No. 20–

In The

Supreme Court Of The United States

DWIGHT D. MITCHELL, ET AL.,

Petitioners,

v.

DAKOTA COUNTY SOCIAL SERVICES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

County officials seized three children, keeping two for five months and held another child for 22 months for parental spanking, as "child abuse," with one official asserting that all black families as too quick to spank their children, yet, Minnesota's public school teachers may use corporal punishment and are immune when using reasonable force to discipline a child, while Minnesota's criminal and civil defenses protecting parental discipline do not apply to Minnesota's definition of "child abuse. There is a circuit split between the Sixth and Eighth Circuits on whether parental rights are constitutionally protected against child protection services. The questions presented in this petition for writ of certiorari are:

1. Whether the Eighth Circuit erred by applying the "shock the conscience" test under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) for child protection services' liability instead of strict scrutiny review under *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) and its predecessors when pre-investigation allegations under Minnesota's statutes chill constitutionally-protected parental discipline.

2. Whether the Eighth Circuit erred by failing to weigh a minor child's fundamental liberty interests of familial association in preserving an

existing enduring family relationship, *Troxel v. Granville*, 530 U.S. 57, 87 (2000), and rights to due process to ensure the psychological effects and trauma of separation are minimal to assert constitutional claims under the First, Fourth, and Fourteenth Amendments against government officials and not recognizing a minor's harm as part of a "shock the conscience" analysis when the state takes custody of the child causing the dislocating of the "emotional attachments that derive from the intimacy of daily association," with the family. *See e.g., Smith v. Org. of Foster Families For Equal. and Reform*, 431 U.S. 816, 844 (1977).

LIST OF PARTIES

The Petitioners are Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M., Bryce Mitchell, an individual, and Stop Child Protection Services From Legally Kidnapping, a not-for-profit 501(c)(3) organization.

The Respondents are Dakota County Social Services, a governmental organization, Patrick Coyne, individually and in his official capacity as Executive Director of Dakota County Social Services, Joan Granger-Kopesky, individually and in her official capacity as Deputy Director of Dakota County Social Services, Leslie Yunker, individually and in her official capacity as Supervisor of Dakota County Social Services, Diane Stang, individually and in her official capacity as Supervisor of Dakota County Social Services, Susan Boreland, individually and in her official capacity as Social Worker of Dakota County Social Services, Chris P'Simer, individually and in his official capacity as Social Worker of Dakota County Social Services, Christina Akolly, individually and in her official capacity as Social Worker of Dakota County Social Services, Jacob Trotzky-Sirr, individually and in his official capacity as Guardian ad Litem of Dakota County, Tanya Derby, individually and in her official capacity as Public Defender of Dakota County, Kathryn Scott, individually and in her official capacity as Assistant County Attorney of Dakota County, Elizabeth

Swank, individually and in her official capacity as Assistant County Attorney of Dakota County, Lucinda Jesson, an individual, County of Dakota, a governmental subdivision of the State of Minnesota, and Pamela Wheelock, in her official capacity as Acting Commissioner of Minnesota Department of Human Services.

CORPORATE DISCLOSURE STATEMENT

The Petitioners Dwight D. Mitchell and his children X.M. and A.M. as well as Bryce Mitchell are not a nongovernmental corporation and do not represent a nongovernmental corporation.

The Petitioner Stop Child Protection Services From Legally Kidnapping is a non-governmental corporation that has no parent corporations and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

The related cases are:

Mitchell v. Dakota Cnty. Soc. Servs., No. 18-cv-1091-WMW-BRT), United States District Court for the District Of Minnesota. Judgment entered January 29, 2019; and

Dwight Mitchell v. Dakota County Social Services, No. 19-1419, United States Court of Appeals for the Eighth Circuit. Judgment entered May 19, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M., Bryce Mitchell, and Stop Child Protection Services From Legally Kidnapping respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the United States District Court of Minnesota, *Mitchell on Behalf of X.M. v. Dakota County Soc. Services*, 357 F. Supp. 3d 891 (D. Minn. 2019), granting Defendants' motions to dismiss is reprinted in Appendix B (24a–52a). The opinion of the United States Court of Appeals for the Eighth Circuit, *Mitchell v. Dakota County Soc. Services*, 959 F.3d 887 (8th Cir. 2020), rehearing and rehearing en banc denied (Jul 16, 2020), affirming the decision of the lower court is not reported and reprinted in Appendix A (1a–23a).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on May 19, 2020.

The United States Court of Appeals for the Eighth Circuit denied Petitioners' petition for

rehearing en banc on July 16, 2020 (App C. 53a).

This petition is timely pursuant to the order of this Court dated March 19, 2020, extending this Court's Rule 13.1 ninety day deadline to file any petition for a writ of certiorari to 150 days from the date on which rehearing was denied, that date being December 13, 2020. On December 11, 2020, the Petitioners applied on an equitable basis to extend the deadline to December 29, 2020. The Court has not ruled on that motion.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. amend. I.

The Fourth Amendment of the United States Constitution provides:

"The right of the people to be secure in their

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

U.S. Const. amend. IV.

Section 1 of the Fourteenth Amendment of the United States Constitution 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."

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In Minnesota, a teacher or school principal may use reasonable force "when it is necessary under the circumstances to correct * * * a student * * *." Minn. Stat. § 121A.582. Under civil and criminal prosecutions against school officials, the use of "reasonable force: to correct a student is a defense." *Id.* Subds. 2, 3, 4. Yet, when the black family of

Dwight Mitchell were separated though actions of the Dakota County, Minnesota Child Protection Services, for the spanking of a then 10-year-old child, state statutes did not afford Mitchell a similar defense. And, for his children X.M., A.M., and Bryce Mitchell,[1] their familial bonds would be severed—A.M. and Bryce for five months—X.M. for 22 months —approximately 664 days—when the County abruptly dropped X.M.'s case (for lack of jurisdiction) and returned the child to Mitchell. In district court proceedings Mitchell and his children would allege CPS told X.M. that his father no longer wanted him, had abandoned him and made numerous misrepresentations to family court regarding X.M.'s desire to return to his family, of agency efforts to return X.M. to Mitchell's ex-wife who not only lived in Spain but had been previously convicted of hiring a person to kill Mitchell (hence, the reason for deportation to Spain), contrary to three agency psychiatrists recommendations. Further, CPS ignored another state court's jurisdiction over custody issues regarding the children related to Mitchell's previous divorce from his former wife.

Nevertheless, the U.S. Appellate Court for the Eighth Circuit would not find an asserted due process violation because the official's conduct did not "shock the conscience." App A. 11a.

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1 At the time of the children's seizure, Bryce Mitchell was a minor. He is no longer a minor, hence he is identified by name.

> "Conscience shocking conduct only includes 'the most serve violations of individual rights that result from the brutal and inhumane abuse of official power.' *White v. Smith*, 696 F.3d 740, 757–58 (8th Cir. 2012). 'Only a purpose to cause harm *unrelated to the legitimate object of* [the government action in question] will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.'"

Id., *quoting Folkerts v. City of Waverly*, 707 F.3d 975 (8th Cir. 2013) (original italics). The appellate court failed to acknowledge the familial association rights of the family relationship between the *parent* and the child, and the reciprocal relationship and rights between the *child* and the parent.

In Minnesota, compared to white children, based on child population estimates, African-American children were 3.0 times more likely to be seized by CPS.[2] Children identified as two or more races were 4.8 times more likely to be seized by CPS.[3] (59.9 percent of those children identified as two or more races, identified one race as African-American-Black).[4] This racial disparity has been acknowledged and consistent in each Department of Human

2 *Minnesota's Out-of-home Care and Permanency Report, 2017* at 2, Minnesota Department of Human Services (Nov.2018); <https://www.leg.state.mn.us/docs/2018/mandated/181111.pdf>.

3 *Id.*

Services annual, out-of-home-placement report for the last ten years.

Notably, the Eighth Circuit quoted respondent Dakota County Child Protection Services, black parents are "quick to spank their children" and "don't deserve to have children:"

> In a private meeting room outside of the courtroom where an emergency hearing was held, Boreland [of Dakota County Child Protection Services] told Mitchell, "I am going to do everything in my power to see that the children are never returned to your custody." After Mitchell told her that Campos and the children were lying about the abuse, Boreland responded: "Why are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children."

Mitchell, 959 F.3d at 895, App A. 4a. Simply, black families are targeted the most for state CPS action to disrupt families. And, it is the children who suffer the harm as even Congress has acknowledged, "'there is a profound effect on the child and family once a child is removed from [the] home, even for a short time.'" Vivek Sankaran, co-author, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, C. Church, U. Pa. J. L. & Soc. Change 19, no. 3 (2016) 207, 212.

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4 *Id.* at 16.

And in Minnesota, during the period 2015 to 2019, 47,995[5] Children in Need of Protection Services petitions were filed. Of that number, 38,173 cases[6] involved an initial 72-hour Emergency Protection Care Hearing in which parents and children were without counsel, like Mitchell, X.M., A.M. and Bryce at their initial hearing.

Five months after the seizure or approximately 150 days, CPS recognized Mitchell as a *fit* parent by returning his then 6-year old son A.M. and 14-year son Bryce Mitchell. Notably, X.M. asked to return home with his brothers as CPS notes from discovery revealed and attached to the underlying §1983 complaint, yet, the seizure of Mitchell's 10-year old son X.M. inexplicably lasted another year-and-a-half. In total, CPS seized X.M. for approximately 664 days, or 22 months, based on a single instance of spanking which did not warrant medical attention.[7]

The Eighth Circuit's decision avoided the Petitioners constitutional claims challenging Minnesota's CPS statutes chilling parental

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5 *See generally*, <https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=County_Reports>.

6 *See generally*, <https://mncourts.gov/Help-Topics/Data-Requests/Dashboards.aspx>.

7 In May 2014, Mitchell entered an *Alford* plea to a charge of malicious punishment of a child in violation of Minn. Stat. § 609.377. *Mitchell,* 959 F.3d at 895.

discipline. The Petitioners were denied meaningful judicial review. The Eighth Circuit should have applied strict scrutiny review to the constitutional claims against the Minnesota statutes chilling parental discipline instead of the shock the conscience test.

Minnesota's civil statutes § 260C.007, subdivisions 5 and 6, prohibit all parental discipline by defining it as "child abuse." Even ordinary parenting yelling or threatening to discipline invites CPS interference and termination of parental rights. *Id.* The unconstitutionally low standard causes the government's admitted racial disparities because African-American parents, particularly, have a more aggressive view of parental discipline.[8]

Additionally, in the Mitchell family's case, CPS was so committed to breaking up this black family —"I am going to do everything in my power to see that the children are never returned to your custody"[9]—that it engaged in patterns of judicial deception to ensure continued seizure of X.M. for 22

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8 According to the University of Chicago's General Social Survey, which has been asking Americans about disciplining children "with a good, hard spanking" since 1986, the latest data, through 2016, show that about 74% strongly agree or agree with that sentiment; however, African-Americans are, on average, about 11 percentage points more likely than whites, including Hispanics, to favor corporal punishment. University of Chicago General Survey data can be found at <https://gssdataexplorer.norc.org/variables/646/vshow>.

months. Such interference with children's and parental rights, statutory and judicial deception, violates the U.S. Supreme Court's doctrine of familial rights expressed in *Troxel* and its predecessors.[10]

The Eighth Circuit decision does not follow the U.S. Supreme Court's jurisprudence on parental rights in that governmental interference with parental rights is subject to strict scrutiny under *Troxel* and its predecessors. Instead, the Eighth Circuit[11] and several other courts of appeals[12] have

9 *Mitchell*, 959 F.3d at 895, App A. 4a.

10 "*Troxel* and its predecessors" include: *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

11 The Eighth Circuit's opinion at page 8 relies on *Folkerts v. City of Waverly, Iowa*, 707 F.3d 975, 980 (8th Cir. 2013) which applied *County of Sacramento* instead of strict scrutiny under *Troxel* and its predecessors.

12 The other courts of appeals applying *County of Sacramento* "shock the conscience" test instead of *Troxel* and its predecessors' strict scrutiny include the Second, Third and Eleventh Circuits. *Southerland v. City of New York*, 680 F.3d 127, 151 (2nd Cir. 2012); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir. 1999); and *Maddox v. Stephens*, 727 F.3d 1109, 1119 (11th Cir. 2013).

rejected strict scrutiny under *Troxel*, even though *Troxel* was decided in 2000, because the 1998 case *County of Sacramento* mandated the "shock the conscience" test for damages claims against the police.

Thus, a split exists between the U.S. Supreme Court and the courts of appeals on whether claims against child protection services should be governed by the U.S. Supreme Court's strict scrutiny test of *Troxel* and its predecessors or the shock the conscience test of *County of Sacramento*.

Petitioners agrees with Sixth Circuit: *Troxel* applies to child protection services proceedings. But, the Eighth Circuit disagrees. There is a circuit split that should be rectified.

REASONS FOR GRANTING THE PETITION

In their amended complaint, Mitchell and his children brought damages claims, including a nominal damages claim,[13] based on Minnesota's statutes chilling constitutionally-protected parental discipline. The parents' association, including 3,459 Minnesota parents, sought prospective relief against the state and local defendants as well.[14] Forty-six association members filed declarations in support of

13 Corrected Amended Complaint at ¶ 144 (Dkt. 8).

14 Mitchell Dec. at 2 (Dkt. 45).

the lawsuit alleging Minnesota statutes unconstitutionally interfere with their parental rights.[15] The association has already assisted parents in rescuing seven Minnesota children from CPS seizures.[16]

The amended complaint was dismissed in 2019 by the District Court based on the shock the conscience test, lack of associational standing and qualified immunity. The District Court's decision was affirmed by the Eighth Circuit panel on May 19, 2020. The petitioners' petition for rehearing and rehearing en banc was denied on July 16, 2020. In this petition, the petitioners seek further appellate court review of the questions presented.

The Court should grant the petition under Rule 10(c) of the Rules of the Supreme Court of the United States. Rule 10(c) states in relevant part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter * * *
>
> (c) * * * a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with

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15 Kaardal Dec. Exs. 1–46 (Dkt. 46).

16 Mitchell Dec. at 2 (Dkt. 45).

relevant decisions of this Court.

The Eighth Circuit's decision contradicts the Sixth Circuit decision, applying *Troxel*, leaving no path for Minnesota parents and their association to sue under 42 U.S.C. § 1983 against statutes which unconstitutionally chill constitutionally-protected parental discipline. According to the U.S. Supreme Court decisions in *Troxel* and its predecessors, the legal issues presented here are of exceptional importance as they relate to the federal courts providing legal protection to Minnesota's parents and children from unconstitutional interference.

I. The Respondents' misrepresentations of Minnesota's "child abuse" statutes to avoid liability violate the general rule that "ignorance of the law is no excuse."

The Respondents, throughout these proceedings, have misrepresented the state statutes to avoid liability. But, typically, ignorance of the law is no excuse; the Latin maxim is "ignorantia juris non excusat" or "ignorantia legis neminem excusat." See *McFadden v. U.S.*, 576 U.S. 186, 192 (2015) ("ignorance of the law is typically no defense to criminal prosecution"), citing *Bryan v. United States*, 524 U.S. 184, 196 (1998). The rationale of this maxim is that if ignorance of law was an excuse then any person charged with a criminal offense or subject of a civil suit can claim that he or she was unaware of the

law in question and avoid liability. Therefore, the law imputes knowledge of all laws to all persons within its jurisdiction.

The Respondents' arguments in the Eighth Circuit that Minnesota's definition of "child abuse" under § 260C.007 for purposes of civil seizure of children permits parental discipline is based on three unpersuasive authorities: § 609.379; § 626.556, subdivision 2; and *In re Welfare of Children at N.F.*, 749 N.W.2d 802 (Minn. 2008).

First, Minnesota Statutes § 260C.007, subdivision 5 fails to incorporate § 609.379, the parental "authorized use of force" criminal defense, leaving a parent who has corporally punished a child without an "authorized use of force" defense in a civil seizure proceeding in which the parent is accused on the theory that the parental discipline is an assault or malicious punishment of a child—i.e., "child abuse" under § 260C.007, subdivision 5.

Notably, the § 609.379 affirmative defense, quoted above, states that it only applies to criminal proceedings, including § 260C.045 criminal acts regarding child abuse, but not to civil proceedings based on "child abuse" such as § 260C.007 proceedings to seize a child or restrict parental rights:

Subd. 2. Applicability.

This section applies to sections 260B.425,

260C.425, 609.255, 609.376, 609.378, and 626.556.

Minn. Stat. § 609.379, subd. 2.

Second, the references in Minnesota Statutes § 260C.007, subdivisions 5 and 6, to § 626.556, subdivision 2's definitional limitation of "physical and sexual abuse" to exclude some parental discipline, are partially excepted by the text of subdivisions 5 and 6. In subdivision 5, any limitation in § 626.556, subdivision 2 only applies to Clause 2, not Clauses 1 and 3:

> Subd. 5. Child abuse.
>
> "Child abuse" means an act that involves a minor victim that [Clause 1] constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.322, 609.324, 609.342, 609.343, 609.344, 609.345, 609.377, 609.378, 617.246, or [Clause 2] that is physical or sexual abuse as defined in section 626.556, subdivision 2, or [Clause 3] an act committed in another state that involves a minor victim and would constitute a violation of one of these sections if committed in this state.

(Emphasis added.) The disjunctive "or" and the text "as defined in § 626.556, subdivision 2" reveals the limitations of § 626.556, subdivision 2, as it applies only to Clause 2 and not Clauses 1 and 3. Clauses 1 and 3 are not similarly-worded to legally authorize

parental discipline. So, parental discipline is prohibited in Minnesota.

Similarly, in subdivision 6, any limitation in § 626.556, subdivision 2 only applies to section (2)(i), not to sections (2)(ii) and (2)(iii).

> Subd. 6. Child in need of protection or services.
>
> "Child in need of protection or services" means a child who is in need of protection or services because the child: * * * (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2, (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13, (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15;

(Emphasis added.) The disjunctive "or" and the text "as defined in § 626.556, subdivision 2" shows that the limitations of § 626.556 are limited to section (2)(i), but not sections (2)(ii) nor (2)(iii).

Third, the Minnesota Supreme Court decision in *In re Welfare of Children at N.F.* in 2008 was decided prior to the 2010 amendment to § 260C.007 which makes it clear that the § 626.556, subdivision 2 limitations only apply to § 260C.007's section (2)(i) of

subdivision 6, not to sections (2)(ii) and (2)(iii). Under Minnesota case law, an appellate court decision interpreting a pre-amended statute is considered "cabined" as a limited precedent. *Melillo v. Heitland*, 880 N.W.2d 862, 865 (Minn. 2016). The 2010 amendment to subdivision 6 made a significant change to subdivision 6, section 2. The 2008 text considered in *In re Welfare of Children at N.F.* was

> (2)(i) has been a victim of physical or sexual abuse, (ii) resides with or has resided with a victim of domestic child abuse as defined in subdivision 5, (iii) resides with or would reside with a perpetrator of domestic child abuse or child abuse as defined in subdivision 5, or (iv) is a victim of emotional maltreatment as defined in subdivision 8.

In re Welfare of Children at N.F., 749 N.W.2d at 810. The 2010 amendment amended the text to read:

> (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2, (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13, (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as

defined in subdivision 15.

Minn. Sess. Laws 2010, ch. 281, § 1 (emphasis added). By the legislature adding the text "as defined in § 626.556" to section 2(i) and with the disjunctive "or", the limitations of § 626.556 do not apply to sections (2)(ii) and (2)(iii).

Therefore, Respondents' arguments in the Eighth Circuit based on *In re Welfare of Children at N.F.*, a 2008 case, are incorrect because subsequent amendments made it clear that the limitations of § 626.556 only apply to subdivision 6's section (2)(i) and do not apply to sections (2)(ii) and (2)(iii). No one falsely represented "to the Court that reasonable corporal punishment is prohibited by Minnesota law."[17] Parental discipline is not available as a defense against "child abuse" under Minnesota's child protection services statutes.

Moreover, the statutory provisions at issue are constitutionally suspect because they include ordinary parental discipline, yelling and spanking, in the definition of "child abuse." But, the Respondents in the District Court and Eighth Circuit deny it is so. So, there needs to be more explanation than there otherwise would be.

The Respondents assert that Minnesota's children are in need of protection or services under

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17 Minn. Dept. of Human Serv. 8th Cir. Rsp. Br. 21.

§ 260C.007, subdivisions 6(2)(i); (2)(ii); (2)(iii), and (9):

- (2)(i) has been a victim of physical or sexual abuse as defined in section 626.556, subdivision 2,
- (ii) resides with or has resided with a victim of child abuse as defined in subdivision 5 or domestic child abuse as defined in subdivision 13,
- (iii) resides with or would reside with a perpetrator of domestic child abuse as defined in subdivision 13 or child abuse as defined in subdivision 5 or 13, or (iv) is a victim of emotional maltreatment as defined in subdivision 15 * * *
- (9) is one whose behavior, condition, or environment is such as to be injurious or dangerous to the child or others. An injurious or dangerous environment may include, but is not limited to, the exposure of a child to criminal activity in the child's home * * *.

The underlying issue and facial constitutional challenges relate to the limitation imposed by the legislature in 2010 as applied to subdivision 6 (2)(i), but not to either subdivision 6 (2)(ii), (iii), or (9).

To be sure, the legislature has stated under

§ 626.566, subdivision 2(k) that "abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury." Minn. Sess. Laws 2010, ch. 281. However, this limitation is specific to subdivision 6 (2)(i), but not to other provisions: subdivision 6 (2)(ii), (iii), or (9).

Under subdivision 6 (2)(ii) and (2)(iii), references to subdivision 5, are not a limitation, but an expansive definition of "child abuse" each providing a different and sometimes overlapping definition under criminal statutory law (which do not include any affirmative defense for the use of reasonable force):

> "Child abuse" means an act that involves a minor victim that constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.322, 609.324, 609.342, 609.343, 609.344, 609.345, 609.377, 609.378, 617.246.

§ 260C.007, subdivision 5.

The same subdivision also cites § 626.556, subdivision 2 as a definition of "child abuse." While the definition includes the use of "reasonable and moderate physical discipline of a child" by a parent, because of the use of the disjunctive "or," the civil defense of § 626.556, subdivision 2(k), protecting parental discipline is unavailable under subdivisions 6(2)(ii) and (iii) because of the explicit legislative limitation of its use to subdivision 6(2)(i). And, as for

subdivision 9, there is no available defense as explained.

Thus, the facial challenges regarding the subdivision 6, (2)(ii) and 2(iii) and subdivision 9 apply. Under no circumstances, when a CHIPS petition asserts these specific subdivisions, does a parent have available to him or her the affirmative defense of reasonable and moderate physical discipline of a child under § 626.556, subdivision 2(k).

Consistently, the legislative limitation under subdivision (2)(i) in 2010, occurred after the Minnesota Supreme Court decision in *In re Welfare of Children at N.F.*, 749 N.W.2d 802, 810 (Minn. 2008). *See* Minn. Dept. of Human Serv. Eighth Circuit Rsp. Br. 22–23. Hence, the applicable rationale of the decision is cabined to the statute as then enacted. *See e.g.*, *Melillo v. Heitland*, 880 N.W.2d 862, 865 (Minn. 2016).

An example may help show the differences between subdivision 6(2)(i) and subdivision 6(2)(ii) and (iii). A parent who physically disciplined a child would not satisfy subdivision 6(2)(i) because the civil defense of § 626.556, subdivision 2(k), protecting parental discipline is available. But, the same parental conduct toward the same child would be "child abuse" under subdivision 6(2)(ii) and (iii) because the civil defense of § 626.556, subdivision

2(k), protecting parental discipline is unavailable. In both cases, the § 609.379 parental "authorized use of force" criminal defense is unavailable. Minn. Stat. § 609.379, subd. 2.

The Respondents in the Eighth Circuit also tried to deflect from the continuing seizure of X.M. and A.M., and Bryce Mitchell by stating that it did not "seize" the children—the police did. Dakota Cty. Rsp. Br. 27. However, while the police took removed the children from the home County officials made the decision to retain the children. Moreover, it was the County that continued the seizure of X.M. for over 21 months and A.M. and Bryce for five months based upon the initial seizure and despite having no evidence to support the continuing seizure for the subsequent months separating father from sons and sons from their father. It was not the police who continued the seizure, but Dakota County officials: "The Fourth Amendment applies in the context of a seizure of the child by a government agency official *during* a civil-abuse or maltreatment investigation."[18] Hence, Fourth Amendment analysis is inclusive as to the moment of seizure and the continuing of that seizure.[19]

The Respondents also misrepresented facts as

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18 Mitchell Princ. 8th Cir. Br. 24 citing *Phillips v. County of Orange*, 894 F. Supp.2d 345, 359–60 (S.D.N.Y. 2012) *quoting Kia P. v. McIntyre*, 235 F3d 749, 762 (2d Cir. 2000) (emphasis added).

19 *Id.* citing *Stanley v. Finnegan*, 899 F.3d 623, 628 (8th Cir. 2018).

alleged in the amended complaint regarding the children's seizure. X.M. did not state he was "abused;" he stated that he was "spanked." Dakota Cty. Rsp. Br. 27; compare Amend. Compl. ¶¶ 29 and 31. Notably, no medical treatment was sought or required, and there was no evidence of imminent harm. Meanwhile, the self-serving allegations of the County in its motion to transfer legal and physical custody to X.M.'s mother, Eva Campos, contrary to three agency psychiatrist recommendations, and that Mitchell told two unidentified social workers that they should look to Campos for permanent placement of X.M. instead of reunification, contradicts all allegations of the amended complaint, X.M's repeated requests to return home to his father as documented in the social workers case notes, as well as X.M.'s requests to return home to his father as documented in the child psychologist case reports to the social workers, *and* what the County *knew* about Campos' incarnation for attempting to hire a hit-man to assist in kidnapping the children to Spain, and threatening to set Mitchell's house on fire in an attempt to obtain the children's passports—*before* its continued seizure of X.M.[20]

Moreover, at the time, the Respondents knew the state district court did not have jurisdiction to transfer physical and legal custody over that of the New Jersey courts, yet pursued its course of action

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20 Dakota Cty. Rsp. Br. 27 and Cty. App. 139.

until finally challenged and then virtually admitted its wrongful acts, stating on the record that the County had no jurisdiction. Only then was X.M. returned to his father. The amended complaint, with 84 pages of County documents served notice Dakota County does not deny its knowledge of Campos and the New Jersey district court jurisdiction to justify the continued seizure of X.M. for over 21 months) and its attempt to transfer legal and physical custody to the mother. The County's document revealed X.M.'s voiced desire to return home—early in the process to several individuals, running away from a foster home—officials telling X.M. his father did not want him, and had abandoned him.

II. The Eighth Circuit's decision created a Circuit Split with the Sixth Circuit by avoiding meaningful constitutional review of Minnesota's statutes chilling parental discipline in Minnesota.

The Eighth Circuit's decision avoided meaningful review of the Mitchell family's and the associational parents' constitutional claims against enforcement of Minnesota's civil statutes § 260C.007, subdivisions 5 and 6, which prohibit Minnesota parents from disciplining their children. Minnesota's statutes incorporate parental discipline into its statutory definition of "child abuse."[21]

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21 In these proceedings, Respondents insisted on inaccurately representing to the Eighth Circuit that Minnesota's civil

But, the U.S. Supreme Court in *Troxel* instructed the federal courts that there has been and should continue to be a consistent, nation-wide commitment to parental rights under the Due Process Clause as stated not so long ago by the U.S. Supreme Court:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Troxel, 530 U.S. at 65 (plurality) (citations omitted).

But, in direct contradiction, the Eighth Circuit's application of the "shock the conscience test," qualified immunity and lack of standing leave parents and parents' associations with virtually no path under 42 U.S.C. § 1983 to vindicate the parental rights affirmed in *Troxel*.

The constitutional concern is that fit parents using ordinary physical discipline, according to Minnesota Statutes § 260C.007, subdivisions 5 and 6, are committing "child abuse," and are subjected to child protection proceedings. In turn, the threat of child protection proceedings deters—chills—

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statutes do not include parental discipline in its statutory definitions of "child abuse"—but they do. See Minnesota Statutes § 260C.007, subdivisions 5 and 6. See Appellants' Eighth Circuit reply brief at 7–14 for a more detailed discussion of how Minnesota law includes parental discipline in its definition of "child abuse."

Minnesota parents from disciplining their children—a continuing violation of their constitutionally-protected parental rights.

III. Strict scrutiny, not the shock the conscience test, should apply to Fourteenth Amendment challenges to state child protection statutes chilling constitutionally-protected parental discipline, thus a split exists between the U.S. Supreme Court and the courts of appeals.

The Eighth Circuit erred by applying the shock the conscience test instead of strict scrutiny review to Fourteenth Amendment challenges to state child protection statutes chilling constitutionally-protected parental discipline:

> To state a substantive due process claim against a state official, a plaintiff must demonstrate that a fundamental right was violated and that the official's conduct shocks the conscience. *Folkerts v. City of Waverly*, 707 F.3d 975, 980 (8th Cir. 2013). Whether conduct shocks the conscience is a question of law. *Id.* Conscience shocking conduct only includes "the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." *White v. Smith*, 696

> F.3d 740, 757–58 (8th Cir. 2012) (quotation marks omitted).

Mitchell, 959 F.3d at 898, App. A 11a.

To the contrary, "fit parents" have Fourteenth Amendment rights under the U.S. Supreme Court's precedents which recognize the constitutional presumption that fit parents act in the best interests of their children. In *Troxel*, the Court summarized that parental rights have for more than seventy-five years been given substantive protection under the Fourteenth Amendment. *Troxel*, 530 U.S. at 65. The Seventh Circuit, relying on *Troxel*, stated there is no reason for the state to be involved in the parent-child relationship when there is a fit parent:

> "In assessing the reasonableness of the defendants' actions in this case, we begin with the constitutional presumption that "fit parents act in the best interests of their children,"

Troxel, 530 U.S. at 68, and stress that unless government officials have evidence calling into question the fitness of a parent, there is "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69.

Doe v. Heck, 327 F.3d 492, 521 (7th Cir. 2003). More recently, in 2013, the Court in *Adoptive Couple v.*

Baby Girl, 570 U.S. 637 (2013) re-stated the constitutional "presumption that fit parents act in the best interest of their children." *Id.* 570 U.S. at 686 (citation omitted).

Specifically, the Court in *Troxel* determined that Washington Statutes § 26.10.160(3) (1994), regarding visitation rights to children, as applied to Granville and her family, violated her Due Process Clause right to make decisions concerning the care, custody, and control of her daughters. *Troxel*, 530 U.S. at 67, 73. First, the Court stated that the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 65 (citations omitted).

Second, the Supreme Court held that Washington's breathtakingly broad statute regarding court-ordered visitation to children effectively permits a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. *Id.* at 67. A parent's estimation of the child's best interest was accorded no deference. *Id.* at 69–70.

Third, the Supreme Court noted that a combination of factors compelled the conclusion that Washington Statutes § 26.10.160(3), as applied in that case, exceeded the bounds of the Due Process Clause. *Troxel* at 67–73.

Importantly, the four-justice plurality opinion in *Troxel* is supported by two concurring opinions. Under the *Marks*[22] analysis, the narrowest holding appearing to be supported by five justices would include Justice Thomas' opinion in *Troxel*. This means that, implicitly, strict scrutiny would be applied regarding parental rights as "fundamental" and, hence, applicable to substantive due process analysis. *Troxel*, 530 U.S. at 80 (Thomas, J. concurring).

Similarly, Minnesota statutes unconstitutionally regulate parenting by prohibiting ordinary parental discipline. In Minnesota, a parent cannot discipline his or her child in ordinary ways, verbally or physically, without CPS interference.

In sharp contrast, the U.S. Supreme Court has opined that public school officials may constitutionally administer corporal punishment to students. *Ingraham v. Wright*, 430 U.S. 651, 652 (1977). Minnesota statutes prohibit public school educators from using corporal punishment, but authorize their reasonable use of force to "correct"

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22 *Marks v. United States*, 430 U.S. 188, 193 (1977).

students. Compare Minnesota Statutes § 121A.582 ("A teacher or school principal, in exercising the person's lawful authority, may use reasonable force when it is necessary under the circumstances to correct * * * a student * * *") with Minnesota Statutes § 121A.58, subdivision 2 ("Corporal punishment not allowed. An employee or agent of a district shall not inflict corporal punishment or cause corporal punishment to be inflicted upon a pupil to reform unacceptable conduct or as a penalty for unacceptable conduct") to understand that public teachers, unlike Minnesota's parents, can legally use physical discipline to correct. To be sure, the public school teachers cannot punish students. But, what is the difference between correcting and punishing a student?

In this way, Minnesota's statutes on public school teacher's use of force begs the question, "What is the difference between public school teachers using legally-prohibited corporal punishment on students and the same teachers exercising legally-authorized reasonable use of force to correct the same students?"

Meanwhile, Minnesota's parents are subjected to CPS proceedings for use of reasonable force to correct a child, while a public school teacher, for the exact same conduct to the same child as a student, would not be subjected to CPS proceedings for use of reasonable force to correct a child. *Compare* Minn.

Stat. § 121A.582 with Minn. Stat. § 260C.007, subd. 5, 6.

And, Minnesota's private school teachers can legally engage in both corporal punishment and use of reasonable force to correct a child. Minn. Stat. § 121A.582 (applies only to public school teachers). But, a parent in Minnesota cannot do either one. Minn. Stat. § 260C.007, subd. 5, 6.

In many other states, parental corporal punishment is simply legally authorized.[23] Recently, some deep blue, socially liberal states appear to have discovered the threat to single-parent families when "child abuse" is defined to include corporal punishment. For example, the Supreme Judicial Court of Massachusetts in 2015 upheld a common-law right to parental corporal punishment based on "the long-standing and widespread acceptance of such punishment remain[ing] firmly woven into our nation's social fabric." *Com. v. Dorvil*, 32 N.E.3d 861, 868 (Mass. 2015). And, the Hawaii Supreme Court in 2012 held that a state constitutional right existed to protect parental corporal punishment. *Hamilton ex*

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23 "Punishment vs. Abuse." Gunderson Center for Effective Discipline. <http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/punishment-vs-abuse/>. Retrieved July 23, 2018. Archived (July 5, 2018) at <http://web.archive.org/web/20180705022339/http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-and-the-law/punishment-vs-abuse/>.

rel. Lethem v. Lethem, 270 P.3d 1024 (2012). Similarly, in a deep red, socially conservative, state, Oklahoma Statutes Title 10A, § 1–2–105(A)(2), provides that corporal punishment used to discipline a child cannot be the legal basis for a continuing child protection investigation or proceeding.

The Eighth Circuit's approach to parental rights contradicts the holding of *Troxel* and its predecessors requiring strict scrutiny to be applied to adjudicate the constitutionality of state statutes regulating parenting. Instead, the Eighth Circuit applied the "shock the conscience" test. The Second, Third and Eleventh Circuits has done the same thing. Southerland v. City of New York, 680 F.3d 127, 151 (2nd Cir. 2012); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir. 1999); and *Maddox v. Stephens*, 727 F.3d 1109, 1119 (11th Cir. 2013).

Therefore, the Eighth Circuit failed to properly adjudicate the constitutionality of the Minnesota statutes chilling constitutionally-protected parental discipline. The Eighth Circuit erred by using the "shock the conscience" test instead of strict scrutiny review; this mistake prevented the meaningful constitutional review required by *Troxel* and its predecessors.

IV. In the context of substantial due process rights afforded to children where children have reciprocal rights to that of the parents, there is a conflict in the circuits regarding the application of the "shocks the conscience" standard when children are harmed when separated from their parents to assert a § 1983 claim.

It appears that it had taken this Court over two centuries to recognize that children have constitutional rights. *Powell v. Alabama*, 287 U.S. 45, 50–58 (1932) (holding that "young, ignorant" defendants were denied due process under the Fourteenth Amendment). Although it cannot be said children have no constitutional rights, the scale of justice are weighed against them as the "degree of rights" are dependent upon their developmental abilities derived from "the decisionmaking automony of the individual."[24] This may be true as the attributes of adults is missing from children because they may lack "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *See e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). Hence, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental

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24 Anne C. Dailey, *Children's Constitutional Rights, U A Framework for Analysis*, 95 Minn. L. Rev. 2099, 2100 (2011).

liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "[T]he upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' * * * rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal citation omitted).

Of course, parental rights are not absolute. The state has the *parens patriate* authority to intercede with the family in order to protect a child's safety, or to promote their education, or to otherwise further her best interests. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

However, it cannot be forgotten that while parents have "a constitutionally protected liberty interest in the care, custody and management of their children," children have a parallel constitutionally protected liberty interest in "not being dislocated from the 'emotional attachments that derive from the intimacy of daily [family] association,'" *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977). The "bond between parent and child is meaningful." *Adoptive Couple v. Baby Girl*, 570 U.S. at 673 (2013). This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in

the "companionship, care, custody and management of his or her children," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and of the *children* in not being dislocated from the "emotional attachments that derive from the intimacy of daily association." The associational rights between the parent and between the child and the parent are derived from that importance of the familial relationship, to the individuals involved, and to the society. *Organization of Foster Families*, 431 U.S. at 844. First Amendment freedom of association includes the right to intimate association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 615 (1984). Hence, when the State removes a child from the family, the courts have an obligation to prevent the State from overreaching and do harm to the child as a result from an unnecessary or prolonged removal.

While courts readily identify the parents rights in maintaining the parent-child relationship, the reciprocal rights of the child are not identified in the context of the harm to the child to also maintain their familial association rights. There is ample evidence that separating children from their mothers or fathers leads to serious, negative consequences to children's health and development.[25] Likewise, federal law has recognized the principle of family unity by providing services to families to prevent

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25 *Supra*, p.6, Vivek, "*Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Fosters Care.*"

separation and maintain family unity.[26] But, it is the harm to the child which is also in the interests of the child and her associational rights at stake. The loss of and prolonged absence from her family that standards of review must reflect the actual circumstances from the prospective of the child and the harm to the child that is missing from the analysis of due process and substantive due process claims that are inclusive of the right of association.

The Eighth Circuit in *Mitchell* opined that "to state a substantive due process claim against a state official, a plaintiff must demonstrate that a fundamental right was violated and that the officials conduct shocks the conscience."[27] The appellate court then identified the meaning of "shocks the conscience" as

> "only include[ing] 'the most severe violations of individual rights that result from the brutal and inhumane abuse of official power * * * Only a purpose to cause harm *unrelated to the*

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26 *See* U.S. Dep't of Health and Human Services, Children's Bureau, Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, (Mar. 2016), available at <https://www.childwelfare.gov/pubPDFs/reunify.pdf> ("Federal law has long required State agencies to demonstrate that reasonable efforts have been made to provide assistance and services to prevent the removal of a child from his or her home.").

27 *Mitchell*, 959 F.3d at 898 (citation omitted), App A. 11a.

> *legitimate object of* the government action in question will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[28]

Yet, this is the same court that expounded years ago, albeit in a different context, that

> "if seven days is too long for a car owner to wait for a post-deprivation hearing after his or her car has been towed and impounded * * * as a matter of law, a parent should not have to wait seventeen days after his or her child has been removed for a hearing."[29]

"[A] natural parent's desire for and right to the companionship, care, custody, and management of his or her children," this Court has explained, "is an interest for more precious than any property right." *Santosky,* 455 U.S. at 758–759. The judicial review remains the same—from the prospective of the parent and not from the harm to the child and the deprivation of constitutionally protected rights.

By the Eighth Circuit's standard, if 150 or 664 days of prolonged separation of children from their parent based upon agency deception to the judiciary when the agency knew it had no jurisdiction, or telling X.M. his father no longer wanted him and abandoned him does not reach the level of "shocks

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28 *Id.* (original emphasis).

29 *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005).

the conscience" for purposes of an alleged deprivation of constitutional rights of the child, there is no attainable standard. There is no discretion for the district court to evaluate the child's harm to the circumstances of governmental actions causing that harm. In short, a child has no degree of familial association or other rights to enforce in a § 1983 actions. On the other hand, a district court has found that when State officials told the plaintiff children that their parents had abandoned them, the court found the information conveyed "could shock the conscience."[30]

For instance, allegations were made in the underlying amended complaint of agency deception to the court—misrepresentation or omissions that led to the prolonged State custody of the X.M. (664 days) and A.M. and Bryce (150 days). Eighty-four pages of County documents supporting the claims were attached to the amended complaint In the criminal context, a plaintiff is afforded a greater opportunity to contest a wrong-doing than a child *harmed* physically or psychologically by a prolonged custody to present a 42 U.S.C. § 1983 claim.[31] In *Franks v.*

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30 *Smith v. Parham*, 72 F. Supp. 2d 570, 575 (D. Md. 1999)

31 *Supra*, p.6, Vivek, *"Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Fosters Care." See also*, "The health impact of separating migrant children from parents," Jessica Lussenhop, BBC News (June 19, 2018), <https//www.bbc.com/news/world-us-canada-44528900>; Jack P.

Delaware, 438 U.S. 154 (1978), a plaintiff is given an opportunity to make a substantial showing that a defendant made misrepresentations or omissions that were "deliberate falsehood or of reckless disregard for the truth" and allowed to make accompanied by an offer of proof. *Id.* at 171. Children have a right for their proceedings to be free from agency deception. In *Hardwick v. County of Orange*, 844 F.3d 1112, 1116–17 (9th Cir. 2017), the appellate court recognized this simple principle of due process: "The defendants do not contend—nor could they—that [the Plaintiff] did not have a constitutional Due Process right or a Fourth Amendment right protecting her against deliberate government use of perjured testimony and fabricated evidence in the dependency court proceeding designed to rupture her familial relationship with her mother. This right is beyond debate."

The Eighth Circuit in *Mitchell* disregarded the circumstances in which the child remained in the custody of the State unnecessarily as if no harm came to the child in the deprivation of X.M.'s or A.M.'s or Bryce's familial association rights. In short, the Eighth Circuit does not recognize the substantive due process rights of children in the context of familial association rights but applies the "shocks the

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Shonkoff, Andrew S. Graner, "*The Lifelong Effects of Early Childhood Adversity and Toxic Stress*," Pediatrics, <https://pediatrics.aappublications.org/content/129/1/e232.full>.

conscience" standard in both contexts (of the parent and of the child, although it is the child suffering the actual harm with regard to the long-lasting impact of separation from the parent). *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996).

In the context of executive action by a government official, in the Tenth Circuit, conduct "shocks the conscience" when it demonstrates such "a degree of outrageousness and a magnitude of potential or actual harm" that it "'shocks the conscience of federal judges.'" *Dawson v. Bd. of County Commissioners of Jefferson County, Colorado*, 732 Fed. Appx. 624, 635 (10th Cir. 2018) (unpublished), *cert. denied sub nom. Dawson v. Bd. of County Com'rs of Jefferson County, Colorado*, 139 S. Ct. 862 (2019), quoting *Uhlrig v. Harder*, 64 F.3d 567, 573–74 (10th Cir. 1995) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)). But in the context of familial association rights, "it shocks the conscience when: (1) the officials intended to deprive the plaintiff of a protected relationship with a family member, and (2) the officials' intrusion into the relationship was not warranted by state interests in the health and safety of the family member." *Halley v. Huckaby*, 902 F.3d 1136, 1154 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1347 (2019).

As the court in *Halley*, 902 F.3d at 1155 n.14 recognized other circuits also recognize that familial

association claims are governed by the shocks-the-conscience standard. However, again, it is not in the context of the harm to the child. *See Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir.2010) ("Lewis clarified that the shocks-the-conscience test, first articulated in *Rochin v. California*, 342 U.S. 165 (1952), governs all substantive due process claims based on executive, as opposed to legislative, action"—including familial association claims); *Anthony v. City of New York*, 339 F.3d 129, 143 (2d Cir.2003) (to prevail on a familial association claim, a plaintiff "must demonstrate that her separation from [her child] was so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it" (internal quotations omitted)); *see also United States v. Hollingsworth*, 495 F.3d 795, 802 (7th Cir.2007) (implying that a claim for violation of familial association must show the government conduct shocks the conscience).

Not all circuits agree. *Compare Kolley v. Adult Protective Servs.*, 725 F.3d 581, 585 (6th Cir. 2013) (explaining the shocks-the-conscience standard only applies when a claim does not have to do with a specific substantive due process right, and concluding the shocks-the-conscience standard therefore does not apply to familial association claims), *with Kottmyer v. Maas*, 436 F.3d 684, 691 n.1 (6th Cir.2006) (suggesting a plaintiff could prevail on a familial association claim if the conduct shocked the conscience), *and Rosenbaum v. Washoe*

Cty., 663 F.3d 1071, 1079 (9th Cir. 2011) (for a familial association claim "[t]o amount to a violation of substantive due process * * * the harmful conduct must shock the conscience or offend the community's sense of fair play and decency" (alterations incorporated) (internal quotations omitted)); *with Crowe v. Cty. of San Diego*, 608 F.3d 406, 441 n.23 (9th Cir.2010) (concluding the shocks-the-conscience standard does not apply to familial association claims); *see also Morris v. Dearborne*, 181 F.3d 657, 667 (5th Cir.1999) (apparently treating the shocks-the-conscience standard as one of multiple ways in which a plaintiff could assert a familial association claim).

Therefore, in the context of harm to the child and allegations to assert substantive due process claims, this Court should resolve the disputes of what consistent standards of review that must be applied in protecting the substantial due process rights of children, especially in the context of familial association.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated: December 29, 2020.

Respectfully submitted,

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No. 20–

In The

Supreme Court Of The United States

DWIGHT D. MITCHELL, ET AL.,

Petitioners,

v.

DAKOTA COUNTY SOCIAL SERVICES, ET AL.,

Respondents.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A: OPINION OF THE EIGHTH CIRCUIT (MAY 19, 2020)

United States Court of Appeals
for the Eighth Circuit

A19–1419

Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M.; Bryce Mitchell; Stop Child Protection Services From Legally Kidnapping
Plaintiffs – Appellants

v.

Dakota County Social Services; Patrick Coyne, individually and in his official capacity as Executive Director of Dakota County Social Services; Joan Granger–Kopesky, individually and in her official capacity as Deputy Director of Dakota County Social Services; Leslie Yunker, individually and in her official capacity as Supervisor of Dakota County Social Services; Diane Stang, individually and in her official capacity as Supervisor of Dakota County Social Services; Susan Boreland, individually and in her official capacity as Social Worker of Dakota County Social Services; Chris P'Simer, individually and in his official capacity as Social Worker of Dakota County Social Services; Christina Akolly,

individually and in her official capacity as Social Worker of Dakota County Social Services; Jacob Trotzky–Sirr, individually and in his official capacity as Guardian ad Litem of Dakota County; Tanya Derby, individually and in her official capacity as Public Defender of Dakota County; Kathryn Scott, individually and in her official capacity as Assistant County Attorney of Dakota County; Elizabeth Swank, individually and in her official capacity as Assistant County Attorney of Dakota County; Lucinda Jesson, individually; County of Dakota; Pamela Wheelock, in her official capacity as Acting Commissioner of Minnesota Department of Human Services

Defendants – Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: March 11, 2020
Filed: May 19, 2020

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

Dwight D. Mitchell ("Mitchell"), his three children, and Stop Child Protection Services from Legally Kidnapping (collectively "the plaintiffs")

brought this action in response to a Child in Need of Protection of Services ("CHIPS") proceeding by Dakota County Social Services ("DCSS"). The plaintiffs sued Dakota County, DCSS, nine Dakota County officials, and three State of Minnesota officials (collectively "the defendants") asserting constitutional, federal, and state law claims. The district court[1] granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. Background

We describe the facts in a light most favorable to the plaintiffs, taking as true all allegations in the complaint. Mitchell, a New Jersey resident, lived in Minnesota temporarily for work with his three children, X.M., A.M., and B.M., his then–wife Tatiana Litvinenko, and Litvinenko's son. On February 16, 2014, a babysitter who was watching X.M. and A.M. called the police on behalf of X.M. reporting that Mitchell had used corporal punishment on X.M. After observing bruising, the police took X.M. and A.M. to the police station for questioning. The children told the police and DCSS workers, including appellee Susan Boreland, that Mitchell had spanked them on prior occasions. During this investigation, B.M. was attending school

1 The Honorable Wilhelmina Wright, United States District Judge for the District of Minnesota.

out of state.

Boreland contacted the children's biological mother and Mitchell's ex–wife, Eva Campos. Campos stated that Mitchell had previously abused the children and encouraged officials to pursue legal action in Minnesota. As part of the investigation, DCSS obtained New Jersey court and police records involving the Mitchells. These records indicated that Campos and Mitchell had a hostile relationship, which included an attempt by Campos to abduct the children.

Boreland initiated a CHIPS proceeding in Minnesota state court on February 18, 2014, resulting in the removal of the children from Mitchell's physical custody. In a private meeting room outside of the courtroom where an emergency hearing was held, Boreland told Mitchell, "I am going to do everything in my power to see that the children are never returned to your custody." After Mitchell told her that Campos and the children were lying about the abuse, Boreland responded: "Why are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children."

Jacob Trotzky–Sirr, a guardian ad litem who is also named as a defendant, was appointed to represent the children at the CHIPS hearing held on February 26, 2014. In accordance with Minnesota law, X.M. was also appointed attorney Tanya Derby,

who is a public defender in Dakota County and named as a defendant in this action. In March 2014, Chris P'Simer replaced Boreland as the case agent assigned to the Mitchells' case.

In May 2014, Mitchell entered an *Alford* plea to a charge of malicious punishment of a child in violation of Minn. Stat. § 609.377. In July, Mitchell agreed to a court order prohibiting him from using corporal punishment in exchange for regaining physical custody of A.M. and B.M., from whom he had been separated for five months. Mitchell, A.M., and B.M. then returned to New Jersey. In December 2015, after twenty–two months, the state court dismissed the CHIPS petition and returned X.M. to Mitchell's physical custody.

The plaintiffs brought suit in federal court asserting twenty–five constitutional, federal, and state law claims. The district court granted the defendants' motion to dismiss all claims for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. Plaintiffs appeal.

II. Discussion

We review de novo the district court's grant of a motion to dismiss, accepting plaintiffs' well–pleaded allegations as true. *Ulrich v. Pope Cty.*, 715 F.3d 1054, 1058 (8th Cir. 2013). A plaintiff must "plead facts sufficient to raise a right to relief above the speculative level." *Brown v. Medtronic, Inc.*, 628 F.3d

451, 459 (8th Cir. 2010) (quotation marks omitted). We accept as true a plaintiff's specific factual allegations, but we are not required to accept broad legal conclusions. *Id.* We may affirm based on any grounds supported by the record. *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1248 (8th Cir. 2012).

A. Facial Constitutionality Claims

The plaintiffs challenged three Minnesota child welfare statutes as facially unconstitutional. *See* Minn. Stat. §§ 260C.007, subds. 5, 6, & 13; 260C.301, subd. 1; and 626.556, subd. 2. The district court determined that Mitchell and his children, as individuals, lacked standing to challenge the facial constitutionality of the statutes and dismissed the claims for lack of subject–matter jurisdiction. We review dismissal on the basis of standing *de novo*. *Frost v. Sioux City*, 920 F.3d 1158, 1161 (8th Cir. 2019).

Mitchell and his children assert they have standing to challenge the statutes' facial constitutionality because they might one day return to Minnesota. Stop Child Protection Services from Legally Kidnapping, an association of parents affected by Minnesota's child–protection services, asserts it has standing because its members live in Minnesota, have had experiences with Minnesota's child–protection system, and could again face state or county child abuse investigations. To establish

standing, a plaintiff must show an injury in fact traceable to the defendant's conduct that will likely be redressed by a favorable decision. *Frost*, 920 F.3d at 1161; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Plaintiffs seeking prospective relief based on past actions must show "a real and immediate threat that [they] would again suffer similar injury in the future." *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005) (internal quotation marks omitted). Speculative future harm does not establish a real and immediate threat of injury and is insufficient to confer standing. *Frost*, 920 F.3d at 1161.

Mitchell's or his children's speculative return to Minnesota is insufficient to show a real and immediate threat of repeat injury. Without an injury in fact, Mitchell and his children lack standing. *See Frost*, 920 F.3d at 1161; *see also City of L.A. v. Lyons*, 461 U.S. 95, 101–02 (1983). An association like Stop Child Protection Services from Legally Kidnapping has standing if one of its members independently establishes standing. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). The speculative future action alleged in the plaintiffs' complaint is not enough to confer standing on any individual member of the association. Neither the individual plaintiffs nor the association have standing to challenge the facial constitutionality of the Minnesota statutes.[2]

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2 The plaintiffs also claim dismissal was improper because

B. Mitchell's § 1983 Damages Claims

Mitchell seeks monetary damages under 42 U.S.C. § 1983, claiming procedural and substantive due process violations, Equal Protection violations, municipal liability, and conspiracy.[3] We address these claims in turn.

1. Due Process

Mitchell alleges the defendants violated his due process rights by failing to provide adequate procedural safeguards during the CHIPS proceeding. He also claims the defendants interfered with his substantive due process rights to marriage, intimate association, and privacy.

Parents have a recognized liberty interest in the care, custody, and management of their children. *Webb ex rel. K.S. v. Smith*, 936 F.3d 808, 815 (8th Cir. 2019). Children and parents also share a liberty interest in their mutual care and companionship. *Id.*; *see also Lehr v. Robertson*, 463 U.S. 248, 258 (1983). "'The intangible fibers that connect parent and child

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they sought relief under the Declaratory Judgment Act. The Declaratory Judgment Act does not provide a means for standing or relief. *See Carson v. Pierce*, 719 F.2d 931, 933 (8th Cir. 1983) (stating that the Declaratory Judgment Act requires a controversy appropriate for judicial determination, just like Article III standing).

3 Some, or perhaps all, of Mitchell's claims for damages under 42 U.S.C. § 1983 might be barred by the *Heck* doctrine, *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), but because the issue was not raised by the parties we do not address it.

have infinite variety * * *. It is self–evident that they are sufficiently vital to merit constitutional protection *in appropriate cases*.'" *Whisman ex. rel. Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997) (quoting *Lehr*, 463 U.S. at 256). That said, the right to family integrity does not include a constitutional right to be free from child abuse investigations. *Dornheim v. Sholes*, 430 F.3d 919, 925 (8th Cir. 2005). The government has a compelling interest in protecting minor children, especially when it is necessary to protect them from their parents. *Id.* at 925–26.

State intervention in a family unit must arise under procedures sufficient to meet the requirements of the Due Process Clause. *Lehr*, 463 U.S. at 258. The Due Process Clause requires that the person whose rights are being interfered with receives notice and has an "opportunity to be heard at a meaningful time and in a meaningful manner." *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005) (internal quotation marks omitted). In child removal cases, the meaningful time and manner requirement means that the state must hold a hearing promptly after removal. *Id.*; *see also Webb*, 936 F.3d at 815. While Minnesota law requires a hearing be held within fourteen days of the filing of an emergency petition, Minn. Stat. § 260C.148, subd. 2, we have not established a mandatory time period in which a hearing must occur. *See id.*; *but see Swipies*, 419 F.3d

at 715 (holding that a period of seventeen days is too long); *see also Whisman*, 119 F.3d at 1310. Minnesota also requires an emergency hearing to be held within 72 hours if a child is removed from the home on a suspicion of child abuse. Minn. Stat. §§ 260C.175, subd. 1; 260C.178, subd. 1(a).

Here, the CHIPS petition was filed two days after the children were removed, an emergency hearing was held, and a post–deprivation hearing occurred within ten days of removal. *See* Minn. Stat. §§ 260C.148, subd. 2; 260C.163; 260C.178, subd. 1(a). Mitchell concedes that he received appropriate notice. *See* Minn. Stat. § 206C.151. The amended complaint does not allege that Mitchell was denied a meaningful opportunity to present his case or that any procedural safeguards were lacking. Because Mitchell has not alleged the omission of any procedural safeguards he was due, he has failed to state a claim for a violation of his procedural due process rights.[4]

In addition to its procedural protections, the Due Process Clause protects individual liberties from government action "regardless of the fairness of the

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4 The complaint includes allegations that the appellees violated the Uniform Child Custody Jurisdiction and Enforcement Act by not transferring the proceeding to New Jersey. *See* Minn. Stat. § 518D.101 *et seq*. However, the CHIPS proceeding was an adjudication of Minnesota child protection law, not a child custody dispute requiring deferment to New Jersey courts.

procedures used to implement them." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010) (internal quotation marks omitted). To state a substantive due process claim against a state official, a plaintiff must demonstrate that a fundamental right was violated and that the official's conduct shocks the conscience. *Folkerts v. City of Waverly*, 707 F.3d 975, 980 (8th Cir. 2013). Whether conduct shocks the conscience is a question of law. *Id.* Conscience shocking conduct only includes "the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." *White v. Smith*, 696 F.3d 740, 757–58 (8th Cir. 2012) (quotation marks omitted). "Only a purpose to cause harm *unrelated to the legitimate object of* the government action in question will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Folkerts*, 707 F.3d at 981 (cleaned up).

By initiating and pursuing a CHIPS proceeding, the parties agree that the defendants interfered with Mitchell's liberty interest in the care, custody, and management of his children. However, Mitchell has failed to allege or demonstrate the conscience–shocking behavior necessary to establish a violation of substantive due process rights. Mitchell's allegations against the defendants all derive from actions taken during the course of the child abuse investigation. Even if we accept Mitchell's claim that

the defendants improperly relied on Campos' and the children's allegations, such reliance is not an egregious abuse of power that shocks the conscience. *See e.g., Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371–72 (8th Cir. 1996) (upholding reasonable suspicion of child abuse based solely on circumstantial evidence).

Mitchell claims that Boreland's statements to him during the child abuse investigation violated his constitutional rights. While Boreland's statements were unprofessional, inappropriate, and unacceptable, they do not rise to the level of "conscience shocking behavior" under our precedent. *See id.* at 1372 (stating that belief of an improper investigation and unprofessionalism by a social worker were not enough to violate a plaintiff's constitutional rights). To be "conscience shocking behavior," a verbal threat must be "brutal or wantonly cruel." *King v. Olmsted Cty.*, 117 F.3d 1065, 1067 (8th Cir. 1997). Boreland's statements, while disturbing, do not meet this standard. Because Boreland's comments were related to a child abuse investigation, even taking as true the allegations, Mitchell failed to plausibly allege a substantive due process violation. *See Folkerts*, 707 F.3d at 981.

Mitchell next alleges the defendants violated his due process rights during the course of the child abuse investigation by fabricating evidence. Manufacturing false evidence may be sufficient to

shock the conscience and violate a plaintiff's due process rights. *Livers v. Schenck*, 700 F.3d 340, 351 (8th Cir. 2012). A false evidence claim requires proof that the investigators deliberately fabricated evidence to frame the defendant. *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012). Here, Mitchell has failed to allege, describe, or detail any deliberately fabricated evidence. Instead, he asserts it exists in a conclusory manner. This sort of conclusory allegation is insufficient to nudge his substantive due process claim from conceivable to plausible. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Mitchell also claims that the defendants violated his substantive due process rights by interfering in his marriage to Litvinenko. The right to marriage is a substantive due process right, but actions that only collaterally effect family decisions do not violate the right to marry. *Muir v. Decatur Cty.*, 917 F.3d 1050, 1053–54 (8th Cir. 2019). Mitchell alleges that Boreland threatened to remove Litvinenko's son if she did not move out of Mitchell's home. However, there is no evidence that this alleged threat had more than a collateral effect on Mitchell and Litvinenko's marriage. Mitchell did not allege a sufficient nexus to survive a Rule 12(b)(6) motion to dismiss and has failed to establish a due process violation.

2. Equal Protection

The amended complaint alleged Equal Protection

violations based on racial discrimination. Because state officials are presumed to act in good faith, the plaintiff has the burden of establishing the presence of discrimination. *Robbins v. Becker*, 794 F.3d 988, 995 (8th Cir. 2015). A plaintiff may prove unlawful discrimination either by direct evidence or by creating an inference under the McDonnell Douglas burden–shifting test. *Lucke v. Solsvig*, 912 F.3d 1084, 1087 (8th Cir. 2019); *see also Wimbley v. Cashion*, 588 F.3d 959, 961 (8th Cir. 2009). An inference of racial discrimination may be established by showing that a similarly–situated person of another race was treated more favorably. *Lucke*, 912 F.3d at 1087. To be similarly–situated, the person must "possess[] all the relevant characteristics the plaintiff possesses except for the characteristic about which the plaintiff alleges discrimination." *Id.*

Mitchell relies on Boreland's statements as support for his claim that the CHIPS proceeding was influenced by racial animus. "'[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting [damages] relief.'" *Babb v. Wilkie*, 140 S. Ct. 1168, 1178 (2020) (quoting *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam) (discussing an equal protection claim)). Mitchell neither disputes that sufficient evidence existed to support the filing

of a CHIPS petition nor alleges that a petition would not have been filed but for Boreland's conduct. *See* Minn. Stat. §§ 260C.141, subd. 1; 260C.148, subds. 1, 2. Once the petition was initiated, Boreland's decision making authority ceased. *See id.* at § 260C.141, subd. 1(b) (vesting jurisdiction in the court to determine whether probable cause for protection or services exists).

After the petition was filed, the court determined that the children met the definition of a "child in need of protection or services" under Minnesota law. The complaint does not allege racial animus in the court's decision. Additionally, the CHIPS proceeding continued after P'Simer replaced Boreland as the case agent. The record contains no evidence of any racial animus by P'Simer or any other defendant involved in the case. The result of the CHIPS proceeding would have been the same regardless of Boreland's reason for filing the petition. Because Boreland's statements to Mitchell did not impact the outcome of the proceeding, Mitchell has failed to plead a racial discrimination claim upon which relief may be granted. *See Babb*, 140 S. Ct. at 1178.

3. Municipal Liability & Conspiracy

The complaint alleges municipal liability against DCSS under § 1983 for its policies and failure to supervise as well as claims of conspiracy against all defendants. We have consistently recognized that "in order for municipal liability to attach, individual

liability first must be found on an underlying substantive claim." *Moore v. City of Desloge*, 647 F.3d 841, 849 (8th Cir. 2011) (internal quotation marks omitted). Because Mitchell failed to plead a plausible constitutional claim, his municipal liability claims cannot survive a motion to dismiss. *See id.* Mitchell's conspiracy claims also fail without an underlying constitutional violation. *See Robbins*, 794 F.3d at 997.

C. The Children's § 1983 Damages Claims

The children seek monetary damages under 42 U.S.C. § 1983 for claims closely related to those posed by the father. Our analysis of Mitchell's § 1983 claims is equally applicable to the children's claims. On appeal, the children also raise a Fourth Amendment claim alleging an unreasonable removal from their home. The children have a fundamental right not to be unreasonably removed from their home. *See Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir. 2008) (requiring a protective seizure of children to occur pursuant to a court order, probable cause, or exigent circumstances). However, the children did not plead this claim to the district court and we will not consider it for the first time on appeal. *See Eagle Tech v. Expander Ams., Inc.*, 783 F.3d 1131, 1138 (8th Cir. 2015) ("It is well settled that we will not consider an argument raised for the first time on appeal.").

1. Due Process

The children claim violations of their procedural due process rights based on their removal and retention from the family home. Like Mitchell, the amended complaint does not allege that the children were denied any procedural safeguards they were entitled to receive. The CHIPS petition was filed two days after the children's removal, an emergency protective care hearing was held, and a post–deprivation hearing was held within ten days of removal. *See* Minn. Stat. §§ 260C.148, subd. 2; 260C.178, subd. 1(a). All parties received appropriate notice. *See* Minn. Stat. § 206C.151. The children were appointed a guardian ad litem and X.M. was appointed an attorney to represent their best interests. *See* Minn. Stat. § 260C.163, subds. (3), (5). There is no claim that the children were not provided the opportunity to personally attend the hearings. *See* Minn. Stat. § 260C.163, subd. (2)(a). Having failed to allege or even identify the denial of a procedural safeguard, the children's procedural due process claim fails.

The children also claim a violation of their substantive due process rights based on their prolonged separation from their father. While parents and children have a liberty interest in each other's companionship, *Webb*, 936 F.3d at 815, "[l]aw enforcement and social workers face difficult decisions in deciding whether the risks facing a child

justify intruding into the highly protected rights of familial integrity." *K.D. v. Cty. of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006). The question is whether the defendants' actions and the resulting disruption to the plaintiffs' familial relations were disproportionate under the circumstances. *Id.*

In this case, the children were removed from their home based on a reasonable suspicion of child abuse. Police officers removed X.M. and A.M. from the home after the babysitter called to report X.M.'s allegations of corporal punishment. X.M. Stated that Mitchell had beaten him with a belt and punched him repeatedly in the hip. Officers and Boreland observed bruises on X.M.'s arms, left hip, and buttocks. A.M. also reported that Mitchell had recently used a belt on him and faded bruises were observed on his leg and buttocks. During an interview, X.M. told officers and Boreland that Mitchell had spanked A.M. two days prior. B.M. also told Boreland that Mitchell had previously hit him and that he feared for his brother's safety if returned to Mitchell's custody. Additionally, the children's mother reported a history of abuse to both the police and Boreland. Even though the subsequent discovery of the animosity between the children's parents effectively undermined the mother's claims, the children's own statements and bruising provided sufficient reasonable suspicion to remove the children from their home. *See Dornheim*, 430 F.3d at 926; *see also*

K.D., 434 F.3d at 1056 ("In light of the facts known to the officers at the time, it was reasonable for [them] to conclude that they were presented with a situation where a child's welfare was imminently threatened."). The defendants' removal of the children under these circumstances is not an "inhumane abuse of official power" that shocks the conscience. *White*, 696 F.3d at 758.

After their initial removal, the children's separation from Mitchell was the result of family court orders outside of the defendants' control. *See Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987) (abrogated on other grounds) ("The prolonged separation of parents and children derived from family court orders finding juvenile protection matters and ordering foster care placement."). The children have made no allegations that the family court's decisions violated their substantive due process rights. Because removal of the children was based on a reasonable suspicion of child abuse and did not shock the conscience, the children have not established a viable substantive due process violation for their prolonged separation from Mitchell.

2. Equal Protection, Municipal Liability, & Conspiracy

As discussed above, the children's Equal Protection claim for racial discrimination fails because the result of the CHIPS proceeding would have been the same regardless of Boreland's reasons

for filing the CHIPS petition. *See Babb*, 140 S. Ct. at 1178. The children's claims for municipal liability and conspiracy also fail for failure to establish an underlying constitutional violation. *See Moore*, 647 F.3d at 849; *Robbins*, 794 F.3d at 997.

C. Qualified Immunity

Even if the complaint was sufficiently pled and established a constitutional violation, the defendants would be entitled to qualified immunity. The plaintiffs' due process allegations against the individual defendants are based on events that occurred during the child abuse investigation and court proceedings. "When a state official pursuing a child abuse investigation takes an action which would otherwise unconstitutionally disrupt familial integrity, he or she is entitled to qualified immunity, if such action is properly founded upon a reasonable suspicion of child abuse." *Dornheim*, 430 F.3d at 926 (internal quotation marks omitted). "The need to weigh a parent's right to familial integrity against the state's interest in protecting the child makes it difficult to overcome a qualified immunity defense in the context of a child abuse investigation." *Id.* Because the actions taken by all defendants were in response to a reasonable suspicion of child abuse, the defendants are entitled to qualified immunity.

D. State Law Claims[5]

The district court held that it lacked subject matter jurisdiction over the plaintiffs' state law claims based on sovereign immunity and individual common law official immunity. The plaintiffs do not appeal the sovereign immunity finding. We review *de novo* the district court's ruling on the question of immunity. *Johnson v. Carroll*, 658 F.3d 819, 829 (8th Cir. 2011).

Although the plaintiffs argue that the defendants are not entitled to immunity on the individual capacity claims, Minnesota law entitles a public official to immunity from state law claims when the official's duties require the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong. *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 600 (Minn. 2016); *Johnson*, 658 F.3d at 829. Official immunity depends on: "(1) the conduct at issue; (2) whether the conduct is discretionary or ministerial * * *; and (3) if discretionary, whether the conduct was willful or malicious." *Kariniemi*, 882 N.W.2d at 600 (internal quotation marks omitted). A discretionary duty involves "individual professional judgment that necessarily reflects the professional

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5 Similar to his claims under 42 U.S.C. § 1983, Mitchell's state law claims may be barred by *Noske v. Friedberg*, 670 N.W.2d 740, 744 (Minn. 2003), which bans attacking a valid criminal conviction in a subsequent civil proceeding under state law. However, the parties failed to raise or brief this potentially dispositive issue.

goal and factors of a situation." *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014) (internal quotation marks omitted).

The parties do not dispute that the defendants' conduct was discretionary, but rather allege that it was willful and malicious. In the context of official immunity, malice exists where an official intentionally committed an act that he or she believed was illegal. *Johnson*, 658 F.3d at 829. An act is not malicious if it: (1) was objectively legally reasonable, (2) was performed in good faith, or (3) did not violate a clearly established right. *Gleason v. Metro. Council Transit Ops.*, 563 N.W.2d 309, 318 (Minn. Ct. App. 1997). To find malice, the court must determine that "the wrongful act so unreasonably put at risk the safety and welfare of others that as a matter of law it could not be excused or justified." *Vassallo*, 842 N.W.2d at 465 (internal quotation marks omitted).

The amended complaint's conclusory allegations that the defendants fabricated unidentified evidence are insufficient to establish malice. The amended complaint also alleges a malicious concealment of documents relating to the New Jersey custody proceedings. It is indisputable that Mitchell had access to the New Jersey documents and had the same duty as the defendants to present them to the state court, which he did. The defendants' actions in investigating child abuse, initiating a CHIPS

proceeding, and presenting their findings to the state court were all based on an objectively legal basis. Nothing in the amended complaint plausibly alleges that the defendants believed their actions were illegal or explains which clearly established right the appellees violated. Additionally, there is no allegation that the defendants failed to act in good faith. No conduct by the individual defendants, as alleged in the amended complaint, rose to the level of maliciousness required to deny official immunity under Minnesota law.

E. Declaratory Relief

The plaintiffs sought a declaratory judgment invalidating Dakota County's invoices to Mitchell for foster care costs under the Uniform Declaratory Judgments Act. *See* Minn. Stat. § 555.01 *et seq.* Because they have not established an underlying cause of action, there is no basis on which to award declaratory relief. *See Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007).

III. Conclusion

For the foregoing reasons, we affirm.

APPENDIX B: ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN THE MINNESOTA DISTRICT (JANUARY 29, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M.; Bryce Mitchell; and Stop Child Protection Services from Legally Kidnapping,
Plaintiffs,

v.

Dakota County Social Services et al.,
Defendants.

Case No. 18–cv–1091 (WMW/BRT)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

In this dispute arising from Defendants' temporary removal of Plaintiff Dwight D. Mitchell's children from his custody, Defendants move to dismiss Plaintiffs' 25–count amended complaint. (Dkts. 15, 24.) For the reasons addressed below, the Court grants Defendants' motions to dismiss.

BACKGROUND

Plaintiffs are New Jersey residents Mitchell and his three children, X.M., A.M., and B.M. (collectively,

the individual plaintiffs) and Stop Child Protection Services from Legally Kidnapping (SCPS), an association of parents who have been affected by Minnesota's child–protection services. The individual plaintiffs, along with Mitchell's then–wife Tatiana Litvinenko and her child, M.L., lived in Minnesota fromat least February 2014 to July 2014. Defendants are Dakota County, Dakota County Social Services (DCSS), nine Dakota County officials, and three State of Minnesota officials.

Plaintiffs' claims arise from a February 16, 2014 incident in which police responded to a call from the Mitchell family's babysitter. The babysitter relayed to police X.M.'s allegations that Mitchell had inflicted corporal punishment on him. Police took the children from their home to the police station for questioning, where both X.M. and A.M. alleged that Mitchell had spanked them on prior occasions. County officials also reached out to Eva Campos, Mitchell's ex–wife and the biological mother of X.M., A.M., and B.M.[1] Campos alleged that Mitchell had abused the children, and she encouraged officials to pursue legal action against Mitchell in Minnesota, instead of in the children's home state of New Jersey. In response to Campos's allegations, DCSS removed X.M., A.M.,

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1 Campos had an antagonistic relationship with Mitchell. Dating back to 2009, Campos had made terroristic threats, violated restraining orders obtained by Mitchell, and repeatedly attempted to abduct their children.

and B.M. from Mitchell's custody.[2]

Defendant Susan Boreland subsequently commenced a Child in Need of Protection or Services (CHIPS) proceeding.[3] Mitchell accepted service of the CHIPS petition and attended an emergency protective hearing on February 26, 2014. In May 2014, Mitchell entered an *Alford* plea[4] in response to a criminal charge for malicious punishment of a child. At a July 10, 2014 settlement conference for the CHIPS proceeding, Mitchell agreed to a court order prohibiting him from using corporal punishment in exchange for regaining physical custody of A.M. and B.M. On July 21, 2014, Mitchell and his family returned to New Jersey without X.M. On December 4, 2015, the state court dismissed the CHIPS petition against Mitchell. The following day, DCSS returned X.M. to Mitchell's custody.

Plaintiffs allege numerous instances of

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2 Because B.M. was attending school outside Minnesota in February 2014, he was not physically removed from Mitchell's custody.

3 CHIPS proceedings are codified at Minn. Stat. §§ 260C.001 *et seq.*

4 In an *Alford* plea, an individual enters a plea without admitting guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (holding that, when a "strong factual basis for the plea" exists in the record, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a * * * sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

misconduct by Defendants between February 2014 and December 2015. Plaintiffs allege that Defendants were unlawfully motivated to separate Mitchell from his children, conspired to transfer custody to Mitchell's ex–wife, and made racially disparaging comments during their interactions with Mitchell.[5] Plaintiffs also allege that Defendants forced Litvinenko to move out of Mitchell's Minnesota house during the CHIPS proceeding, threatening that Litvinenko would lose custody of her child, M.L., if she did not leave. Finally, according to Plaintiffs, Defendants submitted unreliable accusations to the Minnesota court in the CHIPS proceeding and concealed a court order indicating that New Jersey—not Minnesota—was the proper jurisdiction for the CHIPS proceeding.

In the present action, Plaintiffs' amended complaint alleges 25 counts against Defendants, including constitutional, federal, and state law claims. Counts 1 through 6, advanced by all plaintiffs, allege that several Minnesota child–protection statutes are facially unconstitutional because they are void for vagueness and violate the Due Process and Equal Protection Clauses of the United States Constitution.[6] The remaining 19

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5 Plaintiffs allege that Dakota County social worker Susan Boreland said to Mitchell, "[w]hy are all black families so quick to spank their children? You are unfit to be parents and don't deserve to have children."

6 Plaintiffs challenge the following child–protection statutes:

counts are advanced only by the individual plaintiffs. Counts 7 through 12 allege that the same Minnesota child–protection statutes challenged in Counts 1 through 6 are unconstitutional as applied to the individual plaintiffs. Counts 13 and 14 allege that Dakota County's policies caused civil rights violations. Counts 15 through 17 allege that state and county officials engaged in conspiracies to terminate Mitchell's parental rights. Counts 18 through 24 are state law claims, alleging intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, malicious prosecution, abuse of process, and false imprisonment. Count 25 is a request for declaratory relief against Dakota County.

ANALYSIS

Defendants move to dismiss the amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A defendant may challenge the plaintiff's complaint for lack of subject–matter jurisdiction either on its face or on the factual truthfulness of its averments. Fed. R. Civ. P. 12(b)(1); *see, e.g., Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Here, Defendants assert a facial challenge to subject–matter jurisdiction.[7] In a facial challenge,

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Minnesota Statutes Section 260C.007, subdivisions 5, 6 and 13 ; Section 260C.301, subdivision 1 ; and Section 626.556, subdivision 2.

7 Defendants argue that the amended complaint's allegations, taken as true, are insufficient to confer jurisdiction.

the nonmoving party "receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).

A complaint must be dismissed if it fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, the complaint must allege sufficient facts that, when accepted as true, state a facially plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). When determining whether the complaint states such a claim, a district court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010). The factual allegations need not be detailed, but they must be sufficient to "raise a right to relief above the speculative level" and "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A plaintiff, however, must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id.* At 555. Legal conclusions that are couched as factual allegations may be disregarded by the district court. *See Iqbal*, 556 U.S. at 678–79.

I. Subject–Matter Jurisdiction over Federal Claims

Defendants argue that this Court lacks subject–matter jurisdiction over Counts 1 through 6 because

Plaintiffs lack constitutional standing.

Federal courts are courts of limited jurisdiction. U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012). Before a district court can reach the merits of a claim, the court must determine the jurisdictional question of standing. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007). If a federal district court determines at any time that it lacks subject–matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3). When the district court or a party challenges standing, the party invoking federal jurisdiction has the burden to establish that the requirements of standing have been satisfied. *Mineta*, 495 F.3d at 569. Standing is determined based on the facts as they existed when the complaint was filed. *Lujan*, 504 U.S. at 569 n.4.

A. Individual Plaintiffs' Standing for Counts 1 through 6

Defendants argue that the individual plaintiffs lack standing to challenge the facial validity of the Minnesota statutes because there is no real and immediate threat of repeated injury.

To have standing, a plaintiff must (1) have suffered an injury in fact, (2) establish a causal relationship between the defendant's conduct and the alleged injury, and (3) show that the injury would be redressed by a favorable decision. *Id.* at 560–61;

Mineta, 495 F.3d at 569. When, as here, a plaintiff seeks prospective relief, a plaintiff also must establish a "real and immediate threat" that the injury will be repeated. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102–05 (1983); *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005).

Here, the individual plaintiffs seek injunctive and declaratory relief in Counts 1 through 6.[8] When the suit was commenced, the individual plaintiffs had returned to their home state of New Jersey and Defendants no longer had custody over Mitchell's children. As they live in New Jersey, the individual plaintiffs are no longer subject to Minnesota's laws. And there is no allegation in the amended complaint that demonstrates a real and immediate threat that Minnesota's child–protection statutes will interfere with the individual plaintiffs' familial relationship again. Accordingly, the individual plaintiffs lack standing to bring Counts 1 through 6.

B. SCPS's Standing for Counts 1 through 6

Defendants argue that SCPS also lacks standing to bring Counts 1 through 6 because SCPS's members do not have standing in their own right.

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8 Although Plaintiffs' amended complaint also seeks damages, a facial challenge is "necessarily directed at the statute itself and [the remedy] must be injunctive and declaratory." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011); *cf. Mosby*, 418 F.3d at 932–33 (equating a litigant bringing a facial challenge to one seeking declaratory or injunctive relief).

Plaintiffs counter that SCPS's members have standing because they have been affected by Minnesota's child–protection statutes.

An association has standing when three conditions are met: at least one of its members has standing, the asserted interests are germane to the association's purpose, and the individual members' participation in the lawsuit is unnecessary. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). A member's interest must be more than an "abstract concern" or "unadorned speculation." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 44 (1976).

Here, Defendants argue that no SCPS member has standing in his or her own right. The amended complaint alleges that SCPS is "an association of parents who have been affected or may be affected" by Minnesota's child–protection system. This abstract concern does not establish that any SCPS member has suffered an injury in fact. *See id.* at 40. Nor does the amended complaint provide any allegations linking the Minnesota statutory provisions at issue to SCPS's members.[9] Moreover,

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9 In a facial challenge to the Court's jurisdiction, like the challenges here to Counts 1 through 6, the standing analysis is limited to the pleadings. *See Semler v. Klang*, 603 F.Supp.2d 1211, 1219–20 (D. Minn. 2009) ("If the defendant brings a facial challenge * * * the Court reviews the pleadings alone * * *."). Thus, the SCPS declarations submitted by Plaintiffs in their responsive briefs are not

there is no indication that SCPS's members face a real and immediate threat of being harmed by Minnesota's childprotection statutes again. *Lyons*, 461 U.S. at 102–05. Accordingly, SCPS does not have standing to bring Counts 1 through 6.

For these reasons, the Court grants Defendants' motions to dismiss Counts 1 through 6, as both the individual plaintiffs and SCPS lack standing to bring these claims.

II. Failure to State a Claim

Defendants argue that Counts 7 through 17, the remaining constitutional and federal claims, fail to state claims on which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

A. Constitutional Claims

The individual plaintiffs allege four categories of constitutional claims: procedural due process, substantive due process, equal protection, and freedom of association claims. The Court addresses each category of claims in turn.[10]

1. Procedural Due Process (Counts 7, 8 and 12)

Defendants argue that Counts 7, 8 and 12 fail to state a claim for violation of procedural due process. The amended complaint alleges that Defendants

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considered in this analysis.

10 Count 12 alleges Fourteenth Amendment procedural and substantive due process violations as well as a First Amendment freedom of association violation. Each of these allegations is addressed in the relevant section of the Court's analysis.

failed to provide adequate procedural safeguards during the CHIPS proceeding and in Mitchell's separation from Litvinenko.

To state a claim for a violation of procedural due process, a plaintiff must allege that defendants deprived the plaintiff of a protectible liberty or property interest without providing adequate procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). Natural parents have a fundamental liberty interest "in the care, custody, and management" of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). When the government attempts to interfere with this liberty interest, a parent must be afforded "fundamentally fair procedures." *Id.* at 754. Procedural due process requires that parties have "a meaningful opportunity to present their case." *Eldridge*, 424 U.S. at 349. The extent of procedural safeguards required depends on the nature of the interest at stake. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *see also Eldridge*, 424 U.S. at 334 ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

Here, through the commencement and pursuit of a CHIPS proceeding, Defendants interfered with Mitchell's liberty interest in the care, custody, and management of his children. Although the individual plaintiffs are unhappy with the decisions Defendants

made during the CHIPS proceeding,[11] the amended complaint fails to allege that Mitchell was denied a meaningful opportunity to present his case or that any procedural safeguards were lacking. The complaint concedes that Mitchell had notice of the CHIPS proceeding and attended several hearings adjudicated by neutral officials. That the individual plaintiffs were dissatisfied with the outcome of the hearings is not a cognizable due process claim. *See Eldridge*, 424 U.S. at 349. As there are no allegations of *any* omission of procedural safeguards, the individual plaintiffs fail to state a claim.

The amended complaint also alleges that Mitchell was not afforded due process when he was deprived of his interest in living with Litvinenko. As a threshold matter, it is not clear that Mitchell's proffered liberty interest, cohabitation with a spouse, is entitled to procedural due process protections. *See Kerry v. Din*, 135 S. Ct. 2128, 2133–35 (2015) (plurality) (holding that spousal cohabitation is not a protected interest under procedural due process and

11 The amended complaint alleges that Defendants concealed pertinent documents, which indicated that New Jersey was the proper jurisdiction for the CHIPS proceeding. But Mitchell himself resolved this concern by bringing the documents to the Minnesota court's attention on October 19, 2015. The amended complaint also alleges that during the CHIPS proceeding Defendants failed to prove Mitchell's unfitness. Yet the individual plaintiffs concede that a showing of unfitness is not a requirement under the Uniform Child Custody Jurisdiction and Enforcement Act.

explaining that procedural safeguards are not triggered merely because "a regulation in any way touches upon an aspect of the marital relationship"). And even if procedural due process extends to spousal cohabitation, the amended complaint fails to sufficiently allege how *Defendants* deprived Mitchell of this interest. The amended complaint alleges that county officials warned Litvinenko that she would lose custody of M.L. if she did not move out of Mitchell's house. At some unspecified time after this conversation, Litvinenko moved. Without more, the nexus between Defendants' conduct and Mitchell's separation from Litvinenko is too speculative to survive a Rule 12(b)(6) motion to dismiss. *See Twombly*, 550 U.S. at 555.

For these reasons, the Court grants Defendants' motions to dismiss the procedural due process claims in Counts 7, 8 and 12.

2. Substantive Due Process (Counts 9 and 12)

Defendants also argue that Counts 9 and 12 fail to state claims for substantive due process violations. The amended complaint alleges that Defendants interfered with the individual plaintiffs' rights to marriage, intimate association and privacy.

Substantive due process protects an individual's fundamental liberty interests from certain government actions, regardless of the procedural safeguards in place. *See Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007). To

state a claim for an executive official's violation of substantive due process, a plaintiff must allege "(1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the contemporary conscience." *Id.* (internal quotation marks omitted).

Whether an official's action shocks the conscience is a question of law. *Hayes v. Faulkner Cty.*, 388 F.3d 669, 674–75 (8th Cir. 2004). Conscience–shocking conduct includes "[o]nly the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." *White v. Smith*, 696 F.3d 740, 757–58 (8th Cir. 2012) (internal quotation marks omitted). This type of severe abuse of power exists, for example, when an officer systematically coerces witnesses and entirely ignores implausible aspects of witness testimony. *See, e.g., id.* at 758 (holding that officer's reliance on coerced testimony, even though the witness's proffered time, location, and description of the murder were incorrect, constituted conscience–shocking conduct). In contrast, an officer's unsubstantiated and inaccurate statements in minor reports, such as shoplifting reports, do not shock the conscience. See *Krogh v. Sweeney*, 195 F. Supp. 3d 1049, 1054 (D. Minn. 2016).

While agreeing that fundamental rights are at stake, Defendants argue that the amended complaint does not allege conscience–shocking conduct. Even

when accepting as true that Defendants relied on Campos's and A.M.'s accusations and that these accusations were of questionable credibility, the amended complaint nonetheless fails to allege a sufficiently severe abuse of power. CHIPS proceedings are designed to protect the welfare and safety of children. *See* Minn. Stat. § 260C.001, subd. 2. Pursuing a CHIPS proceeding—even in the face of hotly contested accusations—is not the type of "inhumane abuse of official power" necessary to state a substantive due process claim. *See White*, 696 F.3d at 758 (internal quotation marks omitted). Moreover, unlike the testimony in *White*, there are no allegations that Campos's and A.M.'s accusations were the product of witness coaching or were wholly contradictory to established facts. *See id.* Instead, Defendants' inclusion of unverified or inaccurate statements in an official report is akin to the actions in *Krogh*, which were not conscience–shocking. *See* 195 F. Supp. 3d at 1054.

Because the amended complaint fails to allege facts that would establish a substantive due process violation, the Court grants Defendants' motions to dismiss Counts 9 and 12.

3. Equal Protection (Counts 10 and 11)

Defendants also challenge Counts 10 and 11, arguing that they fail to state claims for violations of the Equal Protection Clause because there is no allegation that Mitchell was treated differently than

similarly situated individuals. Counts 10 and 11 allege that Minnesota's child–protection statutes' consideration of a child's culture amounts to racial discrimination.[12]

To state an equal–protection claim, a plaintiff must allege that a law either is discriminatory on its face or has both a discriminatory purpose and discriminatory impact. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). Whether a plaintiff brings the claim as a member of a protected class or as a class of one, the plaintiff must allege "invidiously dissimilar" treatment relative to similarly situated persons. *Flittie v. Solem*, 827 F.2d 276, 281 (8th Cir. 1987).

The Minnesota statutes at issue here are not facially discriminatory because the consideration of "culture" applies equally to all children.[13] As such, the question presented here is whether the amended complaint sufficiently alleges that the statutes have

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12 The individual plaintiffs challenge the application of Minn. Stat. § 626.556, subds. 2(r), (f) and (g). Section 626.556, subdivision 2(r), provides that investigators must consider the "accepted child–rearing practices of the culture in which a child participates" when assessing the suitability of a child's environment. Subdivisions 2(f) and 2(g) similarly permit investigators to consider a child's culture when assessing the child's mental or cognitive impairment.

13 Although the individual plaintiffs contend that racial disparities exist within Minnesota's child–protection services, the amended complaint does not plausibly link any racial disparity problem to the statutory provisions' consideration of culture.

a discriminatory purpose and impact. By this measure, the amended complaint falls short. The individual plaintiffs do not allege that the challenged Minnesota child–protection statutes were enacted with a discriminatory purpose. Nor do the individual plaintiffs compare Mitchell's treatment under the statutory framework to that of any other similarly situated parent.

For these reasons, the Court grants Defendants' motions to dismiss Counts 10 and 11.

4. Freedom of Expressive Association (Count 12)

Count 12, Defendants argue, fails to state a claim for a First Amendment violation. Count 12 alleges that Defendants interfered with the individual plaintiffs' freedom of expressive association by forcing Mitchell and Litvinenko to live separately.

Freedom of expressive association prohibits excessive governmental interference with certain relationships, including marital relationships. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984); *Wingate v. Gage Cty. Sch. Dist.*, No. 34 , 528 F.3d 1074, 1081 (8th Cir. 2008). To state such a claim, a plaintiff must allege that "a substantial or motivating factor" of the defendant's conduct was the defendant's intent to interfere with the protected relationship. *Wingate*, 528 F.3d at 1081–82 (internal quotation marks omitted). Governmental interference with the protected relationship is

justified, however, if the government has a sufficiently important interest and uses narrowly tailored means to further that interest. *Id.* at 1081.

The individual plaintiffs' First Amendment claim fails for at least two reasons. First, as addressed in Part II.A.1 of this Order, Defendants' alleged interference with Mitchell's marital relationship is too speculative to survive a Rule 12(b)(6) motion to dismiss. *Twombly*, 550 U.S. at 555. Second, the amended complaint contains only conclusory allegations that Defendants' conduct was motivated by a desire to interfere with Mitchell's marital relationship.[14] Merely asserting that Defendants "intentionally and with malice interfered in Mitchell's and Litvinenko's marital relationship" is insufficient to state a plausible claim.

Accordingly, the Court grants Defendants' motions to dismiss the individual plaintiffs' freedom of expressive association claim.

B. Federal Law Claims

The individual plaintiffs bring two categories of claims arising under federal law. The individual plaintiffs allege that Dakota County's policies led to civil rights violations. The individual plaintiffs also

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14 Because the claim fails for the foregoing reasons, the Court need not reach the question of whether Defendants' conduct was justified. However, the Court observes that it is well established that the government has a strong interest in protecting children. *See Dornheim v. Sholes*, 430 F.3d 919, 925–26 (8th Cir. 2005).

allege that Defendants engaged in a conspiracy to deprive Mitchell of his parental rights. Each category is addressed, in turn.

1. County Policies and Supervisory Violations (Counts 13 and 14)

Defendants argue that Counts 13 and 14 fail to adequately allege defective governmental policies. Count 13 alleges that Dakota County and its employees engaged in various unlawful practices; and Count 14 alleges, more specifically, that county officials failed to train and supervise their social workers.[15]

A municipality can be held liable for civil rights violations arising from the implementation of its wrongful policies or customs. *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 694 (1978). Liability for such violations does not extend to isolated instances of misconduct, but rather to defective county–wide policies. *See Ulrich v. Pope Cty.*, 715 F.3d 1054, 1061 (8th Cir. 2013). Allegations that the training of a particular official was

15 The amended complaint alleges that Dakota County's wrongful policies include separating families without warrants, performing medical examinations on children without parental consent, coercing parents to sign contracts, fabricating evidence, failing to comply with the CHIPS proceeding jurisdictional requirements codified in Minn. Stat. § 518D.203, refusing to implement safety plans that avoid foster care placement, failing to supervise agents adequately, and publishing premature conclusions of parental maltreatment.

unsatisfactory, that a municipality was occasionally negligent in administering a program, or that an injury could have been prevented by different or better training are all insufficient to state a claim. *See City of Canton v. Harris*, 489 U.S. 378, 390–91 (1989). Instead, a plaintiff must allege that the county "had notice of prior misbehavior by its [employees] and failed to take remedial steps amounting to deliberate indifference to the offensive acts." *See Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985). And a plaintiff must allege that the municipality's defective policy was the "moving force behind the constitutional violation." *Harris*, 489 U.S. at 389 (internal quotation marks omitted).

Each of the policies alleged in the amended complaint is rooted in the individual plaintiffs' interactions with particular Defendants, and these interactions provide no indication of a widespread policy. The amended complaint alleges that Dakota County customarily fails to comply with jurisdictional requirements in CHIPS proceedings. Yet, in the only other CHIPS proceeding referenced in the complaint, that of Litvinenko, the amended complaint concedes that Dakota County properly observed jurisdictional rules. The amended complaint's allegations regarding failure to train also are insufficient to state a claim. Even assuming Dakota County's training manuals do not include citations to all pertinent Minnesota statutes

governing CHIPS proceedings, merely alleging that training could have been better is insufficient to survive a motion to dismiss. *See id.* at 391.

Notably, Counts 13 and 14 are insufficient for additional reasons. The amended complaint fails to allege that Dakota County was on notice of any prior misconduct of its employees. Moreover, the amended complaint fails to allege that Dakota County's policies were the "moving force" behind a constitutional violation because, as addressed in the preceding sections of this Order, the amended complaint has not sufficiently alleged a constitutional violation. *See id.* at 389.

For these reasons, Defendants' motions to dismiss Counts 13 and 14 are granted.

2. Conspiracy (Counts 15 through 17)

Defendants also argue that Counts 15 through 17 fail to state claims for conspiracy under Title 42, United States Code, Sections 1985 and 1986. Counts 15 through 17 allege that state and county officials conspired to deprive Mitchell of his parental rights and transfer custody of the children to Campos. The officials acted in furtherance of this conspiracy, the amended complaint alleges, by concealing relevant documents, submitting unreliable accusations, and orchestrating B.M.'s expulsion from his school.

To state a claim for a Section 1985 conspiracy, a plaintiff must allege "that the defendant conspired with others to deprive him or her of a constitutional

right; that at least one of the alleged co–conspirators engaged in an overt act in furtherance of the conspiracy; and that the overt act injured the plaintiff." *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999). A plaintiff also must allege an actual deprivation of the constitutional right. *Id.* Only if a plaintiff sufficiently alleges a Section 1985 conspiracy can a plaintiff state a claim for a Section 1986 failure to prevent the conspiracy. *See Gatlin ex rel. Estate of Gatlin v. Green*, 362 F.3d 1089, 1095 (8th Cir. 2004).

As addressed here in Part II, the individual plaintiffs have failed to state a claim for any constitutional violation. For this reason, the amended complaint does not allege the required elements of a Section 1985 conspiracy claim. *See Askew*, 191 F.3d at 957. By extension, the individual plaintiffs' Section 1986 claim fails for lack of a predicate conspiracy. *See Gatlin*, 362 F.3d at 1095. Accordingly, the Court grants Defendants' motions to dismiss Counts 15 through 17.

III. Subject–Matter Jurisdiction Over State–Law Claims (Counts 18 through 24)

Defendants argue that they are immune from liability for the state–law claims, Counts 18 through 24.[16] Moreover, when it appears that subject–matter

16 The individual plaintiffs allege intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, malicious prosecution, abuse of process, and false imprisonment. Defendants DCSS and state official

jurisdiction may be lacking, a federal court may consider jurisdictional immunity issues *sua sponte*. *See Hart v. United States*, 630 F.3d 1085, 1089 (8th Cir. 2011) (affirming district court's *sua sponte* ruling on subject–matter jurisdiction and noting that a defendant's burden to prove entitlement to immunity is "irrelevant"). Both sovereign immunity and common–law official immunity are implicated here, and the Court addresses each in turn.

A. Sovereign Immunity for Official–Capacity Claims

Sovereign immunity bars state–law claims against government officials in federal court, absent the state's unequivocal consent. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–99 (1984). Subject to certain exceptions, Minnesota has expressly waived the sovereign immunity of its state officials for tort liability via the Minnesota Tort Claims Act (MTCA). Minn. Stat. § 3.736. But the MTCA does *not* waive immunity for an injury caused by a state official's performance of a discretionary duty, even when the discretion is abused. Minn. Stat. § 3.736, subd. 3(b). In this context, a discretionary act is an act that "involve[s] balancing policy objectives such as economic, social, and political factors." *Christensen v. Mower Cty.*, 587 N.W.2d 305, 307 (Minn. Ct. App. 1998). Similarly, Minnesota

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Emily Piper are not named as defendants in these state–law claims.

expressly waives the sovereign immunity of municipalities and their officials, subject to exceptions. Minn. Stat. § 466.02. As relevant here, however, municipalities and their officials are *not* liable for tort claims arising from an official's discretionary acts. Minn. Stat. § 466.03, subd. 6.

The amended complaint challenges state and local officials' investigation of child–abuse accusations and the officials' conduct during the CHIPS proceeding. All of the alleged actions involve the exercise of the state and local officials' judgment. When investigating child–abuse accusations and making case–management decisions, state and local officials necessarily must balance the parents' interest in the care and management of their children with the state's interest in the welfare of children. Because the state–law claims implicate only discretionary functions, Minnesota has not waived the state or local officials' sovereign immunity to this suit.

For the reasons addressed above, this Court lacks subject–matter jurisdiction over Counts 18 through 24, the tort claims asserted against Dakota County and the state and county officials in their official capacities.

B. Common–Law Official Immunity for Individual–Capacity Claims

Defendants argue that they are immune from personal liability for Counts 18 through 24 under the common–law doctrine of official immunity. The

individual plaintiffs counter that such immunity has been statutorily waived because Defendants submitted false reports in the CHIPS proceeding.

Official immunity is a common–law doctrine that protects public officials from personal liability for state–law tort claims. *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). Under Minnesota law, public officials are entitled to official immunity unless the plaintiff shows either that a public official failed to perform a ministerial duty, performed that duty negligently, or committed a willful or malicious wrong. *See Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 505 (Minn. 2006). "Malice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 663 (Minn. 1999). Malice is not present if a defendant's conduct (1) objectively was legally reasonable, (2) was performed in good faith, or (3) did not violate a "clearly established" right. *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 318 (Minn. Ct. App. 1997). As neither party argues that Defendants' conduct was ministerial, the question before the Court is whether the amended complaint alleges malicious conduct.[17]

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17 The individual plaintiffs argue that Minn. Stat. § 626.556, subd. 5, waives official immunity. Under the "Malicious and reckless reports" provision codified at Minn. Stat. § 626.556, subd. 5, "[a]ny person who knowingly or recklessly makes a false report under the provisions of this section shall be

First, the allegations regarding Defendants' negligent investigation of accusations and Defendants' negligent training and supervision of social workers do not rise to the level of malicious behavior. These allegations invoke a negligence standard and are, by definition, not intentional. Because the malice exception to official immunity requires an intentional commission of an act, the amended complaint's allegations of negligence do not qualify for this exception.

Second, the amended complaint alleges that Defendants submitted unreliable accusations to the Minnesota court presiding over the CHIPS proceeding, pursued the CHIPS proceeding with the aim of terminating Mitchell's parental rights, and removed Mitchell's children from his custody. These allegations fall short of malice because Defendants provide a basis for their actions that objectively is legally reasonable. Defendants assert that they commenced the CHIPS proceeding in furtherance of the state's well–established interest in protecting children and preventing child abuse. Indeed, Minnesota's child–protection statutes expressly contemplate that these proceedings may result in the removal of a child and termination of parental rights

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liable in a civil suit for any actual damages suffered by the person or persons so reported * * *." The malicious submission of a CHIPS report is already accounted for by the malice exception to official immunity. As such, Minn. Stat. § 626.556, subd. 5, does not change this analysis.

if it is in the child's best interests. Minn. Stat. § 260C.001. Therefore, Defendants' actions—pursuing a CHIPS proceeding and presenting to the state court the accusations against Mitchell—are grounded in an objectively, legally reasonable basis.

Third, the amended complaint alleges that, during the CHIPS proceeding, Defendants concealed documents relating to proper jurisdiction. This alleged act also does not qualify as malicious conduct. Mitchell had both access to these documents and the ability to present these documents to the Minnesota court. Moreover, as the amended complaint concedes, Mitchell presented these documents to the Minnesota court. It simply does not follow that Mitchell had a right, let alone a "clearly established" right, to have *Defendants* present this information.[18]

In summary, because all Defendants against whom the state–law claims were brought are entitled to immunity in their individual and official capacities, this Court lacks subject–matter jurisdiction over Counts 18 through 24. Defendants' motions to dismiss Counts 18 through 24 are granted.

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18 As Defendants correctly observe, there is no duty to disclose exculpatory evidence in a civil action. *See Millspaugh v. Cty. Dept. of Pub. Welfare of Wabash Cty.*, 937 F.2d 1172, 1175 n.1 (7th Cir. 1991) (noting that there is no parallel to the *Brady* requirement of disclosing exculpatory evidence in civil litigation).

IV. Declaratory Relief (Count 25)

Finally, Defendants argue that Count 25's request for declaratory relief fails because there is no underlying cause of action on which to predicate the request.

The Uniform Declaratory Judgments Act (UDJA) gives courts "within their respective jurisdictions" the power to "declare rights, status, and other legal relations." Minn. Stat. § 555.01. The declaratory relief must be based on an underlying cause of action because the UDJA does not "create a cause of action that does not otherwise exist." *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. Ct. App. 2003).

The individual plaintiffs seek declaratory judgment that Dakota County's invoices to Mitchell for foster care costs are invalid. But in light of the dismissal of Counts 1 through 24, the Court lacks any basis to award declaratory relief. Accordingly, the Court grants Defendants' motions to dismiss Count 25.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' motions to dismiss, (Dkts. 15, 24), are **GRANTED** and Plaintiffs' amended complaint, (Dkt. 8), is **DISMISSED WITHOUT PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 28, 2019

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

APPENDIX C: ORDER DENYING REHEARING IN THE EIGHTH CIRCUIT (JULY 16, 2020)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No: 19–1419

Dwight D. Mitchell, individually and on behalf of his children X.M. and A.M., et al.
Appellants

v.

Dakota County Social Services, et al.
Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:18–cv–01091–WMW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 16, 2020

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

/s/ Michael E. Gans