the law," standard applied in *Hope*, rather than under the arguably myopic, unrealistic, atomistic approach taken below.

V. The Opinion Below Clearly Misapprehends Standards Set by the Court's Precedents for Disposing of Qualified Immunity Cases

The opinion below also clearly misapprehends the summary judgment standards on claims of qualified immunity. *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) ("[W]e intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."). The opinion not only (a) fails to "view the evidence 'in the light most favorable to the opposing party,' " *Id.*, 572 U.S. 659 (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970)), (b) fails to adhere to the Court's standard that "all justifiable inferences are to be drawn in [the non-movant's] favor," *id.* at 651, and (c) fails to apply the Court's standard that, "under either prong [of qualified immunity], courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," *id.*, at 656, but also (d) fails to consider the non-moving party's material evidence--the defendant's own deposition testimony.

The Court's qualified immunity precedents hold, "if a violation could be made out on a favorable view of the parties' submissions," *Saucier*, 533 U.S. at 201, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," *Tolan*, 572 U.S. at 656, because "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial,' " *Tolan*, 572 U.S. at 656 (quoting *Anderson,* 477 U.S., at 249).

But the lower court's rank speculation here about non-record "facts," including the thought processes of unknown hospital staff, or doctors (seen only *after* the six-week window in which J.D.D. could have received effective treatment with antibodies), who the lower court, on its own and without evidence, conjectured, "did not see a need" for HIV testing, App. A at 14, or had not "thought to have him tested," id. at 9, "improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Tolan*, 572 U.S. at 657 (quoting *Anderson,* 477 U.S. at 249).

The panel's failure to even consider Weaver's own deposition testimony that she actually knew the law required J.D.D.'s testing is itself grounds for reversal. Material under the first prong was whether Weaver (a) knew the law required testing, yet (b) did nothing to protect the infant J.D.D. by having him tested. Despite the district court's finding the risk factors were "repeated numerous times throughout different documents in J.D.D.'s DCF file" above the defendants' names or signatures, App. B at 27, and despite the court of appeals' concession the federal statute's " 'laboratory tests' includes screening for HIV," App. A at 12, the court below wholly ignored Weaver's own deposition testimony she actually knew at the time the law required J.D.D.'s testing but did nothing. *Cf. H.A.L.*, 551 F.3d at 1231; *Taylor*, 818 F.2d at 795.

The court below thus wholly ignored Weaver's own deposition testimony that she had actual notice of the law but did nothing, deciding each item of fair notice in favor of the summary judgment *movants*. This was the error in *Tolan*. *See id.* 572 U.S. at 657 ("In holding that [defendant's] actions did not violate

clearly established law, the [lower court] failed to view the evidence at summary judgment in the light most favorable to [the plaintiff] with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party") (quoting *Anderson,* at 477 U.S. at 249); *see also Tolan,* 572 U.S. at 660 ("By weighing the evidence and reaching factual inferences contrary to [plaintiff's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party.").

Though Weaver admitted having actual notice that the law required J.D.D.'s testing, the court below ignored that material evidence, and instead construed each item of fair notice *against* the non-moving party, thereby, as in *Tolan*, "lead[ing] to the inescapable conclusion that the [lower court] credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.,* 572 U.S. at 659.

As to the first prong of qualified immunity analysis, Weaver's deposition testimony that she knew communicable disease testing was required, "[b]ut I don't do that," App. D, makes any question whether she had "diagnose[d]" the risk, App. A at 12, academic, because, resolving that factual issue in favor of the non-moving party, Weaver would not have had J.D.D. tested *regardless* of his medical right or risk--epitomizing "deliberate indifference."

A jury could find Weaver's actual knowledge that the law required J.D.D.'s testing, and circumstantial evidence of her knowledge of risk factors "repeated numerous times throughout different documents," above her name or signature, App. B at 27, coupled with her deposition testimony, "[b]ut I don't do that," App D, demonstrated her "deliberate indifference" to Weaver's serious medical need. Had the court below correctly applied this Court's standard in *Saucier*, it would have found the summary judgment evidence makes out a violation of J.D.D.'s constitutional right to be kept free from unreasonable risk of harm while held in state custody, precluding summary judgment.

Even assuming that factual reasonableness should be considered in deciding the second prong of qualified immunity analysis (*cf.,* Sections I-III, *ante*), although "the salient question" with respect to the second prong, was "whether the state of the law" at the time "gave [defendants] fair warning that their alleged treatment of [J.D.D.] was unconstitutional," *Hope*, 536 U.S. at 741, Weaver could not "reasonably" have concluded that "doing nothing to protect the child[ ], given the circumstances," *H.A.L.*, *supra* (citing *Taylor*, *supra*), by withholding legally required "laboratory tests," 42 U.S.C. § 1396d(r)(1)(B)(iv) (which she admitted actually knowing at the time), could comport with the Fourteenth Amendment.[8]

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[8] Indeed, *Tolan* suggests the danger of applying the wrong view of the facts is even greater where, as here, the wrong view is applied to *both* of the prongs: "Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, *even when*, as here, a court decides only the clearly-established prong of the standard." *Id.*, at 657 (emphasis added).

A jury could easily find it was unreasonable not to have J.D.D. tested by finding the need was obvious. *See Farmer*, 511 U.S. at 842 ("Whether … official[s] had the requisite knowledge of a substantial risk is a *question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence … and a *factfinder* may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (emphasis added). The factual question was not for a court, but for a jury.

This case does not merely "question whether the evidence in the summary judgment record is just enough or not quite enough," *Tolan*, 572 U.S. at 661 (Alito, J., concurring in the judgment), or rue entry of a non-final decision holding that, if proven, the facts would show a constitutional violation, so that, "even without [the Court's] intervention, qualified immunity [would or] would not be available in any similar future case," *Taylor v. Riojas*, 19-1261, 2020 WL 6385693, at *3 (U.S. Nov. 2, 2020) (Alito, J., concurring in the judgment), but instead one in which the lower court "conspicuously disregarded governing Supreme Court precedent," *id.*, and did not consider the non-movant's submitted material evidence *at all*. *See Tolan*, at 659 (granting certiorari "because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents"); *Beard v. Aguilar*, 572 U.S. 1110 (2014) (Alito, J., with whom Scalia, J., joins, dissenting from denial of certiorari, citing *Tolan* (Alito, J., concurring in the judgment)); *Thomas v. Nugent*, 572 U.S. 1111 (2014) (granting certiorari, vacating judgment, and remanding for further consideration in light of *Tolan*).

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14558

D.C. Docket No. 8:16-cv-00998-MSS-SPF

SHANE DAVIS,

Plaintiff-Appellant,

versus

MIKE CARROLL,
WILEEN R. WEAVER,
PAULINE RILEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 13, 2020)

Before JILL PRYOR and GRANT, Circuit Judges, and ROYAL,[*] District Judge.

GRANT, Circuit Judge:

Discovering that someone has a serious, life-long illness can strike a terrible blow. Especially when the one suffering is a child. That is the hardship J.D.D. and his adoptive parents have endured since learning that J.D.D. was HIV-positive—a condition he likely contracted at birth but that went unnoticed until he was 14 years old. On behalf of his son, Shane Davis sued two state social workers for failing to request an HIV screening when the State of Florida took custody of J.D.D. shortly after his birth. The district court granted the social workers' summary judgment motion because it found that qualified immunity protected them from suit. After careful review and with the benefit of oral argument, we affirm.

I.

J.D.D. was born in a hospital on April 10, 2000, to a mother who was tragically unfit for parenting. Shortly after his birth, the hospital filed an abuse report with the Pinellas County Sheriff's Office. The report explained that J.D.D.'s mother tested positive for cocaine, that she had no prenatal care, and that other children had already been removed from her care.[1]

[*] Honorable C. Ashley Royal, Senior District Judge of the Middle District of Georgia, sitting by designation.

[1] The parties dispute many of the relevant facts. Because this case comes to us after the district court granted the defendants' motion for summary judgment, we draw all inferences in favor of Davis.

After his birth, J.D.D. remained at the hospital for a week because of complications stemming from his cocaine exposure, low birthweight, and low oxygen. When he was released, the Florida Department of Children and Families took custody of him directly from the hospital. At that time, the hospital provided the department with an Infant Discharge Summary, which noted several normal findings about J.D.D.'s health—but said nothing about HIV. No records suggest that the hospital tested him for HIV.

Within ten days of J.D.D.'s hospital discharge, social workers Wileen Weaver and Pauline Riley, the defendants here, were working with J.D.D. They soon learned about his case. Case staffing notes record that the last four children from J.D.D.'s mother tested positive for cocaine and were then cared for by family members. Riley also knew that J.D.D.'s mother had little or no prenatal care and that J.D.D. himself had been exposed to cocaine at birth. And Weaver had access to J.D.D.'s file, which contained information about both the lack of prenatal care and his cocaine exposure. Neither Weaver nor Riley sought HIV screening.

An investigator for the Sheriff's Office later petitioned a county court to place J.D.D. in foster care. The petition summarized other abuse reports filed after J.D.D.'s mother had given birth to her previous children. One case summary mentioned alleged "domestic violence," and noted that J.D.D.'s "mother 'smokes crack like it was cigarettes.'" Other police investigations in 1993 and 1995

uncovered that J.D.D.'s mother had been treated for heroin and had been arrested in 1983 for soliciting prostitution, but the custody petition for J.D.D. did not include these details. "To the best of writer's knowledge," the petition read, "mother has no criminal history." The petition also stated that "neither the mother nor the child has any medical problems or physical abnormalities."

J.D.D. was placed with a foster family that same year. J.D.D.'s foster parents took him to see Dr. Richard Gonzalez for typical childhood illnesses like common colds and asthma. Like the hospital staff, Dr. Gonzalez knew about J.D.D.'s cocaine exposure, and about his mother's drug addiction and lack of prenatal care. And like the hospital staff, Dr. Gonzalez did not pursue HIV screening for J.D.D.

Shane and Patricia Davis adopted J.D.D. when he was three years old. Eleven years later, at age fourteen, J.D.D. developed thrush, a mouth infection somewhat common for infants but rare for teenagers. His infection prompted physicians to conduct immunological testing. The doctors diagnosed him with AIDS, and treatment began immediately.

Dr. Carina Rodriguez, who treated J.D.D. after his diagnosis, said that J.D.D. probably contracted HIV at birth from his mother, although no direct evidence shows that she had HIV. The doctor also explained that HIV-positive newborns are usually asymptomatic at birth. Another expert opined that if J.D.D.

had been tested and treated for HIV within six weeks of his birth, "it is highly unlikely he would have developed an HIV infection, and highly unlikely that his HIV infection would have progressed to AIDS."

About two years after J.D.D.'s diagnosis, his adoptive father sued social workers Weaver and Riley in their individual capacities.[2] Davis's second amended complaint alleged that they were liable under 42 U.S.C. § 1983 for violating J.D.D.'s clearly established federal rights. Specifically, Davis claimed that by not requesting HIV screening, Weaver and Riley showed deliberate indifference to J.D.D.'s serious risk of contracting HIV. Davis also alleged violation of J.D.D.'s federal right to prompt medical assistance under the Medicaid Act. *See* 42 U.S.C. § 1396a(a)(8). The district court disagreed, and granted the defendants' motion for summary judgment based on qualified immunity. Davis now appeals.

[2] He also sued Weaver, Riley, and the Secretary of the Florida Department of Children and Families in their official capacities. The district court granted the defendants' motion for summary judgment on these claims, and Davis does not challenge that decision on appeal.

II.

We review de novo the district court's granting of a summary judgment motion based on qualified immunity. *Whittier v. Kobayashi*, 581 F.3d 1304, 1307 (11th Cir. 2009) (per curiam). In doing so, we "resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity." *Id.*

III.

On appeal, Davis challenges the district court's determination that qualified immunity shields Weaver and Riley from suit. "In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Carruth v. Bentley*, 942 F.3d 1047, 1054 (11th Cir. 2019) (quotation marks and citation omitted). The parties agree that Weaver and Riley were acting within the scope of their discretionary authority as foster caseworkers. Given this agreement, the burden shifts to Davis "to show that qualified immunity is not appropriate." *Id.* (citation omitted).

To defeat qualified immunity, Davis must show that the defendants "violated clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). He contends both that Weaver and Riley were deliberately

indifferent to J.D.D.'s serious risk of HIV and that they violated his clearly established federal statutory right to HIV screening. Neither argument persuades us.

A.

We have held that "a foster child can state a 42 U.S.C. § 1983 cause of action under the Fourteenth Amendment if the child is injured after a state employee is deliberately indifferent to a known and substantial risk to the child of serious harm." *H.A.L. ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008) (per curiam) (citing *Taylor v. Ledbetter*, 818 F.2d 791, 794–96 (1987) (en banc)). "To survive summary judgment on a deliberate indifference failure-to-protect claim, a plaintiff must produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (quotation marks and citation omitted).

For the second element—deliberate indifference to the risk—"a plaintiff must produce evidence that the defendant actually (subjectively) knew" about the "substantial risk of serious harm." *Id.* (punctuation and citation omitted). In other words, "a state official acts with deliberate indifference only when he disregards a risk of harm of which he is *actually aware*." *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). It is not

enough for the official to "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists"—"he must also draw the inference." *Farmer*, 511 U.S. at 837. That said, proving actual awareness does not require a smoking gun; a factfinder could conclude that an "official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.

Davis does not have any direct evidence that Weaver and Riley were actually aware of a substantial risk that J.D.D. (or even his mother) had HIV. In Davis's view, though, J.D.D.'s mother had such an obvious risk of HIV that Weaver and Riley must have concluded that by extension J.D.D. also faced a substantial risk. After all, he says, J.D.D.'s mother had multiple risk factors: her lack of prenatal care, use of cocaine, removal of four of her previous children for drug exposure, domestic violence, and J.D.D.'s ambiguous paternity.

We do not view the risk as being obvious. Like most newborns with HIV, J.D.D. did not have any physical symptoms. Although Davis sees warning signs of the hidden illness, several of his proposed risk factors would show little or no risk at all. Davis says one risk factor is the uncertainty of J.D.D.'s paternity. Yet record documents repeatedly reference Ernest "Keith" Majors as the biological father, and Davis has not directed us to any contrary evidence. Moreover, there is no reason that an allegation of domestic violence would suggest an HIV risk—especially when that allegation, as the custody petition for J.D.D. noted, resulted in

a closed case "with no indicators of any abuse or neglect." Even the strongest risk factor, cocaine usage, may not be strong as it first appears: the record reflects that J.D.D.'s mother mainly—if not exclusively—ingested cocaine through smoking rather than injection. For example, the petition filed by an investigator in J.D.D.'s case only discusses his mother as "smok[ing] crack."

More importantly, although J.D.D. received treatment from several medical professionals, none of them thought to have him tested for HIV. Hospital staff and doctors cared for J.D.D. not only at his birth but also for his week-long stay after his birth. The hospital's abuse report shows that medical staff knew that J.D.D. was exposed to his mother's cocaine, that his mother had no prenatal care, and that J.D.D. had low oxygen. Still, they did not request HIV screening. In fact, the hospital's Infant Discharge Summary noted several normal health findings for J.D.D., and did not so much as hint about the possibility of HIV. Nor did Dr. Gonzalez, who saw J.D.D. many times during his time in foster care, detect the need for screening—even though he also knew about J.D.D.'s cocaine exposure and his mother's addiction. Under these circumstances, a jury could not reasonably conclude that a substantial risk of HIV was obvious to social workers when the risk was overlooked by many medical professionals.

Davis counters that only the defendants (and not the doctors and nurses) were aware that J.D.D.'s mother had been treated for prior heroin use and had been

arrested in the 1980's for soliciting prostitution. It strikes us as speculative to assume that they would have known this information because, as the district court explained, these details were "not included in any document summarizing J.D.D.'s case or on any document containing Weaver and Riley's signature." Instead, these facts came from police abuse reports for previous children of J.D.D.'s mother.

Even if we assume that the defendants read the old police reports, we could not embrace Davis's argument. True, the prostitution arrest and heroin usage raise a yellow flag. But they do not make the risk obvious. And at any rate, the older police reports were undermined by the custody petition filed by an investigator in J.D.D.'s own case—which said that, to the best of the author's knowledge, J.D.D.'s "mother has no criminal history," and that "neither the mother nor the child has any medical problems or physical abnormalities." Lacking evidence that the risk was obvious, Davis can only hope to show that the defendants were negligent—but "deliberate indifference entails something more than mere negligence." *Farmer*, 511 U.S. at 835.

In short, the record does not show that Weaver and Riley actually inferred that J.D.D. had a substantial risk of contracting HIV. No actual inference of risk means no deliberate indifference. And without deliberate indifference, there can be no constitutional violation—clearly established or otherwise. The defendants are thus immune from suit on this claim.

B.

Next, Davis points to the Medicaid Act to overcome qualified immunity. Under the Act, Florida must create a plan that provides "medical assistance" with "reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8) (2000); *see id.* § 1396a(a)(10) (listing covered individuals). That medical assistance includes early and periodic screening, such as "laboratory tests" and other treatment "to correct or ameliorate defects" and physical "illnesses and conditions." *Id.* § 1396d(r)(1)(B)(iv), (5).

To the extent Davis seeks to tack this statutory argument onto his constitutional one, his attempt flounders. We have already explained that the defendants did not violate J.D.D.'s constitutional rights. And officials "sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984).

At the same time, "we have acknowledged the possibility that some federal statutory provisions will be sufficiently clear on their own to provide defendants with fair notice of their obligations under the law." *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1301 (11th Cir. 1998). To provide sufficient notice to Weaver and Riley, the statutory provisions and regulations must be so clear that any "reasonable public official, having read the plain terms of this statute, certainly

would have understood that federal law makes it unlawful" not to request HIV screening. *Id.* at 1302.

That level of clarity is not present here. None of the provisions Davis cites, as the district court put it, "mandate HIV testing specifically, nor do they unmistakably instruct that the failure to refer a child for such a test is illegal." We do not doubt that a state plan's required coverage of "laboratory tests" includes screening for HIV. Still, we cannot say that this language puts social workers on notice that they must diagnose an HIV risk and pursue screening, or else face personal financial liability.

To be sure, we have identified "a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act." *Doe 1-13 ex rel. Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998). Although Davis leans on this holding in *Doe*, the case cannot withstand the weight he understandably wishes to place on it. There, Medicaid-eligible patients waited several years for treatment of their known medical conditions. *Id.* at 711. We held that they had a federal right, enforceable through § 1983, to prompt state treatment under the Medicaid Act. *Id.* at 715–19. But a state's duty to provide prompt care for known medical needs does not imply—let alone "clearly establish"—that an individual social worker must request specific tests for an unknown medical need.

Nor would state law have put Weaver and Riley on notice. According to a Florida statute, the Department of Children and Families "is authorized to have a medical screening performed on the child." Fla. Stat. § 39.407(1) (1999). The statute also says that the "medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases." *Id.* Davis argues that the statute "clearly and unequivocally states DCF 'shall' have the child examined for illness and 'communicable diseases.'" We do not read the statute to authorize screening in one sentence only to mandate screening in the next. The "shall be" language does not obligate social workers to initiate any screening; rather, that language explains who can perform medical screening and what kind of screening the department is authorized to request. Far from creating a clear requirement to initiate screening, the language becomes relevant only *after* a social worker decides to pursue a screening.

Davis also looks to a now-repealed Florida regulation to make up for the law's lack of clarity on the screening issue. The regulation provided several examples of children who "should be considered at risk" and "should be tested" for HIV. Fla. Admin. Code. R. 65C-13.017(7) (1992) (repealed in 2008). Those children include any "abandoned newborn" and children who tested positive for "drugs commonly self-administered by injection," although the regulation also

notes that hospital "staff will normally discover these [drug-positive] children and request appropriate permission" for testing. *Id.* We can assume for argument's sake that J.D.D. "should" have been considered at risk. But *should* indicates a recommendation, not a requirement. Again, hospital staff and doctors—those who, as the regulation indicates, are often best positioned to detect the need for testing—also did not see a need for HIV screening. Simply put, none of the statutes or regulations commanded Weaver and Riley to detect the HIV risks and request screening.

* * *

At bottom, no federal law mandated HIV screening here—much less "clearly established" such a requirement. Weaver and Riley are therefore immune from suit. We **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHANE DAVIS, on behalf of J.D.D., a minor child,

Plaintiff,

v. **Case No: 8:16-cv-998-T-35MAP**

MIKE CARROLL,[1] in his official capacity as Secretary of the Florida Department of Children and Families, WILEEN R. WEAVER, in her official and individual capacities as Family Services Counselor for the Florida Department of Children & Families, and PAULINE RILEY, in her official and individual capacities as Family Services Counselor Supervisor for Florida Department of Children & Families,

Defendants.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Motion for Partial Summary Judgment as to Liability of Defendants Weaver & Riley, (Dkt. 87), Defendants' response in opposition thereto, (Dkt. 98), and Plaintiff's reply, (Dkt. 99); Defendants' Motion for Summary Judgment with Request for Oral Argument, (Dkt. 104), Plaintiff's response in opposition thereto, (Dkt. 110), and Defendants' reply, (Dkt. 116); Plaintiff's Amended Motion for Partial Summary Judgment for Declaratory and Injunctive

1 Defendant Carroll has left his role as secretary of DCF effective September 6, 2018. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Interim Secretary, Rebecca Kapusta, is automatically substituted for Defendant Carroll in this suit. To avoid confusion, the name remains the same in the style of the case and body of this Order.

Relief as to Defendant Mike Carroll (as to Count IV Only), (Dkt. 115), Defendants' response in opposition thereto, (Dkt. 120) and Plaintiff's reply, (Dkt. 121); Plaintiff's Daubert Motion to Disqualify Expert Witness John S. Harper, (Dkt. 88), and Defendants' response in opposition thereto, (Dkt. 98); and Plaintiff's Objection to Defendants' Untimely Filing of Unauthenticated Papers and Inadmissible Hearsay Incapable of Being Made Admissible, (Dkt. 113), and Defendant's response in opposition thereto. (Dkt. 119) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Defendants' Motion for Summary Judgment, (Dkt. 104), **DENIES** Plaintiff's Motion for Partial Summary Judgment as to Liability of Defendants Weaver & Riley, (Dkt. 87), and **DENIES** Plaintiff's Amended Motion for Partial Summary Judgment for Declaratory and Injunctive Relief as to Defendant Mike Carroll (as to Count IV Only), (Dkt. 115), for the reasons that follow. Plaintiff's Daubert Motion to Disqualify Expert Witness John S. Harper, (Dkt. 88), is **DENIED AS MOOT**.

I. BACKGROUND

A. Procedural History

Shane Davis ("S. Davis") filed this action on April 25, 2016 on behalf of his adopted son J.D.D., a minor child ("Plaintiff"), two years after J.D.D. was diagnosed with HIV/AIDS. (Dkt. 1) On July 7, 2016, Plaintiff amended his complaint as a matter of course, (Dkt. 12), and on August 23, 2016, Plaintiff filed a Second Amended Complaint after obtaining the Court's leave to do so, asserting claims pursuant to 42 U.S.C. § 1983 against Mike Carroll ("Carroll"), in his official capacity as Secretary of the Florida Department of Children and Families ("DCF"), Wileen Weaver, n/k/a Randall ("Weaver"), in her official and individual capacities as a Family Services Counselor for DCF, and

Pauline Riley ("Riley"), in her official and individual capacities as a Family Services Counselor Supervisor for DCF (collectively, "Defendants"). (Dkt. 17) In Counts I, II, and III of the Second Amended Complaint, Plaintiff asserts claims against Weaver and Riley in their official and individual capacities for violating J.D.D.'s federal statutory rights to Early Periodic Screening, Diagnosis, and Treatment ("EPSDT") and "outreach services" under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* and for violating J.D.D.'s constitutional right to due process under the Fourteenth Amendment for failing to have him tested for HIV while he was in the custody of DCF. (Id. at 11–14) Count IV of the Second Amended Complaint asserts the same federal statutory and constitutional violations as to Defendant Carroll in his official capacity, but seeks only declaratory and prospective injunctive relief for DCF's ongoing failure to notify J.D.D. and his parents of available Medicaid benefits. (Id. at 15–16)

On February 28, 2018, Plaintiff moved for partial summary judgment as to the liability of Weaver and Riley. (Dkt. 87) On March 2, 2018, all three Defendants filed a cross-motion for summary judgment. (Dkt. 104) On March 15, 2018, Plaintiff moved for partial summary judgment as to Count IV, the claim against Carroll. (Dkt. 115) For the reasons that follow, the Court grants summary judgment in favor of Defendants on all counts.

B. Factual Background

At the outset, the Court issued an Order directing the Parties to file a stipulation of agreed material facts due on the date the response to any motion for summary judgment was due. (Dkt. 82 at II.H.1) The Parties failed to file any such stipulation for any of the three motions for summary judgment filed. Thus, against a hotly disputed record, the

Court must determine whether any portion of this matter can be resolved as a matter of law. The material facts, which the Court construes in the light most favorable to the Plaintiff for purposes of the Defendants' motion, are as follows.

1. J.D.D.'s birth and removal into DCF Custody

J.D.D. was born on April 10, 2000 at Bayfront Medical Center. (Dkts. 87 at 1; 98 at 3) At the time of his birth, J.D.D.'s birth mother, Angela Davis ("A. Davis") tested positive for cocaine. (Dkt. 87-1 at 32) J.D.D. remained hospitalized for seven days following his birth and was treated for exposure to cocaine, low birthweight, and low oxygen. (Dkts. 87 at 2; 98 at 3) The circumstances of J.D.D.'s birth were reported by a Bayfront Medical Center social worker to the Pinellas County Sheriff's Office ("PSCO") Child Protection Division in an Abuse Report, which advised that A. Davis tested positive for cocaine and "knew she would," and that she had no prenatal care. (Dkt. 87-1 at 11; Dkt. 104-5) The Abuse Report also indicated that A. Davis had prior children removed from her custody. (Dkt. 104-5) An investigation commenced, and on April 17, 2000, J.D.D. was taken into DCF custody directly from the hospital.[2] (Dkt. 87-1 at 47, 54) J.D.D.'s Infant Discharge Summary[3] from Bayfront Medical Center indicates that he met certain health criteria at the time of his discharge into DCF custody, including "Stooling appropriately," "Monitor site healing," "Skin clear," "Umbilical cord healing," "Feeding

2 Defendants appear to dispute that J.D.D. was placed into DCF's custody at this time, pointing to an agreement between the PCSO and DCF in which the PCSO was contracted to administer and control the Emergency Shelter Division. (Dkts. 98 at 4; 104 at 10) Based on this agreement, it is Defendants' position that J.D.D. was placed in the custody of the PCSO and not DCF when he was discharged from the hospital. (Id.) However, Shorter's Detention Petition expressly states that J.D.D. was taken into custody by DCF on April 17, 2000, (Dkt. 87-1 at 47), and Defendants have admitted that "J.D.D. was placed in the custody of DCF on April 17, 2000." (Id. at 1) Nevertheless, to the extent that this fact is disputed, the Court does not find that it is material to the resolution of the summary judgment motions.

3 Plaintiff's objection to Dkt. 98-1 is overruled. See discussion infra.

appropriately," "Voiding appropriately," "Color pink," "Eyes clear," "Circumcision healing," and "Temperature [greater than or equal to] 97.6 to [less than or equal to] 99.6 [degrees]." (Dkt. 98-1) Under a section labeled "Hearing Screen," there is a check mark indicating that an "OAE," or otoacoustic emissions hearing screen, was completed and that follow-up was required. (Id.) There is no other documentation provided in the record to determine what medical testing or treatment was or was not administered during those seven days.

Defendants admit that Weaver was assigned as one of J.D.D.'s family service counselors by the time he was discharged from the hospital on April 17, 2000. (Dkt. 87-1 at 2) At her deposition, Weaver insisted that if J.D.D. was born in the hospital, he would have had a health screening, and that DCF would not have taken a child who had not had a screening. (Dkt. 87-2 at 22:14–18, 23:8–10) However, crediting Plaintiff's version of the facts for purposes of this Order, the Court does not accept this to be true with respect to J.D.D. On the same day that J.D.D. was discharged from the hospital, PSCO Protective Investigator, Jewel Shorter ("Shorter") filed a Detention Petition in the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County Juvenile Division to temporarily shelter J.D.D. from his parents, A. Davis and Ernest "Keith" Majors ("Majors"). (Dkt. 87-1 at 54–55) Therein, Shorter checked a box indicating that, as an appropriate reason for J.D.D.'s removal, allowing him to return to the family home presented "substantial and immediate danger." (Id. at 54) Specifically, Shorter wrote: "The mother has abused crack cocaine since she was 19 years old, the mother has used cocaine throughout her pregnancy [and] tested positive

for cocaine [at] the birth of [J.D.D.]." (Id.) Further, Shorter added the following in support of her Petition:

> The mother has seven children, the last four have all tested positive for cocaine. The other children remain with relatives. The mother admits to smoking at least one rock per day during her pregnancy. The child's father was incarcerated in Atlanta, GA. He was released on 4/15/00, but is unable to obtain custody of his son [at] this time. It is therefore recommended that [care, custody, and control] of [J.D.D.] be place[d] w[ith] the Dept. of Child[ren] [and] Fam[ilies] Shelter.

(Id. at 50) On April 18, 2000, the state court judge signed an Order on Shelter Hearing, directing that J.D.D. shall remain in the "shelter" custody of DCF, with parental visitation to be supervised by PCSO. (Id. at 50) On April 27, 2000, DCF held a "staffing" of J.D.D.'s case for Foster Care, and by that time, Riley was J.D.D.'s Family Services Counselor Supervisor. (Id. at 2, 53) The presenting concerns set forth in the document entitled "Case Staffing" were as follows: "Mom has 7 children, the last 4 children tested positive for cocaine. [T]here have been fam[ily] members who've provided care for the six children but [at] this time there are no relatives available for this ch[ild]." (Id. at 53) The Case Staffing document also identified five tasks for the Child Protective Investigations unit to handle, including: all court work, child in care packet, bi-weekly visits, a pre-disposition study, and a case plan. (Id.) At this time, the Foster Care/Adoption Related Services unit appears to have been tasked with handling bi-weekly visits until disposition. (Id.)

Defendants admit that around the time of the staffing, when Riley became J.D.D.'s Family Services Counselor Supervisor, she would have had knowledge that A. Davis had limited or no prenatal care, that four of her previously born children were removed from her custody due to illicit drug exposure, and that J.D.D. had been exposed

to cocaine at birth. (Dkt. 87-1 at 2–3) Defendants do not admit that Weaver had knowledge of these circumstances. (Dkt. 87-1 at 2; Dkt. 98 at 9) Although she does not recall J.D.D. specifically, Weaver stated generally at her deposition that she would not have known the totality of the information in a child's file. (Dkt. 87-2 at 42:3–12)

However, Plaintiff argues that Weaver was present at the April 27, 2000 staffing, signed documents that contained this information, and that she had access to J.D.D.'s file which contained this information; thus, the evidence indicates that she would have had knowledge of those circumstances as well. (Dkt. 87 at 4–6) For purposes of this Order, the Court finds that Weaver possessed this knowledge.

Consistent with the directives in the Case Staffing document, a Pre-Disposition Study for Dependency ("PDS") was prepared by Shorter detailing the circumstances of J.D.D.'s case and recommending that J.D.D. be placed in foster care pending A. Davis's completion of case plan tasks. (87-1 at 32–34) Therein, Shorter states that A. Davis was initially interviewed at the hospital after J.D.D.'s birth, where she admitted to having "sporadic prenatal care" and use of "cocaine (crack only)" during her pregnancy, the last time being one day prior to J.D.D.'s birth. (Id. at 32) The PDS also stated that Majors, J.D.D.'s biological father, was not interviewed because he was in Atlanta. (Id.) The PDS contained a section entitled "Prior Case History," detailing four prior reports to Child Protective Services, three in which the agency reported that A. Davis gave birth to a child and tested positive for cocaine, resulting in the removal of that child from her custody, and one alleging domestic violence. (Id.) As to the domestic violence incident, the PDS alleged that A. Davis "smokes crack like it was cigarettes." (Id.) Under a section labeled "Criminal History and Dispositions," Shorter wrote:

> To the best of writer's knowledge mother has no criminal history. Father's criminal history is currently unknown, although mother advised that father recently was in Pinellas County Jail due to a warrant for his arrest. Father allegedly has a history of drug charges himself and his recent incarceration was due to theft charge.

(Id. at 33) Under a section labeled "Health and Medical Assessments," Shorter wrote: "To the best of this writer's knowledge neither the mother nor the child has any medical problems or physical abnormalities." (Id. at 34) The PDS is signed by Shorter and a person named Patricia Murphy of the "CPIS Unit," and contains the handwritten date May 31, 2000. (Id.) That same day, J.D.D. was adjudicated dependent. (Id. at 14–17)

A Judicial Review Social Study Report/Case Plan Update, signed by both Weaver and Riley on August 25, 2000, indicates that on June 5, 2000, J.D.D. was placed into foster care. (Id. at 36) The document contains a summary of J.D.D.'s reason for placement in foster care, including that A. Davis tested positive for cocaine at his birth, had no prenatal care, and that the case was closed with verified findings of "drug dependent newborn." (Id.) The document further states that DCF services that were being provided to J.D.D. at that time included (1) assistance with achieving goals, (2) transportation, and (3) medical assistance. (Id. at 41) Kevin Clifford ("Clifford"), J.D.D.'s foster father, testified in his deposition that he and his wife took J.D.D. to various medical appointments during the 2000–2003 time period in which they fostered J.D.D. (Dkt. 104-2 at 9:15–25; 10:1–22) Specifically, Clifford stated that during this time, J.D.D. was treated by Dr. Richard Gonzalez ("Dr. Gonzalez") at Suncoast Krug Medical Center ("Krug") for thrush, asthma, as well as "[t]he usual colds, runny noses, sniffles, that type of thing," and he received immunizations "[a]s required by the doctor's office."

(Id. at 21:6–20) The Cliffords' adult daughter who eventually adopted J.D.D., Patricia Davis ("P. Davis"), testified that she occasionally accompanied her parents to J.D.D.'s doctor appointments at Krug. (Dkt. 115-3 at 19:1–7) P. Davis testified that Dr. Gonzalez was aware of J.D.D.'s mother's addiction. (Id. at 25:5–22) Specifically, she testified that she and her parents told Dr. Gonzalez that J.D.D. was born with cocaine exposure and the DCF paperwork that they gave to him indicated that J.D.D.'s mother "was a crack addict" and had "no prenatal care." (Id.)

2. J.D.D.'s Adoption and HIV/AIDS Diagnosis

J.D.D.'s birth parents were not cooperative with DCF's case plan. (Dkt. 87-1 at 44, 60) Thus, DCF recommended that J.D.D.'s case be "staffed for Adoptions." (Id. at 60) On August 6, 2003, J.D.D. was adopted by S. Davis and P. Davis. (Dkt. 87 at 2; Dkt. 104 at 4–5) Approximately eleven years later, when J.D.D. was fourteen years old, he developed thrush, an oral infection in the mouth. (Dkt. 98-10 at 69; Dkt. 110-2 at 13) Medical authorities suspected an immunological condition and tested J.D.D. for HIV. (Dkt. 98-10 at 69; Dkt. 110-2 at 13) On June 13, 2014, J.D.D. was informed that he had tested positive for HIV, which by then had progressed to full-blown AIDS. (Dkt. 87-4 at 36:4–9; 98-10 at 74; Dkt. 110-2 at 13)

Within hours of his diagnosis, J.D.D. began treatment with Dr. Carina Rodriguez ("Dr. Rodriguez"), Division Chief of Pediatric Infectious Diseases at USF Health. (Dkt. 87-4 at 29:17–23, 30:1–5; 34:1) Dr. Rodriguez testified that J.D.D. was placed on prophylaxis immediately, and within a few days he was started on highly active antiretroviral therapy ("HAART"). (Id. at 36:13–17) Currently, Dr. Rodriguez sees J.D.D. every three months, and she states that he "has improved significantly" since

beginning treatment. (Id. at 37:3–17) Dr. Rodriguez stated that she was unable to review all of J.D.D.'s medical records, as some had been destroyed due to the passage of time. (Id. at 42:4–7; 115-3 at 45:3–12) However, based on her review of the available records, Dr. Rodriguez opined that J.D.D. most likely contracted HIV at birth via vertical transmission from A. Davis. (Id. at 43:17–25; 44:1–16; 59:10–20) Dr. Rodriguez based this opinion on J.D.D.'s low CD4 levels at the time of his diagnosis as well as the fact that J.D.D. told physicians that he was not sexually active or involved in any illicit drug activity. (Id.) Dr. Rodriguez also testified that most HIV-positive newborns are asymptomatic at birth. (Id. at 12:12–24)

Dr. Jay H. Tureen ("Dr. Tureen"), Plaintiff's expert witness in the fields of Pediatrics and Pediatric Infectious Diseases also opines that J.D.D.'s is "a case of perinatally acquired HIV infection which was silent for any AIDS-defining illness for 14 years, until the presence of thrush and symptoms of esophagitis prompted his evaluation for HIV infection," which was confirmed upon testing his blood for the virus. (Dkt. 87-7 at 2) Further, Dr. Tureen states that, to a reasonable degree of medical probability, had J.D.D. been properly tested, diagnosed, and treated within 6 weeks of birth, "it is highly unlikely he would have developed an HIV infection, and highly unlikely that his HIV infection would have progressed to AIDS." (Id.) Defendants do not proffer any medical testimony to the contrary. However, both Dr. Rodriguez and Dr. Tureen conceded that if A. Davis did not have HIV, their opinions that J.D.D. contracted the virus at birth would change.[4] (Dkt. 98-10 at 87:15–19; Dkt. 87-4 at 47:12–16)

4 Defendants argue a lack of evidence that A. Davis has HIV undermines the medical testimony that J.D.D. most likely contracted the virus at birth. (Dkt. 98 at 13) The Court notes that it is not entirely clear to what degree of medical certainty Plaintiff's medical experts rendered this opinion absent knowledge of A. Davis's HIV status. Clifford recalls at some unknown point

Weaver and Riley admit that they did not conduct any screening or testing on J.D.D., (Dkt. 87-1 at 2–3), and that they have no personal knowledge of any HIV test having been administered to J.D.D. while in their custody. (Dkt. 110-2 at 4) Based on the admissions, the expert testimony that J.D.D. most likely contracted HIV at birth and the absence of any records indicating that he had ever been tested for HIV prior to 2014, Plaintiff argues that J.D.D. was never tested for HIV while in DCF custody. However, Clifford recalls being told by a social worker named Tavey Garcia that J.D.D. had been tested for HIV as an infant and that he had been cleared. (Dkt. 104-2 at 31:18–19; 32:14–18) S. Davis and P. Davis, also recall specifically asking Tavey Garcia whether J.D.D. had been tested for HIV and being told that he had been and was cleared. (Dkt. 98-8 at 20:16–23; Dkt. 115-3 at 30:16–21) Defendants speculate that based on this testimony, J.D.D. may have been tested for HIV at the hospital after birth with the tests resulting in a false negative.[5] (Dkt. 98 at 6) Despite this testimony, which is inadmissible in any event as hearsay, the Court credits Plaintiff's version of the facts and assumes for purposes of this Order that J.D.D. was never tested for HIV prior to 2014.

Weaver testified that she did not normally authorize medical screenings for children because typically prior to coming to her care a child would have already

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learning that A. Davis has HIV by seeing one of her medical records, though no such document has been offered as evidence. (Dkt. 104-2 at 30:1–18) S. Davis recalls that a representative from the State Department came to their home looking for J.D.D. sometime around 2014 after J.D.D. had been diagnosed and, while the representative could not confirm that A. Davis was HIV positive, "he indicated very strongly that that was the case" and "they were very likely checking on all of the siblings." (Dkt. 98-8 at 28:21–25; 29:1–7) The Court notes that this testimony is hearsay that would appear to be entirely inadmissible to prove that A. Davis, in fact, has HIV. There is no other record evidence that A. Davis has HIV. Thus, upon this level of uncertainty and with the absence of admittedly crucial information, causation of J.D.D.'s illness remains unclear. Nevertheless, for purposes of this Order, the Court credits Plaintiff's contention that J.D.D. contracted the disease at birth from A. Davis.

5 Dr. Rodriguez testified that there is a window of time "where HIV tests can be negative despite the person being infected." (Dkt. 87-4 at 47:18–23)

received a medical write-up, although the record contains no such document. Further, Weaver does not believe that she had the authority to request a medical screening without a court order. (Id. at 14:14–22) She indicates that she never encountered a child who needed to be medically screened because "[t]he child was—or any child—is screened thoroughly, medically, before they come to us." (Id. at 21:4–6) She also states that if a child's records indicated that he did not have a medical screening, she would have made her supervisor aware and the supervisor could have ordered one. (Id. at 45:22–24) While Riley also does not recall J.D.D. specifically, like Weaver, she was adamant at her deposition that she would not have accepted a child's case into foster care if a basic medical screening was not done. (Dkt. 87-3 at 16:15–18; 18:12–21) She stated that initial health care assessments are "always done" while a child is in shelter prior to being placed with the foster care unit, and that she has "never known a case the whole time that [she] was with the department that that was not done, because there are so many checks and balances there." (Id. at 36:23–25; 37:1–4, 16–19) However, such a screening would not have necessarily included HIV testing, as Riley insisted "[t]hat's determined by the doctor." (Id. at 42:8–10)

As evidence that no medical assessment or screening was performed, Plaintiff has proffered a Suncoast Child Protection Team Referral Form that was found in DCF's files. (Dkt. 87-1 at 59) The form is addressed to a "Parent or Guardian," and states, in pertinent part:

> "Your child has been referred to the Suncoast Child Protection Team (SCPT) for a medical examination due to a report of abuse or neglect. We understand that this may be a very upsetting time for you and for your child. Therefore, we want to help you to understand what will happen when you come to our office. . . . Please consider the following

information regarding your child's medical exam at SCPT:

- The exam is required by law.
- There is no charge to you for the exam.
- A medical doctor or an advanced registered nurse practitioner will conduct the exam.

. . .

- No shots are given and no bloodwork is done; cultures are taken, only if medically needed. . . ."

(Id.) The letter is signed by Patsy W. Buker, and has a fillable line for appointment date and time, which have both been left blank. (Id.) Plaintiff contends that the blank document further proves that J.D.D. never received such an examination. (Dkt. 87 at 4) Again, crediting Plaintiff's version of the facts for purposes of this Order, the Court assumes this to be true.

3. Medicaid Outreach and Information

J.D.D. was and is currently eligible for Medicaid through the age of 21, although, since his adoption, he also receives insurance through S. Davis's private health insurance company. (Dkt. 115 at 8; Dkt. 121 at 6) P. Davis testified at her deposition that they were "dropped" by the State of Florida and they have heard nothing from any state agency, including DCF, regarding J.D.D.'s entitlement to future medical care. (Dkt. 115-3 at 51-52) S. Davis provided an affidavit in which he too states that at no time before or after serving a notice of claim on Carroll on February 27, 2015, has any person from DCF informed him or provided him with any materials informing him of the availability of child healthcare services under the EPSDT program, the benefits of preventative care, or how to obtain such services. (Dkt. 115-4) He also avers that he has never received such information in written form by mail or otherwise. (Id.)

However, in S. Davis's deposition, he testified that he does receive mailed notices regarding J.D.D.'s Medicaid a "[c]ouple times a year" which say "to see your doctor and do your normal health stuff." (Dkt. 98-8 at 47:1–17) Because the Court resolves the dispute over the adequacy of notice of medical rights on other grounds, it need not resolve this factual dispute, which requires a credibility assessment.[6]

Further, Defendants admit that at no time after the February 27, 2015 Notice of Claim of J.D.D.'s injuries has Defendant Carroll "informed J.D.D. or his adult caretakers of the availability of child healthcare services under the EPSDT program, the benefits of preventative care, so he would know what or where services are available under the Medical Assistance program, or how to obtain them." (Dkt. 115-2 at 2, 7) It is Defendants' position that neither DCF nor Carroll is required by state or federal law to provide such information. (Id. at 7) Defendants also admit that at no time has Carroll "proposed administrative rule-making concerning the provision of information on the availability of HIV or AIDS testing for infants or children who are or were previously held in DCF custody and continue to be under the age of twenty-one (21)." (Id. at 2, 7) Again, Carroll's position is that his agency is not responsible for doing so. (Id. at 7)

C. Plaintiff's Objections to Defendants' Summary Judgment Evidence

Plaintiff has raised, on several occasions, objections to various portions of summary judgment evidence offered by Defendant. Plaintiff's argues that such evidence consists of hearsay and has not been authenticated. (Dkt. 99 at 2; Dkt. 110 at 1–2) Federal Rule of Civil Procedure 56 provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be

6 "[C]redibility determinations and the weighing of evidence 'are jury functions, not those of a judge.'" Feliciano v. City of Miami Beach, 707 F.3d 1244, 1252 (11th Cir. 2013) (quoting Anderson, 477 U.S. at 255).

admissible in evidence." Fed. R. Civ. P. 56(c)(2). The Advisory Committee Notes to Rule 56 state that the proponent of the evidence has the burden to show either that the material is admissible as presented or to explain the admissible form that is anticipated.

Plaintiff's preliminary objections concern four exhibits offered by Defendants in their response to Plaintiff's Motion for Partial Summary Judgment as to Liability of Defendants Weaver & Riley. Defendants also rely on these exhibits in their Motion for Summary Judgment. (Dkt. 99 at 2) The challenged exhibits are Docket Nos. 98-1, 98-5, 98-10, and 98-11.

- Docket No. 98-1 contains copies of J.D.D.'s Infant Discharge Summary from Bayfront Medical Center and an "I'm a Boy" hospital sticker containing his basic birth information. (Dkt. 98-1) The Infant Discharge Summary bears a Bayfront Medical Center logo and appears to have been signed by a nurse as well as a parent or authorized agent, but both signatures are illegibly faded on the copy submitted. (Id.)
- Docket No. 98-5 contains a "Healthy Start Child Health Passport," a medical log, and three other documents containing some information about J.D.D.'s early medical appointments and treatment. (Dkt. 98-5) Specifically, one of these documents lists an appointment date as early as April 24, 2000 at North Pinellas Children's Medical Center and June 16, 2000 at Suncoast Krug Health Center Pediatrics, although these documents do not contain a signature or a date of creation. (98-5 at 5) It also appears from this document that J.D.D. was given his first vaccinations at the June 16, 2000 appointment. (Id. at 4–5) The last

page of this exhibit contains a document with the signatures of J.D.D.'s foster parents, but it is unclear that this page is in any way related to the others. (Id. at 7)

- Docket No. 98-10 contains 81 pages of J.D.D.'s various medical records from 2001 through 2014. (Dkt. 98-10)
- Docket No. 98-11 contains three documents (1) a Client/Vouchering Information Form that appears to bear Shorter's signature, (2) an Agreement to Provide Substitute Care for Dependent Children form that appears to bear Weaver's and Clifford's signatures, and (3) what appears to be a copy of J.D.D.'s Medicaid Card stating that his MediPass Provider is Krug Family Health Care. (Dkt. 98-11)

On March 8, 2018, six days after the dispositive motion deadline and six days after Plaintiff first raised his objections, Defendants filed a Notice of Filing Affidavit, (Dkt. 108), which attached the sworn affidavit of Deanne Fields, Assistant Suncoast Region Counsel for DCF. Ms. Fields' affidavit averred that Docket Nos. 98-1 and 98-5 are true copies of documents contained in the regular business records of DCF. (Dkt. 108-1) That same day, Defendants also filed a Notice of Filing Documents in Support of Motion for Summary Judgment. (Dkt. 109) The attached documents consist of 63 pages of DCF and state court records, some of which were already attached to Plaintiff's Partial Motion for Summary Judgment, and some of which were not. (Dkt. 109-1)

The same day that Defendants filed the affidavit of Ms. Fields and their additional summary judgment evidence, Plaintiff filed his response to Defendants' Motion for Summary Judgment. (Dkt. 110) Therein, Plaintiff again objects to Defendant's

reliance on Docket Nos. 98-1, 98-5, 98-10, and 98-11, portions of which Defendants adopted into their Motion for Summary Judgment, because these documents are unauthenticated. (Id. at 1–2) Specifically, Plaintiff notes that Docket No. 98-5, the "Healthy Start Passport," does not indicate when it was created or by whom, and merely states that J.D.D. was "once set for an appointment scheduled for that date." (Dkt. 110 n.1) Plaintiff further objects to Defendants later submitting documents not incorporated into their Motion, pertaining to the two notices, Docket Nos. 108 and 109, filed by Defendants earlier that day. (Id.)

On March 23, 2018, Defendants addressed Plaintiff's objections in their Reply in Support of Their Motion for Final Summary Judgment. (Dkt. 116) Therein, Defendants argue that Plaintiff's authentication argument relies on a previous version of Federal Rule of Civil Procedure 56. In its current form, Rule 56 no longer requires the authentication of documents at the summary judgment stage, and Defendants cite a list of post-amendment opinions and rulings within the Eleventh Circuit that have recognized this change. (Id. at 1–2) Specifically, Defendants argue that under the current rule, documents may be considered if it is apparent that they will be admissible at trial. See Fed. R. Civ. P. 56. Defendants note that 98-1 and 98-5 have been authenticated by the affidavit of Ms. Fields, and that 98-10 and 98-11 "are records of regularly conducted activities which Defendants anticipate will be authenticated by the appropriate records custodians or other qualified witnesses." (Dkt. 116 at 3) Specifically, as to Docket No. 98-10, Dr. Gonzalez has testified that his signature is contained on several of these records, and he recognized the 15 Month EPSDT form, (Dkt. 98-10 at 10), as "the form we used to use for EPSDTs at that time." (Dkt. 98-6 at 29:4–21) Thus, Defendants

contend that Plaintiff's objection is insufficient, as he argues only that the documents are not currently authenticated, rather than that they cannot ever be authenticated.

On March 23, 2018, the same day that Defendants filed their reply. Plaintiff filed an Objection to Defendants' Untimely Filing of Unauthenticated Papers and Inadmissible Hearsay Incapable of Being Made Admissible, (Dkt. 117), objecting to 108-1, the affidavit of Ms. Fields, and 109-1, the 63 pages of DCF and Court records. Plaintiff contends that both the affidavit of Ms. Fields and the 63 pages of additional evidence supporting Defendants Motion for Summary Judgment are untimely, as they were filed six (6) days after the dispositive motion deadline. Plaintiff also objects to the papers attached to Ms. Fields' affidavit, specifically the documents from Docket No. 98-5 containing the "Healthy Start Child Health Passport" and other papers that reference an April 24, 2000 appointment as being unauthenticated hearsay incapable of being presented in an admissible form at trial and "lacking indicia of trustworthiness as Defendants have admitted they do not know the date on which the papers attached to their affidavit were created." (Dkt. 117 at 2) Plaintiff further argues that Ms. Fields is not a custodian or qualified witness who can explain the record-keeping procedure utilized by DCF; therefore, her affidavit does not suffice to authenticate Docket Nos. 98-1 and 98-5. (Id.)

Defendant responds to Plaintiff's objection, arguing that the notices are not untimely, as Defendants were not on notice of Plaintiff's hearsay and authentication challenges until Plaintiff first raised them in his reply, filed on the dispositive motion deadline. (Dkt. 119 at 2–3) Defendant further argues that all of the objected to documents had been circulating for months in discovery with no objection by Plaintiff. (Id.) Defendant also proffers that all of the documents can be reduced to admissible

evidence at trial, as they qualify as business records under the business records hearsay exception set forth in Rule 803(6) of the Federal Rules of Evidence as "contemporaneous records or reports of events and conditions made in the regular course of business activity." (Id. at 3) This rule allows business records to be introduced through a custodian or qualified witness. See Fed. R. Evid. 803(6)(D).

Upon careful review of the Parties' arguments, the objected-to documents, and being otherwise fully advised, the Court **SUSTAINS** Plaintiff's objection to Docket No. 98-5, J.D.D.'s "Healthy Start Child Health Passport" and other papers therein, as these documents do not contain a date of creation or signature, and Defendants have admitted that they do not know when they were created or who created them. However, Plaintiff's other objections are **OVERRULED**, as it appears the other documents proffered by Defendants are business records that are capable of authentication at trial.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to

the Court that there is an absence of evidence to support the non-moving party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1320-1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

III. DISCUSSION

A. Counts I-III against Weaver and Riley

Plaintiff asserts three counts against Defendants Weaver and Riley in their official and individual capacities. Count I asserts a claim against Weaver and Riley in their official and individual capacities for violating J.D.D.'s federal statutory rights to Early Periodic Screening, Diagnosis, and Treatment ("EPSDT") and prompt medical assistance under 42 U.S.C. § 1396a(a)(8) and (10). Count II asserts a claim against Weaver and Riley in their official and individual capacities for violating J.D.D.'s federal statutory right to "outreach services" under 42 U.S.C. § 1396a(a)(43). Count III asserts a claim against Weaver and Riley in their official and individual capacities for violating

J.D.D.'s constitutional right to due process under the Fourteenth Amendment. (Dkt. 87 at 2)

1. Official Capacity

Defendants argue in their Motion for Summary Judgment that Plaintiff's suit against Weaver and Riley in their official capacities is barred by the Eleventh Amendment. (Dkt. 104 at 18–19) The Eleventh Amendment bars lawsuits for monetary damages against state actors in their official capacities. Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1336 (11th Cir.1999). In Plaintiff's response to Defendant's Motion for Summary Judgment, Plaintiff clarifies that he is not seeking injunctive relief from Weaver and Riley in their official capacities. (Dkt. 110 at 14 n.11) He contends that he sues Weaver and Riley "in their *individual capacities* for their actions taken as officials," and that his "claims for damages against Weaver [and] Riley in their *individual capacities* are incapable of violating the [Eleventh] Amendment." (Id. (emphasis in original)) Plaintiff does not address whether he is attempting to sue Weaver and Riley in their official capacities for monetary damages. Because such a suit would be barred by the Eleventh Amendment, to the extent that Plaintiff asserts claims against Weaver and Riley in their official capacities for monetary damages, summary judgment is granted in favor of Defendants.

2. Individual Capacity

Defendants Weaver and Riley argue that they are protected by qualified immunity from the claims asserted against them in their individual capacities. (Dkt. 104 at 6–18) Qualified immunity provides that "[p]ublic officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a statutory or constitutional right that was clearly

established at the time of the challenged conduct." City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2016 (2014)). "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it . . . meaning that existing precedent . . . placed the statutory or constitutional question beyond debate." Id. (citations and quotation marks omitted) (alteration in original). "This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the law." Id. (citations and quotation marks omitted) (alteration in original).

"To receive qualified immunity, a government official must first establish that he was acting within his discretionary authority." McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir. 2007). "Once an officer raises the defense of qualified immunity, the plaintiff bears the burden to show that the officer is not entitled to it." Keating v. City of Miami, 598 F.3d 753, 762 (11th Cir. 2010). The court must first determine "whether [the] plaintiff's allegations, if true, establish a constitutional violation." Id. (quoting Hope v. Pelzer, 536 U.S. 730, 736 (2002)). The next inquiry is "whether the constitutional violation was clearly established." Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If the plaintiff satisfies both parts of the test, then the officer is not entitled to qualified immunity." Id.

Plaintiff concedes that Weaver's and Riley's actions occurred within the scope of their discretionary authority as foster care caseworkers. (Dkts. 87 at 13, 110 at 7)

Thus, the burden shifts to Plaintiff to establish that J.D.D.'s constitutional rights were violated and that the violations he alleges were based upon clearly established law.

a. Constitutional Violation - Deliberate Indifference

Plaintiff contends that the evidence adduced establishes that when they were deliberately indifferent to his need for HIV screening, Weaver and Riley violated J.D.D.'s clearly established statutory and constitutional rights, including his federal statutory right to EPSDT, his federal statutory right to outreach services, and his constitutional right to physical safety while in foster care. (Dkt. 87 at 14) Specifically, Plaintiff argues that "no reasonable child caseworker confronted with such obvious multiple HIV risk factors—including lack of prenatal care, drug exposure, removal of four (4) previous newborns for drug exposure, domestic violence, and ambiguous paternity (among other factors)—would have refused to refer the infant to medical authorities for communicable disease testing . . . ."[7] (Id.) Resolving all factual disputes in favor of Plaintiff for purposes of determining whether Weaver and Riley violated J.D.D.'s constitutional and statutory rights by not referring him to get testing for HIV based on these risk factors, the Court finds that, at best, this appears to be a case of "mere negligence" as that term is understood in this context. Thus, the Court finds that no reasonable jury could determine that Weaver and Riley were deliberately indifferent to J.D.D.'s need for an HIV screening.

7 It is unclear where in the record Plaintiff determines that J.D.D.'s paternity was ambiguous, as Plaintiff does not cite to any evidence that supports this contention. On the contrary, all documents submitted appear to reference an Ernest "Keith" Majors as J.D.D.'s biological father, dating as early as the Detention Petition Action Summary dated April 17, 2000. (Dkt. 87-1 at 55) However, even assuming that J.D.D.'s paternity was ambiguous and Weaver and Riley were aware of this, the Court reaches the same conclusion.

"It is well established that 'deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment.'" Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The standard for claims of medical deliberate indifference brought by prisoners under the Eighth Amendment also applies to non-prisoner claims brought under the Fourteenth Amendment. Youmans v. Gagnon, 626 F.3d 557, 566 (11th Cir. 2010). Like prisoners, "foster children have a constitutional right to be free from unnecessary pain and a fundamental right to physical safety." Ray v. Foltz, 370 F.3d 1079, 1082 (11th Cir.2004) (citing Taylor v. Ledbetter, 818 F.2d 791, 794–95 (11th Cir.1987) (en banc)). A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003). "[O]nly where it is alleged and the proof shows that the state officials were *deliberately indifferent* to the welfare of the child will liability be imposed." Maldonado v. Snead, 168 F. App'x 373, 379 (11th Cir. 2006) (quoting Taylor, 818 F.2d at 797) (emphasis in original).

"Deliberate indifference is not the same thing as negligence or carelessness. On the contrary, the Supreme Court has made clear that a state official acts with deliberate indifference only when he disregards a risk of harm of which he is *actually aware."* Maldonado, 168 F. App'x at 379 (quoting Ray, 370 F.3d at 1083) (emphasis in original). Deliberate indifference requires: "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence."[8] Lane v.

8 The Court recognizes that Eleventh Circuit case law is seemingly contradictory regarding whether deliberate indifference requires conduct that is "more than *gross* negligence" or "more

Philbin, 835 F.3d 1302, 1308 (11th Cir. 2016). To establish the requisite subjective knowledge, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). The Eleventh Circuit has held "that 'deliberate indifference is not as easily inferred or shown from a failure to act' and that a child abused in foster care is 'faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home.'" H.A.L. ex rel. Lewis v. Foltz, 551 F.3d 1227, 1232 (11th Cir. 2008) (quoting Taylor, 818 F.2d at 796). However, as the Supreme Court in Farmer explained: "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." 511 U.S. at 842.

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than *mere* negligence." Compare Goebert v. Lee County, 510 F.3d 1312, 1327 (11th Cir. 2007), with Bingham v. Thomas, 654 F.3d 1171, 1176 (11th Cir. 2011). In Townsend, the Eleventh Circuit expressly held that a claim of deliberate indifference requires proof of more than gross negligence. Townsend v. Jefferson Cty., 601 F.3d 1152, 1158 (11th Cir. 2010). However, in the more recent Melton case, the Eleventh Circuit disagreed with its prior decision in Townsend, finding "more than mere negligence" to be the appropriate standard. Melton v. Abston, 841 F.3d 1207, 1223 n.2 (11th Cir. 2016). Further, several unpublished, Eleventh Circuit cases post-Melton have continued to use the "gross negligence" standard. See, e.g., Gonzalez v. Archer, 725 F. App'x 739, 742 (11th Cir. 2018); White v. Cochran, No. 16-17490-G, 2017 WL 6492004, at *3 (11th Cir. Nov. 27, 2017); Dunn v. Warden, Ware State Prison, No. 16-16603-E, 2017 WL 5047902, at *3 (11th Cir. Sept. 25, 2017); Sifford v. Ford, 701 F. App'x 794, 795 (11th Cir. 2017); Woodyard v. Alabama Dep't of Corr., 700 F. App'x 927, 932 (11th Cir. 2017); Howell v. Unnamed Defendant, 672 F. App'x 953, 955 (11th Cir. 2016); Mitchell v. McKeithen, 672 F. App'x 900, 903 (11th Cir. 2016); see also Harris v. Prison Health Servs., 706 Fed. App'x. 945, 951 (11th Cir. 2017) (noting lack of clarity between "more than mere negligence" and "more than gross negligence" but declining to decide the issue). The Court finds that Plaintiff's claim fails under either standard. Here, Plaintiff has not established that Weaver and Riley's failure to have J.D.D. tested was more than mere negligence. It follows *a fortiori*, that their inaction was not more than gross negligence.

The Court assumes, for purposes of this Order, that J.D.D. was never tested for HIV while in DCF's custody, as Defendants have admitted that neither Weaver nor Riley ordered J.D.D. to be tested while he was in their care, and they have admitted that they have no personal knowledge of any HIV test having been administered to J.D.D. while he was in their custody.[9] (Dkt. 87-1 at 2–3; Dkt. 110-2 at 4) Thus, Plaintiff argues that Weaver and Riley were deliberately indifferent to J.D.D.'s serious medical need for an HIV screening because they had knowledge of certain pieces of information that he claims so obviously indicated J.D.D.'s substantial risk for having contracted HIV that any reasonable person would have made the inference that he needed to be tested and would have had him tested, yet they failed to do so. (Dkt. 87 at 22)

This assertion simply proves the point that that there is no evidence that Weaver or Riley were actually aware or even suspected that J.D.D. had HIV. Nor is there evidence that Defendants were actually aware or suspected that A. Davis, J.D.D.'s birth mother, had HIV. The information that Plaintiff alleges Weaver and Riley did have knowledge of includes A. Davis's failure to seek prenatal care, use of cocaine, loss of custody of four previous newborns for cocaine exposure, domestic violence, and J.D.D.'s ambiguous paternity. (Id. at 14) Plaintiff also points to a 1993 and 1995 Abuse Report regarding one of A. Davis's prior removed children, which stated that A. Davis stated that she had completed a drug program for heroin. (Dkt. 110-5 at 4) In the 1995 Abuse Report, under a section labeled Investigative Decision Summary, the Abuse Report

9 Weaver testified at her deposition that she would not have requested an HIV test because she did not believe she had the ability to authorize a medical screening or order an HIV test for a child without a court order. (Dkt. 87-2 at 46:15–20) The Court finds that any mistaken belief Weaver may have had regarding the extent of her authority under the law was just that – a mistake. This does not amount to deliberate indifference. Further, since the evidence does not establish that Weaver had subjective knowledge of J.D.D.'s need to be tested for HIV, any mistake regarding whether she was authorized to do so is irrelevant.

includes the information that A. Davis had been previously arrested in 1983 for prostitution. (Dkt. 110-6 at 3) Based on their knowledge of all of this information, Plaintiff argues that Weaver's and Riley's knowledge of J.D.D.'s substantial risk of having contracted HIV can be inferred. (Id. at 22)

Defendants admit that Riley knew of certain circumstances surrounding J.D.D.'s birth, including that A. Davis had limited or no prenatal care, that four of her previously born children were removed from her custody due to illicit drug exposure, and that J.D.D. had been exposed to cocaine at birth. (Dkt. 87-1 at 2–3) Further, while Defendants do not admit that Weaver had knowledge of these circumstances, (Id. at 2), a reasonable juror could conclude she did. The information was repeated numerous times throughout different documents in J.D.D.'s DCF file, including on the Detention Petition, the PDS, the Order of Adjudication of Dependency, the Case Staffing document, and the Shelter Audit Form. (Id. at 14–17, 32–34, 49–56) Though not signed by Weaver, both the Case Staffing document and the Shelter Audit Form contain her name. (Id. at 53, 56) Further, the Judicial Review Social Study Report/Case Plan Update, signed by both Weaver and Riley on August 25, 2000, contains a summary of J.D.D.'s reason for placement in foster care, including that A. Davis tested positive for cocaine at his birth, had no prenatal care, and that the case was closed with verified findings of "drug dependent newborn." (Id. at 36) Despite Weaver's testimony that she would not have known the totality of the information in a child's file, (Dkt. 87-2 at 42:3–12), taking the evidence in the light most favorable to Plaintiff, the Court assumes that both Weaver and Riley were aware of these circumstances. Further, although it was not included in any document summarizing J.D.D.'s case or on any document containing Weaver and

Riley's signature, for purposes of this Order, the Court assumes that both Weaver and Riley had knowledge of A. Davis's prior treatment for heroin and 1983 arrest for prostitution, both of which were embedded within abuse reports from previous children removed from her care. (Dkts. 110-5 at 4, 110-6 at 3) As noted above, Plaintiff has not pointed to any record evidence of "ambiguous paternity" in J.D.D.'s file such that the Court could find that Weaver and Riley knew this information. See supra n.6.

However, even assuming their knowledge of these factual circumstances, the evidence does not support a finding that Weaver and Riley actually, subjectively drew from these circumstances the inference of the risk that J.D.D. had contracted HIV. First, the limited facts known to Weaver and Riley simply do not demonstrate an obvious risk to J.D.D. of having contracted HIV, such that a juror could say that Weaver and Riley must have known of it. At best, the "risk factors" known to Weaver and Riley indicate the mere possibility that J.D.D.'s birth mother, A. Davis**,** may have been exposed to HIV/AIDS. There was no way for Weaver and Riley to have known, in fact, that A. Davis had HIV because there is no evidence proffered from J.D.D.'s file of such a fact. Rather, Weaver and Riley would first have to have drawn the inference that A. Davis might have had HIV based on their knowledge of snippets of information regarding her lifestyle from J.D.D.'s file. Then, they would have to have inferred that based on the mere possibility that A. Davis might have had HIV, J.D.D. might also have contracted HIV from A. Davis perinatally or during birth. The Court notes with interest that Plaintiff's medical expert Dr. Tureen testified that, in actuality, the risk of transmission from an untreated mother who is HIV positive to a baby is only roughly twenty to twenty-five percent. (Dkt. 98-13 at 67:6–9) Plainly, based on the limited information

known to Weaver and Riley about A. Davis's lifestyle, the risk to J.D.D. of being HIV positive was not obvious enough to permit a jury to find that Weaver and Riley were deliberately indifferent by failing to have him tested for the illness.[10]

Second, there is no evidence that J.D.D. was exhibiting any physical signs or symptoms of having contracted HIV, nor would there be, as Dr. Rodriguez testified that children born with HIV are typically asymptomatic. (Id. at 12:12–24) The evidence indicates that J.D.D. was receiving medical treatment for ailments that are common in infants, including thrush, asthma, and "[t]he usual colds, runny noses, sniffles, that type of thing." (Dkt. 104-2 at 21:6–20) However, Dr. Gonzalez testified that thrush is "[v]ery common" in children under five, as it can get into an infant's mouth through breastfeeding and bottle-feeding. (Dkt 98-6 at 25:15–24) Dr. Tureen also testified that "a one-year-old who gets thrush against the backdrop of . . . he's had a couple of ear infections, he's been on some antibiotics, . . . that wouldn't make me think that he had HIV infection. It's very different. A one-year-old with thrush is very different from a 14-year-old with thrush." (Dkt. 98-10 at 89:16–23) Dr. Tureen also testified that after reviewing J.D.D.'s available medical records, none of J.D.D.'s other documented childhood health issues, including a blood test with an abnormal platelet count, reactive airway disease, eczema, and an episode of toxic synovitis would be cause to order an HIV test. (Id. at 88:21–24; 90:21–25; 91:1–20)

Finally, Plaintiff's arguments about the obviousness of J.D.D.'s risk factors are undercut by the fact that at the time of his birth, medical personnel were aware of many of the same pieces of information regarding J.D.D.'s background and birth

10 Plaintiff offered the unsupported opinions of Dr. Alex Redcay, Plaintiff's expert in social work, to bolster the claimed obviousness of J.D.D.'s need for HIV screening. However, the Court has excluded Dr. Redcay, (Dkt. 153) and, therefore, does not address her opinions in this Order.

circumstances, yet they did not draw the inference of a risk of HIV either. Specifically, hospital personnel were aware of the fact that that J.D.D. was exposed to cocaine at birth through his mother, that he had low oxygen and low birthweight, that A. Davis had little to no prenatal care, and that prior children had been removed from her custody. (Dkt. 87-1 at 11; Dkt. 104-5 at 11) This is evidenced by the April 10, 2000 Abuse Report sent from Bayfront Medical Center to the PCSO, which contained all of this information under the allegation narrative section. (Dkt. 104-5 at 11) It is also undisputed that J.D.D. remained in the hospital for seven days following his birth. (Dkts. 87 at 2; 98 at 3) Assuming, as Plaintiff argues, that no HIV test was ever performed, the fact that these medical authorities also did not draw the inference of a risk of HIV during the seven days after J.D.D.'s birth and test or seek consent to have him tested undermines the claimed obviousness of the risk. Further, P. Davis testified that Dr. Gonzalez, J.D.D.'s primary care physician, was also aware of at least some of these circumstances, including that J.D.D. was born with cocaine exposure and that his mother "was a crack addict" and had "no prenatal care." (Dkt. 115-3 at 25:5–22) Despite this knowledge, Dr. Gonzalez also did not draw the inference of a risk to J.D.D. of HIV. Thus, the Court finds that no reasonable jury could find that the risk that J.D.D. was HIV positive was so obvious that Weaver and Riley's subjective knowledge can be inferred.

The Eleventh Circuit's decision in Omar v. Babcock ,177 F. App'x 59, 63 (11th Cir. 2006), is instructive on this point.[11] In Omar, the court confirmed a grant of summary judgment because the record evidence was insufficient to establish deliberate indifference despite expert testimony that the DCF officials missed signs of abuse and

11 The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

failed to follow several policies and procedures. Id. at 64. In so holding, the Court found that the defendants' knowledge of certain facts, including the child's documented illnesses and declining health, evidence of psychological problems, and a doctor's discovery of loop marks on his body, was insufficient to allow a juror to conclude that the defendants actually drew the inference that the child was being abused by his foster parents. Id. at 63–64. The court also noted that the lack of evidence that "any of the physicians who treated [the child] suspected these illnesses resulted from abuse" meant that the defendants would have "no reason to suspect otherwise." Id. at 64. Here, as in Omar, there is no evidence to indicate that Weaver and Riley knew or even suspected that J.D.D. had HIV.

Moreover, the record directly refutes the conclusion that J.D.D. was denied early childhood checkups because the unrebutted evidence adduced by Defendants sufficiently establishes that, while he may not have been specifically tested for HIV, J.D.D. *was* taken for routine medical appointments and received medical treatment during the three years he was in DCF custody. Such evidence includes the testimony of Clifford, J.D.D.'s foster father, who specifically recalls taking J.D.D. to Dr. Gonzalez for various doctor appointments during the 2000 to 2003 time period. (Dkt. 104-2 at 9:15–25; 10:1–22) Specifically, Clifford states that during this time period, J.D.D. was treated by Dr. Gonzalez for thrush, asthma, as well as "[t]he usual colds, runny noses, sniffles, that type of thing," and received immunizations "[a]s required by the doctor's office." (Id. at 21:6–20) J.D.D.'s adoptive mother, P. Davis, also testified to taking J.D.D. to the doctor regularly with her parents, J.D.D.'s foster parents, prior to adopting him. (Dkt.

115-3 at 19:1–7) Thus, this is not a case in which the child was languishing without any medical care whatsoever while in DCF custody.

Accordingly, considering the admissible evidence and drawing all inferences in the light most favorable to Plaintiff, the Court finds that the evidence is insufficient to establish that Weaver and Riley were deliberately indifferent to J.D.D.'s need to be screened for HIV.

b. Clearly Established Law

Even if the Court were to find that Weaver and Riley's inaction amounted to a constitutional violation, Plaintiff still fails to overcome the qualified immunity defense because the Court also finds that the law was not so clearly established that it put Weaver and Riley on notice that their failure to have J.D.D. screened for HIV was a violation of his constitutional rights.

"A right is clearly established if a reasonable official would understand that his conduct violates that right." Melton v. Abston, 841 F.3d 1207, 1221 (11th Cir. 2016). "The touchstone of the 'clearly established' inquiry is whether the official had 'fair warning' and notice that his conduct violated the constitutional right in question." Id. (citing Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)). "In order for the law to be clearly established, 'case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates a federal law.'" Id. (quoting Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000)). The Court looks to the decisions of the Supreme Court, the Eleventh Circuit, and the highest court of the pertinent state to decide whether a right is clearly established. Id. Further, the

relevant law is that which existed at the time of the challenged conduct in question. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

"A narrow exception to the rule requiring particularized case law exists." Melton, 841 F.3d at 1221. "This exception applies in situations where the official's conduct 'so obviously violates the constitution that prior case law is unnecessary.'" Id. (quoting Gilmore v. Hodges, 738 F.3d 266, 279 (11th Cir. 2013)). "A broad statement of legal principle announced in case law may be sufficient if it establishes the law with obvious clarity to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Id. (citing Vinyard v. Wilson, 311 F.3d 1340, 1351 (11th Cir. 2002)) (quotation marks omitted). The obvious-clarity exception also applies where conduct is so egregious that "case law is not needed to establish that the conduct cannot be lawful." Id.

Despite this exception, the Supreme Court has warned against allowing plaintiffs to convert the rule of qualified immunity into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Youmans, 626 F.3d at 563. The Supreme Court recently reiterated the longstanding principle that "clearly established law" for purposes of qualified immunity should not be defined at a high level of generality. White v. Pauly, 137 S. Ct. 548, 552 (2017). In other words, "the clearly established law must be 'particularized' to the facts of the case." Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "[I]f a plaintiff relies on a general rule, it must be obvious that the general rule applies to the specific situation in question." Youmans, 626 F.3d at 563. "Whether an asserted federal right was clearly established at a particular time, so that a

public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" Elder v. Holloway, 510 U.S. 510, 516 (1994).

i. No Clearly Established Case Law

Here, there is no case law from the Supreme Court, the Eleventh Circuit, or the Florida Supreme Court from the relevant time period that is sufficiently factually similar so as to make it clear to DCF workers that their failure to have J.D.D. screened for HIV based on knowledge of certain risk factors violated his constitutional or statutory rights. Plaintiff relies on Taylor v. Ledbetter, a case in which the Eleventh Circuit established the broad general principles that children in state custody have a constitutional right to be free from an unreasonable risk of harm while in state custody and that the state's failure to meet that obligation can constitute a deprivation of liberty under the Fourteenth Amendment. 818 F.2d at 795. The facts of Taylor involved a child who was removed from her birth parents and placed with a foster mother. Id. at 792. While in the foster home, the child was so severely beaten and abused by her foster mother that she was rendered comatose. Id. Without deciding the issue of qualified immunity, the Eleventh Circuit held that deliberate indifference to this type of behavior could give rise to liability under § 1983. Id. at 797.

The Eleventh Circuit has subsequently held that the broad principles set forth in Taylor have clearly established the law in certain cases sufficient to overcome a qualified immunity defense. Plaintiff cites to H.A.L. ex rel. Lewis v. Foltz, a subsequent case in which the Eleventh Circuit recognized that Taylor had clearly established a child's "right to be free from an unreasonable risk of harm while in state custody." 551 F.3d at 1231. In H.A.L., plaintiffs, three minor children, sued under § 1983 when they suffered

child-on-child sexual assault while in foster care. Id. at 1228. Plaintiffs alleged that the defendant DCF workers placed the plaintiffs in a foster home with two older children whom defendants knew to be sexually aggressive and knew to frequently be left alone with the plaintiffs while the foster parents were at work. Id. at 1229–30. Further, after reports of child-on-child sexual abuse were made, the defendants failed to remove the plaintiffs from the home or implement any safeguards to protect them from sexual abuse, subjecting them to a substantial risk of being sexually abused by the older children, which risk eventually manifested. Id. at 1228, 1230. The Eleventh Circuit held that "[a]lthough the injury sustained in *Taylor* was a beating-induced coma and the injury here is sexual abuse and although other unimportant differences exist, we accept that *Taylor* clearly established decisional law that applied, at the pertinent time, with obvious clarity to Defendants in this case." Id. at 1231. Specifically, defendants had fair warning that doing nothing to protect the children from sexual abuse, given their knowledge of child-on-child abuse in the foster home violated clear federal law. Id. at 1232.

Plaintiff argues that, as in H.A.L., despite factual differences, the general constitutional rule identified in Taylor "should apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." (Dkt. 110 at 10 (quoting Hope, 536 U.S. at 741)). Thus, Plaintiff argues, Weaver and Riley were amply on notice that their conduct violated clearly established law, despite the novel factual circumstances of this case. (Id.)

However, Taylor, along with the line of cases that have cited to it as clearly establishing a foster child's right to be free from physical harm while in the custody of the state, all contain important differences from the case at hand. Specifically, those cases

all involve a child suffering from abuse in the foster home in which he or she was involuntarily placed by DCF workers. The Eleventh Circuit has, of course, made clear that it does not accept the notion that different types of physical abuse are not included within the clear directive of Taylor. See H.A.L., 551 F.3d at 1231; Ray, 370 F.3d at 1082–83 (extended to severe physical abuse where prior abuse known); Omar ex rel. Cannon v. Lindsey, 334 F.3d 1246, 1248 (11th Cir. 2003) (severe depraved physical abuse extension recognized).

The Eleventh Circuit has not, however, extended Taylor to circumstances beyond physical/sexual abuse—certainly not to failure to infer the presence of an undiagnosed illness for which a child, if diagnosed, would require treatment. Here, the alleged constitutional violation is not deliberate indifference to abuse by anyone of J.D.D., but rather Weaver and Riley's alleged failure to seek a specific type of medical screening for J.D.D. based on their alleged knowledge of a risk that he was possibly infected with HIV. Unlike H.A.L., Ray, Omar and other similar cases, the facts of the instant case are significantly different from Taylor such that the Court cannot conclude that Taylor put Weaver and Riley on adequate notice that their conduct was a violation of J.D.D.'s constitutional rights.

Cases interpreting the Eighth Amendment prohibition against cruel and unusual punishment, which are analyzed under the same deliberate indifference standard, are also too factually different to put Weaver and Riley on notice. Cottone v. Jenne, 326 F.3d 1352, 1357 n.4 ("[T]he standard for providing basic human needs . . . is the same under both the Eighth and Fourteenth Amendments."). Estelle v. Gamble established the broad constitutional principle that deliberate indifference to serious medical needs of

prisoners constitutes the "unnecessary and wanton infliction of pain." 429 U.S. 97, 104 (1976). In Estelle, a prisoner brought suit under § 1983 against prison personnel for their failure to diagnose and adequately treat his back injury, noting a number of options that were not pursued by medical personnel despite his complaints. Id. at 107. However, the Court held that this conduct did not amount to deliberate indifference. Id. Specifically, the Court stated that "the question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . . ." Id.

The cases that do find an official's conduct to amount to deliberate indifference involve officials ignoring a diagnosed or extremely obvious need for medical attention. Farrow, 320 F.3d at 1243. Under this line of cases, the Court would have to find that Weaver and Riley had knowledge of J.D.D.'s need for treatment, either because his HIV was already diagnosed or its symptoms were obvious. However, as discussed above, these are not the facts at hand. There is no evidence that J.D.D. was suffering from any symptoms that would be indicative of HIV, nor has Plaintiff offered proof that Weaver and Riley were aware of an immediate need for further medical treatment that they ignored. He had thrush as a child, but medical experts testified that this is a normal occurrence in a child under five and would not be cause to conduct an HIV test. (Dkt 98-6 at 25:15–24; Dkt. 98-10 at 89:16–23) In fact, after reviewing J.D.D.'s medical records, Plaintiff's medical expert Dr. Tureen testified that all of J.D.D.'s childhood health issues, even a blood test with an abnormal platelet count, which in hindsight is what leads him to believe J.D.D. had HIV as a child, would not have been cause to order an HIV test. (Dkt. 98-10

at 88:21–24; 90:21–25; 91:1–20) Clifford, J.D.D.'s foster father, testified that J.D.D. may have suffered from slightly more ailments than other children, but he attributed that to A. Davis's use of drugs during her pregnancy. (Dkt. 104-2 at 28:2–13) Thus, there was nothing to put anyone on notice of J.D.D.'s illness, distinguishing this case from those finding deliberate indifference. See Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004)[12] (finding deliberate indifference when the defendants knew that Plaintiff had been diagnosed with HIV and hepatitis but withdrew the prescribed treatment for his illness anyway). Farrow, 320 F.3d at 1246 (11th Cir. 2003) (finding deliberate indifference when plaintiff repeatedly told defendant about his pain, weight loss, and other symptoms, and thus defendant knew of a serious risk of harm); H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1083 (11th Cir. 1986) (finding deliberate indifference when, inter alia, defendants ignored plaintiff's demands for medical attention for a known injury). Thus, the case law interpreting deliberate indifference to a prisoner's serious medical need does not set forth the clearly established law needed to overcome Defendants' qualified immunity defense.

Similarly, the Court cannot find that the alleged conduct was so egregious that "case law is not needed to establish that the conduct cannot be lawful." Melton, 841 F.3d at 1221. Plaintiff cites to U.S. v. Lanier, 520 U.S. 259, 271 (1997), in which the Supreme Court stated that "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." (Dkt. 87 at 16) However, the conduct alleged in this case—failure to refer a child for HIV testing based on

12 Brown is inapposite because the defendants in that case subjectively knew that the plaintiff was HIV positive but withdrew his treatment and medication despite this knowledge. 387 F.3d at 1352. Moreover, Brown was decided in 2004, after the relevant time period and would be insufficient to clearly establish the law in this case.

knowledge of certain risk factors of the mother— stands in stark juxtaposition to the level of egregiousness posited by this hypothetical or exhibited in other cases that have fallen within its narrow exception. See, e.g., Hope, 536 U.S. at 745 (applying exception when defendants handcuffed an already subdued prisoner to a hitching post for seven hours in the Alabama sun, taunting him and depriving him of water and bathroom breaks. "The obvious cruelty inherent in this practice should have provided [defendants] with some notice that their alleged conduct violated [plaintiff's] constitutional protection against cruel and unusual punishment."). Plainly, this case does not fall within the exception.

ii. No Clearly Established Statutory Law

Plaintiff also argues that the Medicaid Act clearly established federal statutory law for purposes of overcoming qualified immunity. Specifically, Plaintiff argues that

> J.D.D. had a clearly established federal statutory right to early screening, testing, diagnosis, treatment, information and care, 42 U.S.C. § 1396a(a)(8) and (10), as defined by § 1396a(a)(43), and 1396d(a),(r), because "medical assistance *shall* be furnished with reasonable promptness to all eligible individuals," . . . and that means early and regular check-ups and testing, which *must* include laboratory testing, § 1396d(a),(r), diagnosis and treatment to correct or ameliorate defects and physical conditions. . . . In violation of this clearly established right, Defendants Weaver and Riley denied J.D.D. required and rightful testing, and medical assistance with reasonable promptness, despite multiple risk factors of which they had actual knowledge.

(Dkt. 87 at 16, n.15 (emphasis in original)) For the reasons that follow, the Court does not find that the Medicaid Act provisions cited are sufficiently clear to put Weaver and Riley on notice that their failure to recommend HIV screening for J.D.D. violated his statutory right to medical assistance with reasonable promptness and EPSDT.

As established by the Supreme Court in Davis v. Sherer, "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct

violates some statutory or administrative provision." 468 U.S. 183, 194 (1984). As the Court noted, state officials "are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." Id. at 196 (citation and quotation marks omitted). However, some federal statutory provisions can be "sufficiently clear on their own to provide defendants with fair notice of their obligations under the law." Gonzalez v. Lee Cty. Hous. Auth., 161 F.3d 1290, 1301 (11th Cir. 1998). Moreover, if the statute's language provides insufficient notice, its implementing regulation can do so in very narrow circumstances. Id. at 1302–03 ("[W]e do not expect state officials to be aware of every regulation that indirectly might give rise to a possible constitutional claim.") The statute or regulation must "unmistakably" instruct that the described public official's behavior is illegal. Id. at 1304–05 (finding that a *federal* regulation implementing the Fair Housing Amendments Act of 1988 which "unmistakably instructs that it is illegal to fire an employee for refusing to discriminate against prospective tenants on the basis of race" was sufficient to put an official on notice that she was subject to liability for its violation).

None of the federal statutes cited by Plaintiff mandate HIV testing specifically, nor do they unmistakably instruct that the failure to refer a child for such a test is illegal. The Medicaid Act provisions cited set forth requirements that a state must incorporate into its plan for medical assistance if the state elects to receive federal funding. See 42 U.S.C. §§ 1396a(a)(8) (mandating that a state plan provide medical assistance with reasonable promptness to all eligible individuals), (10) (mandating that a state plan make medical assistance available to specific categories of individuals), (43) (mandating that a state plan inform persons under the age of 21 of the availability of EPSDT and arrange for such

services and treatment when requested); § 1396d(a) (defining medical assistance), (r) (defining EPSDT). As discussed above, the record reflects that J.D.D. did receive normal medical examinations as well as treatment for discovered ailments such as thrush, asthma, colds, etc. while in the custody of DCF. Such evidence includes the testimony of Clifford, J.D.D.'s foster father, who specifically recalls taking J.D.D. to Dr. Gonzalez for various doctor appointments during the 2000 to 2003 time period at which J.D.D. received treatment for known ailments and immunizations. (Dkt. 104-2 at 9:15–25, 10:1–22, 21:6–20) Nowhere in the Medicaid Act does it clearly establish that a DCF worker who fails to specifically refer a foster child for HIV screening despite knowledge that the child's birth mother (and, by extension the child) has certain risk factors for HIV has violated the child's statutory rights.

The case law cited by Plaintiff to further clarify the statutory rights created by the Medicaid Act is also insufficient to clearly establish that Weaver and Riley's failure to have J.D.D. tested for HIV was a violation of his rights. The only case cited by Plaintiff that falls within the relevant time period is Doe 1-13 By & Through Doe Sr. 1-13 v. Chiles, 136 F.3d 709, 719 (11th Cir. 1998). Plaintiff points to Doe as decisional authority that established the law in question "'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." (Dkt. 87 at n.16) (quoting Melton, 841 F.3d at 1221). However, a reading of Doe does not set forth with such obvious clarity that the Medicaid statutes required Weaver and Riley to have J.D.D. screened for HIV or that failure to do so would clearly be a violation of his rights.

Doe involved a § 1983 class-action against state officials by Medicaid-eligible, developmentally disabled individuals who were placed on waiting lists for entry into intermediate care facilities. 136 F.3d at 711. The Doe plaintiffs claimed that the defendant state agency officials were violating their right to receive medical assistance with reasonable promptness under 42 U.S.C. § 1396(a)(8) of the Medicaid Act. Id. Specifically, the plaintiffs in Doe alleged that the agencies had them waiting for over five years for Medicaid services, during which time they were languishing without desperately needed therapies and treatment. They sought injunctive relief for the officials' continuous violation of the Medicaid Act. Id. The Eleventh Circuit affirmed the injunction issued by the district court and held that the plaintiffs had "a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act, and that this right is enforceable under section 1983." Id. at 719. Unlike the plaintiffs in Doe, J.D.D.'s medical issue was not known. Additionally, treatment was not denied or delayed at any point once he and his caretakers sought it. Within hours of being diagnosed with HIV/AIDS, J.D.D. began treatment with Dr. Rodriguez. (Dkt. 87-4 at 33:24–25; 34:1) Dr. Rodriguez testified that J.D.D. was placed on prophylaxis immediately, and within a few days he was started on HAART. (Id. at 36:13–17) Although Doe puts participating states on notice that they must furnish medical assistance with reasonable promptness and that failing to do so could result in liability under § 1983, it says nothing about providing such medical assistance where an ailment is unknown, or for providing HIV testing for children who meet certain "risk factors." Thus, it does not clearly establish a statutory requirement, the violation of which would vitiate an official's qualified immunity.

Further, to the extent that Plaintiff relies on various provisions of the Florida statutes and administrative rules, they too fail to set forth the requisite clearly established law needed to overcome qualified immunity. Plaintiff cites to Florida Statute § 39.407(1), which states:

> When any child is removed from the home and maintained in an out-of-home placement, the department is **authorized** to have a medical screening performed on the child without authorization from the court and without consent from a parent or legal custodian. Such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases and to determine the need for immunization. The department shall by rule establish the invasiveness of the medical procedures authorized to be performed under this subsection. In no case does this subsection authorize the department to consent to medical treatment for such children.

Fla. Stat. §39.407(1) (emphasis added). Notably, this statute gives DCF the *authority* to have a medical screening performed on a child, but does not *mandate* that such screening be done. Plaintiff also cites to Florida Statute § 411.223(1), which states:

> [DCF], in consultation with the Department of Education, shall establish a minimum set of procedures for each preschool child who receives preventive health care with state funds. Preventive health care services shall meet the minimum standards established by federal law for the [EPSDT] Program and shall provide guidance on screening instruments which are appropriate for identifying health risks and handicapping conditions in preschool children.

Fla. Stat. § 411.223(1). This statute also does not make clear that Weaver and Riley were required to have J.D.D. screened for HIV, as it requires DCF to establish minimum procedures and provide certain guidance, but it does not mandate any specific action by a DCF worker. Plaintiff also cites to Florida Administrative Code Rule 65C-12.002, which mandates a health screening for any child entering the emergency shelter system, "if the child protective investigator, service counselor or the receiving shelter parent determines that one is needed immediately." Fla. Admin. Code R. 65C-12.002(2). This rule also

requires an initial health care assessment to be done using the EPSDT procedures "within 72 hours after placement in shelter care." Id. at 65C-12.002(3). However, the rule specifies:

> If the child received a health screening upon entering shelter care, as explained in subsection (2) above, **or if the child is a newborn who has not left the hospital prior to placement in shelter care and has received a health assessment at the hospital, all or part of the health care assessment may have been performed.** If so, any components of the health care assessment that were performed during a health screening, or during a health assessment of a newborn, do not have to be repeated. **Only a health care professional may determine, by review of the medical record, which portions of the health care assessment were performed during a health screening or health assessment of a newborn.**

Id. (emphasis added) The Court notes that it does not appear that Weaver and Riley violated this rule, which would have permitted them to rely on a health care assessment performed at the hospital and the determination of a health care professional for what portions of the assessment were needed. Further, the rule says nothing about whether an HIV test was required as part of the screening.

The most directly relevant legislation set forth by Plaintiff is Florida Administrative Code Rule 65C-13.017, which discusses services for HIV infected children and states in pertinent part:

> (7) The following children **should be considered** at risk and **should be tested** following consent and counseling:
>
> (a) Children born with a positive drug screen for those drugs commonly self-administered by injection. Hospital staff will normally discover these children and request appropriate permission prior to the children's leaving the hospital following birth;
>
> (b) Children of mothers who admit to present or past use of injection drugs;
>
> (c) Children with symptoms of drug withdrawal and where (d) also applies;

> (d) Children whose mothers have a history of arrests for drug offenses or prostitution, or a professional has observed that the mother is using injection drugs;
> (e) Any abandoned newborn . . . .

Fla. Admin. Code R. 65C-13.017(7)(a)–(e) (repealed in 2008) (emphasis added). The record is clear that J.D.D. had symptoms of drug withdrawal and his mother had a history of prostitution per the old abuse reports. (Dkt. 110-5 at 4; Dkt. 110-6 at 3) Also, Plaintiff argues that J.D.D. was an abandoned newborn under subsection (e). (Dkt. 110 at 9 n.6) Thus, Plaintiff argues that Weaver and Riley were "required to have J.D.D. tested for HIV" pursuant to this statute. (Id. (emphasis in original)) However, like the previously discussed rules, this rule strongly recommends but does not mandate testing in the above-mentioned circumstances. Thus, the cited state statutes and administrative rules do not interpret the Medicaid Act; they do not have the requisite force of law necessary to clearly establish federal constitutional law for purposes of qualified immunity; and, for the reasons discussed above, they also do not unmistakably instruct that Weaver and Riley's conduct was illegal. See Davis, 468 U.S. at 194–96; Gonzalez, 161 F.3d at 1304–05. Because Plaintiff has not proven that Weaver and Riley violated clearly established law, the Court finds that they are entitled to qualified immunity.

Accordingly, Defendants' Motion for Summary Judgment is due to be **GRANTED** as to Counts I, II, and III.

B. Count IV against Carroll

Count IV of Plaintiff's Second Amended Complaint asserts a claim for declaratory and prospective injunctive relief against Carroll in his official capacity as Secretary of DCF. (Dkt. 17 at 15–17) Generally, the Eleventh Amendment to the United States Constitution bars suits against a state initiated by that state's own citizens. U.S. Const.

amend. XI. However, under the doctrine of Ex parte Young, 209 U.S. 123 (1908), "there is a long and well-recognized exception to this rule for suits against state officers seeking prospective equitable relief to end continuing violations of federal law." Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs., 225 F.3d 1208, 1219 (11th Cir. 2000). Ex parte Young can be applied in cases where there is an ongoing violation of federal law, "as opposed to cases in which federal law has been violated at one time or over a period of time in the past." Id. Thus, the relief sought must directly end the violation of federal law, rather than merely seeking to encourage compliance through deterrence or to compensate the victim. Id. To determine whether a plaintiff has alleged a proper Ex parte Young claim, the federal court "need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 645 (2002).

Here, Plaintiff asserts that in violation of 42 U.S.C. § 1396a(a)(8), (10), and (43), Carroll has failed to provide J.D.D. or his adult caretakers with information regarding the availability of EPSDT, the benefits of preventative care, where services are available, and how to obtain them. (Dkt. 115 at 8) Plaintiff seeks prospective injunctive relief to remedy Carroll's continuing wrong in violating the right of J.D.D., and others like him, to EPSDT, prompt medical assistance, and outreach services under the Medicaid Act. (Id. at 3) Specifically, Plaintiff seeks an Order requiring Carroll to "promulgate, enact, and institute rules, regulations, policies and/or procedures to prevent such future violations." (Dkt. 17 at 17) Defendants contend that, inter alia, Plaintiff does not have standing to

pursue his claims against Carroll and that DCF does not have outreach responsibilities under the Medicaid Act.

As a threshold matter, Plaintiff has the burden of proving that he has Article III standing. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). To do so, he must allege sufficient facts to establish that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. (citation omitted). As to the first element, the injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992) (citations and quotation marks omitted). As to the second element, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" Id. at 560. (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41–42 (1976)). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561. In response to a summary judgment motion, a plaintiff cannot merely rest on the allegations in his complaint, but must set forth by evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. Id.

Defendants argue that Plaintiff has not met his burden of proving an Article III injury and that, even assuming Plaintiff was injured, Carroll's agency is not the proper

entity responsible for said injury. (Dkt. 120 at 5–12) The Court finds that, even assuming Plaintiff has established the requisite injury, he has failed to prove that his injury was caused by Defendant Carroll or his agency because neither the Medicaid Act nor the Florida laws implementing it require Carroll's agency to provide the information J.D.D. seeks. Thus, Plaintiff lacks standing.

As the Eleventh Circuit has summarized,

> [the Medicaid] program is a cooperative federal-state effort to furnish with public assistance people who are unable to meet the cost of necessary medical services. Unlike major federal entitlement programs such as Social Security, Supplemental Security Income, and Medicare, Medicaid is not a federally-administered program with a uniform set of statutorily-defined benefits; rather, it is a state-administered program where the costs of services are allocated between the federal government and the states. No state is obligated to participate in the Medicaid program. If a state opts to participate in the Medicaid program, however, it must do so in a manner that complies with federal statutory and regulatory requirements. *See* 42 U.S.C. § 1396n. Within the general framework of federal law, states that choose to participate in the Medicaid program (thus qualifying for federal financial aid covering the medical assistance costs of eligible individuals) are granted broad latitude in defining the scope of covered services as well as many other key characteristics of their programs. Florida, like all other states, participates in the Medicaid program.

Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs., 225 F.3d 1208, 1211 (11th Cir. 2000).

Title 42 U.S.C. § 1396a(43)(A) requires that a State plan for medical assistance must "provide for . . . informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance . . . of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations . . . ." 42 U.S.C. §1396a(43)(A). Plaintiff argues that J.D.D. is injured because he is not currently

receiving this information. (Dkt. 115 at 8) Plaintiff also argues that Carroll's failure to give notice of the availability of these services causes a *de facto* denial of EPSDT and medical assistance as required under 42 U.S.C. § 1396a(8) and (10). (Dkt. 121 at 3) Plaintiff's argument fails because he cannot establish that Carroll's agency is responsible for promulgating this information. Plaintiff also cannot establish that he is currently being denied EPSDT or medical assistance.

Defendants argue that DCF is not statutorily responsible for providing outreach services to J.D.D., and others like him, therefore Plaintiff cannot prove that it is Carroll's agency that is causing his injury. (Dkt. 104 at n.2, Dkt. 120 at 8–10) Defendants note that while the Medicaid Act requires the state of Florida to provide this information, it does not specify DCF as the agency that must do so. (Dkt. 116 at 5–6; Dkt. 120 at 8) Defendants argue that Florida's Agency for Health Care Administration ("AHCA"), Florida's Department of Health ("DOH"), or another agency has the obligation to provide such outreach services and information on EPSDT. (Dkt. 120 at 9–10) In support, Defendants proffer an EPSDT Sunshine Health Annual Training manual available on the DOH's public website, as well as another EPSDT informational document available on AHCA's website. (Dkts. 120-1, 120-2)

Plaintiff contends that federal law "not only requires Florida provide such Outreach information, but requires Carroll's DCF agency to provide it." (Dkt. 115 at 12) Plaintiff cites to four cases to support his argument: Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 433–34 (2004), Doe, 136 F.3d at 719, Smith v. Benson, 703 F. Supp. 2d 1262, 1273 (S.D. Fla. 2010), and Fla. Pediatric Soc'y/Fla. Chapter of the Am. Acad. of Pediatrics v. Benson, No. 05-23037-CIV, 2009 WL 10668708 (S.D. Fla. Mar. 20, 2009).

(Id. at 12–14) However, Plaintiff's cited cases do not establish that DCF is the agency required to provide EPSDT outreach services.

In Frew, the mothers of children eligible for EPSDT services in Texas sued under § 1983 seeking injunctive relief against officials at the Texas Department of Health and the Texas Health and Human Services Commission, as well as the Texas State Medicaid Director alleging that the Texas EPSDT program did not satisfy the requirements of federal law, including the notice requirements under §1396a(43). Frew, 540 U.S. at 434. Notably, Frew did not involve a suit against a DCF official. Id. The issue in Frew was whether a consent decree voluntarily entered into by the parties was enforceable in light of the fact that it imposed more obligations on the state officials than were required under the Medicaid statute. Id. at 435–36. The Supreme Court held that even though the consent decree included obligations beyond what was required under the Medicaid Act, its enforcement was not violative of the Eleventh Amendment. Id. at 438–39. In dicta, the Court cautioned that "principles of federalism require that state officials with front-line responsibility for administering [a federal] program be given latitude and substantial discretion." Id. at 442. The opinion said nothing about DCF being responsible for administering outreach provisions under the Medicaid Act.

Doe is also unhelpful, as it too did not involve a suit against DCF officials. Doe, 136 F.3d at 709. Additionally, Doe dealt not with the outreach requirement but with the reasonable promptness requirement in § 1396a(8). 136 F.3d at 711. Specifically, in Doe, the Eleventh Circuit upheld an injunction that required the defendants to establish within Florida's Medicaid plan a reasonable waiting list time period that did not exceed 90

days for eligible individuals. Id. at 720–21, 723. Like Frew, Doe is inapposite and does not point to DCF as the agency responsible for providing outreach services under the Medicaid Act.

In Smith, the district court granted declaratory and prospective injunctive relief against the defendant, an AHCA official, for her failure to provide prescribed incontinence supplies to a qualified Medicaid recipient. 703 F. Supp.2d at 1264. Like Frew and Doe, Smith does not mention DCF, nor does it deem DCF the agency responsible for providing outreach services. On the contrary, the court expressly noted that "[t]he Agency for Health Care Administration (AHCA) is the Florida agency charged with the duty of administering the federal Medicaid program." Id. at n.1.

Plaintiff's most helpful authority is Benson, a case in which a DCF official, along with others, was sued for, inter alia, failure to provide outreach and information in violation of § 1396a(a)(43). 2009 WL 10668708 (S.D. Fla. 2009) at *2. Unlike the other cases, Benson does involve a suit against a DCF official and does discuss DCF's outreach responsibilities under the Medicaid Act. Id. at *8. Specifically, the Benson court stated that "DCF, as well as AHCA and DOH, have outreach responsibilities; they are required to 'ensure that each Medicaid recipient receives clear and easily understandable information' about Medipass or managed care options." Id. (quoting Fla. Stat. § 409.9122(2)(c)). However, the provision of Florida law that gave rise to the Benson court's finding that DCF had outreach responsibilities under the Medicaid Act was repealed on October 1, 2014. See ch. 2011-135, § 21, Laws of Fla. (providing that subsection (2) expires October 1, 2014). The former § 409.9122(2)(c) stated the following:

> (c) Medicaid recipients shall have a choice of managed care plans or MediPass. The Agency for Health Care Administration, the Department of Health, the Department of Children and Family Services, and the Department of Elderly Affairs shall cooperate to ensure that each Medicaid recipient receives clear and easily understandable information that meets the following requirements:
>
> 1. Explains the concept of managed care, including MediPass.
> 2. Provides information on the comparative performance of managed care plans and MediPass in the areas of quality, credentialing, preventive health programs, network size and availability, and patient satisfaction.
> 3. Explains where additional information on each managed care plan and MediPass in the recipient's area can be obtained.
> 4. Explains that recipients have the right to choose their managed care coverage at the time they first enroll in Medicaid and again at regular intervals set by the agency. However, if a recipient does not choose a managed care plan or MediPass, the agency will assign the recipient to a managed care plan or MediPass according to the criteria specified in this section.
> 5. Explains the recipient's right to complain, file a grievance, or change managed care plans or MediPass providers if the recipient is not satisfied with the managed care plan or MediPass.

Fla. Stat. § 409.9122(2)(c) (subsection repealed 2014). Currently, this section of the Florida Statutes no longer mentions DCF.[13] Id. Plaintiff points to no other statutory subsection wherein DCF is currently specifically delegated outreach responsibilities arising from § 1396a(43)(A). Thus, the reasoning in Benson does not apply here.

Accordingly, even assuming an informational injury to J.D.D. due to his failure to receive outreach and notices regarding the availability of EPSDT services, Plaintiff has not met his burden of proving that his injury was caused by the action or inaction of DCF. Likewise, because Plaintiff cannot prove that DCF is responsible for his alleged informational injury, he cannot prove that DCF is responsible for his *de facto* denial of EPSDT and medical assistance.

13 Ironically, the current iteration of Florida Statute §409.9122 concerns Medicaid managed care enrollment for HIV/AIDS patients. Fla. Stat. § 409.9122 (2018).

Moreover, J.D.D. is not currently being denied EPSDT or medical assistance. As previously noted, J.D.D. began receiving treatment and medical assistance from Dr. Rodriguez within hours of his diagnosis. (Dkt. 87-4 at 29:17–23, 30:1–5; 34:1) J.D.D. is also currently being treated by Dr. Rodriguez on a regular and continuing basis, and his health has improved significantly since beginning treatment, to the point where his viral load is currently undetectable and his CD4 levels are over 500, which Dr. Rodriguez testified is a "good prognosis." (Id. at 37:3–17) Because J.D.D. does not have standing to proceed on this claim, the Court grants summary judgment in favor of Defendant on this count without reaching Defendants' remaining arguments.

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment, (Dkt. 104), is **GRANTED**.
2. Plaintiff's Motion for Partial Summary Judgment as to Liability of Defendants Weaver & Riley, (Dkt. 87), is **DENIED**.
3. Plaintiff's Amended Motion for Partial Summary Judgment for Declaratory and Injunctive Relief as to Defendant Mike Carroll (as to Count IV Only), (Dkt. 115), is **DENIED**.
4. Plaintiff's Daubert Motion to Disqualify Expert Witness John S. Harper, (Dkt. 88), is **DENIED AS MOOT**, as the Court did not take his expert report or testimony into consideration in resolving this matter.

5. The Clerk is directed to enter **FINAL JUDGMENT** in favor of Defendants. After entry of final judgment, the Clerk shall terminate any pending motions and **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 27th day of September, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14558-GG

SHANE DAVIS,
on behalf of J.D.D., a minor child,

Plaintiff - Appellant,

versus

MIKE CARROLL,
in his official capacity as Secretary of the Florida Department of Children and Families,
WILEEN R. WEAVER,
in her official and individual capacities as Family Services Counselor fo the Florida Department of Children & Families,
PAULINE RILEY,
in her official and individual capacities as Family Services Counselor Supervisor for Florida Department of Children & Families,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: JILL PRYOR and GRANT, Circuit Judges, and ROYAL,* District Judge.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

*Honorable C. Ashley Royal, Senior District Judge of the Middle District of Georgia, sitting by designation.

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APPENDIX D

Transcript Excerpts

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA CASE NO. 8:16-CV-998-MSS-SPF

SHANE DAVIS, on Behalf of	*
J.D.D., a Minor Child,	*
Plaintiff,	*
vs.	*
MIKE CARROLL,	*
WILEEN R. WEAVER,	*
PAULINE RILEY,	*
Defendants.	*
	*

Excerpts of Wileen R. Weaver Deposition Transcript November 3, 2017

[p. 26]

* * *

Q. [BY MR. STANZIALE] Were you aware of the fact between April 1 of 2000 and January 1 of 2001, that such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases?

A. Yes.

Q. You were aware of that back at that time?

A. Yes.

Q. You just --

A. But I don't do that.

* * *