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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 20-5928

[Filed: May 19, 2021]

JACOB CLARK and GENETTA CLARK, individually and as next friends and guardians of H.C., a minor,
Plaintiffs-Appellants,

v.

BERNADETTE STONE, CATHERINE CAMPBELL, and DOUGLAS HAZELWOOD, in their individual and official capacities; ERIC FRIEDLANDER and MARCUS HAYCRAFT, in their official capacities only,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky at Owensboro.
No. 4:19-cv-00166—Joseph H. McKinley, Jr., District Judge.

Argued: April 27, 2021

Decided and Filed: May 19, 2021

Before: SUHRHEINRICH, GRIFFIN, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Christopher Wiest, CHRIS WIEST ATTORNEY AT LAW, PLLC, Crestview Hills, Kentucky, for Appellants. David Brent Irvin, CABINET FOR HEALTH AND FAMILY SERVICES, Frankfort, Kentucky, for Appellees. **ON BRIEF:** Christopher Wiest, CHRIS WIEST ATTORNEY AT LAW, PLLC, Crestview Hills, Kentucky, Robert A. Winter, Jr., Fort Mitchell, Kentucky, Thomas A. Bruns, BRUNS, CONNELL, VOLLMAR & ARMSTRONG, LLC, Cincinnati, Ohio, for Appellants. David Brent Irvin, CABINET FOR HEALTH AND FAMILY SERVICES, Frankfort, Kentucky, for Appellees.

OPINION

SUHRHEINRICH, Circuit Judge.

I. INTRODUCTION

Jacob and Genetta Clark are fundamentalist Christians who sincerely believe that their religion requires them to use corporal punishment when necessary upon their children. When one of their children came to school with marks on his arms from being hit with a belt, the Kentucky Cabinet for Health and Family Services ("CHFS") became involved. Pursuant to guidance from a Kentucky regulation, the social workers launched and maintained for several

months an investigation for child abuse. This underlying abuse investigation formed the factual predicate for the legal claims now before this court.

Here, the Clarks claim that the Substantive Due Process Clause of the Fourteenth Amendment gives them a fundamental right to use corporal punishment that may leave marks on their children, and a concomitant right not to be investigated for having done so. They therefore contend that the aforementioned Kentucky regulation is facially unconstitutional. They further argue that by the conducting the investigation, the defendants interfered with this right. The defendants (all employees of CHFS) argue that if there is a such a right, it was certainly not clearly established at the time of the events at issue here and they are therefore entitled to qualified immunity.

The Clarks also take issue with how the investigation was conducted. They allege that a court order requiring them to cooperate with the investigation and permit home visits violated their Fourth Amendment rights. They further claim that their First Amendment rights were violated when they were allegedly retaliated against for insisting on filming the home visits. Finally, the Clarks allege that the investigation violated their Free Exercise rights because it interfered with their ability to use corporal punishment.

For the reasons that follow, we AFFIRM the district court's dismissal of all claims.

II. BACKGROUND

Genetta and Jacob Clark have three children: C.C., age 16, N.C., age 14, and H.C., age 12. Genetta and Jacob are devout Christians, who believe that their faith compels the use of corporal punishment on their children when it is needed.

On December 16, 2018 Genetta was assisting her son N.C. with dealing with his acne. N.C. became aggravated and slammed the door in his mother's face. Genetta claims that she believed he was going to strike her and that only physical punishment would get his attention, so she struck him twice on the rear end with a wooden back scratcher. When the situation did not de-escalate, Jacob became involved and struck N.C.'s rear end five or six times with his belt. In attempt to stop his father, N.C. stuck his arm up, and Jacob hit his arm with the belt.

C.C. then tried to intervene, at which point Jacob also disciplined him with the belt. The next day C.C. reported to a school counselor that he was being abused at home. The counselor, who is legally obligated to report instances of suspected abuse to the authorities, called the Kentucky Cabinet for Health and Family Services.

Kentucky law requires CHFS to initiate a prompt investigation and take necessary protective action when it receives a report of an abused child. Ky. Rev. Stat. § 620.050(4). Defendant Douglas Hazelwood, supervisor of CHFS's Grayson County office, assigned Defendant Bernadette Stone to the case.

Stone interviewed H.C. and N.C. at their school on December 17, 2018. During this interview Stone saw light red marks left on N.C.'s arm from the belt and took photographs of his arm on her cell phone. She interviewed C.C. the next day at his school. All of the children confirmed that their parents used corporal punishment on them when necessary, but also stated that they were not abused and felt safe at home. When she called Jacob to discuss the matter, he told Stone he would not bring the children in to CHFS for further interviews without a court order.

Stone brought the matter to Assistant County Attorney Sidney Durham, who assists and represents CHFS in juvenile court matters. Based on the photos Stone had taken of N.C.'s arm, Durham told her that this was sufficient evidence of abuse for her to file juvenile court petitions for each child. The petitions went before Judge Embry of the District Court of Grayson County, Kentucky on December 19, 2018. The Clarks allege that they were not informed of the hearing until less than an hour before it was set to begin, so they were not able to be there.

At this hearing, Judge Embry, relying at least in part on Stone's report (including the photographs) and testimony, issued an order that stated: "no physical discipline, parents to cooperate w/ CHFS" ("no discipline order").[1] Judge Embry made no findings of

[1] Judge Embry stated in her affidavit that "Stone's imprecise use of the words 'laceration' or 'abrasion' in describing the child's wounds were not relevant to my decision," and explained that she had relied on her own observations of the photographs.

abuse, and instructed the Clarks to appear in court again on January 9, 2019. At that January 9 hearing, which was before Judge Goff (another Grayson County District Court judge), the court ordered the Clarks, who were in attendance, to "cooperate" with CHFS and to allow CHFS into their home. Judge Goff told Jacob that he did not have a Fourth Amendment right to stop the visits, and that if he failed to cooperate with CHFS, the children could be removed from his and Genetta's custody.

On January 28, 2019, Stone, Defendant Catherine Campbell (another social worker at CHFS), and an accompanying police officer arrived at the Clark's residence to perform a home visit. Jacob had taped a copy of the text of the Fourth Amendment to the front door. Jacob stated that Stone had perjured herself at the hearing and insisted on videotaping the entire interaction between himself and Stone and Campbell, which Stone and Campbell stated they did not consent to. Stone and Campbell told Jacob that if he did not allow them to enter their then they would call the county attorney to see how to proceed, at which point Jacob allegedly relented and allowed them to enter the home.

Stone and Campbell interviewed the family members, and during these interviews Genetta admitted to having struck C.C. with a wooden backscratcher (though denied that she had hit him in the crotch), and Jacob admitted striking N.C. and C.C. with a belt. Though Jacob stated that the hearing before Judge Goff was "a joke", Genetta agreed to follow all court orders and to cooperate with CHFS.

On January 30, 2019, another hearing was held. Jacob alleges that Stone only continued with the abuse charges as retaliation for his insistence on videotaping the home visit. According to Tina Moore, who had taken over the case from Stone, the judge told Hazelwood that the Clarks had the right to continue recording any home visits.

On February 3, 2019, Stone recorded in her notes that having conducted interviews and reviewed the evidence, she believed there was a substantial risk of abuse, and that the "family functioning" had "broke[n] down due to [Jacob's] temper." Her involvement with the case ceased after this point.

On August 1, 2019, the abuse cases were dismissed. During the entire pendency of these cases, from December 19, 2018, through August 1, 2019, the orders requiring the Clarks to refrain from using physical discipline on their children and to cooperate with CHFS were in place. The Clarks maintain that all the home visits, investigations, and the abuse cases themselves were all based on the initial testimony from Stone regarding the marks on N.C.'s arm, which the Clarks allege amounts to perjury. They allege that CHFS was acting based on religious animus against Jacob, whom CHFS employees referred to as "the crazy preacher," according to Moore. The Clarks further allege that the investigation caused substantial interference to their fundamental right to make decisions concerning how to raise their children.

In November 2019, Jacob and Genetta, for themselves, and on behalf of H.C., sued Stone, Campbell, and Hazelwood in both their individual and

official capacities. They also sued a CHFS regional supervisor, Marcus Haycraft, and Cabinet Secretary Eric Friedlander in their official capacities.[2] The Clarks sought prospective, declaratory and injunctive relief against all five of the official capacity defendants because title 922, section 1:330, subsection 2(5)(f) of the Kentucky Administrative Regulations, which offers guidance to CHFS workers on when to investigate corporal punishment as child abuse, chilled the exercise of their constitutional right to dictate how to raise their children. They sued the three individual capacity defendants for violations of their First, Fourth, and Fourteenth Amendment rights, and filed a supplemental state law claim against them for malicious prosecution.

The district court dismissed the official capacity claims for declaratory and injunctive relief for lack of Article III standing. It also dismissed the suit against Stone, Campbell, and Hazelwood in their individual capacities, reasoning that the defendants were all protected by absolute and qualified immunity. The court then declined to exercise jurisdiction over the supplemental state law claim and dismissed it without prejudice.

This timely appeal followed.

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[2] The complaint initially named Adam Meier as a defendant, but Friedlander was substituted for Meier when the Kentucky Governor appointed him as the acting Cabinet Secretary for CHFS.

III. ANALYSIS

A. The District Court Did Not Err in Dismissing the Official Capacity Claims for Lack of Article III Standing

We review de novo determinations of a plaintiff's standing to pursue claims for declaratory or injunctive relief. *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 405 (6th Cir. 2019). Here, because the plaintiffs' suit was dismissed at the pleading stage we are required to "accept as true all material [factual] allegations of the complaint." *White v. United States*, 601 F.3d 545, 551 (6th Cir. 2010) (alteration in original) (quotation omitted).

The plaintiffs carry the burden of establishing subject matter jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). To have Article III standing the plaintiff must satisfy three elements: (1) "the plaintiff must have suffered an 'injury in fact'; (2) that injury must have been 'cause[ed]' by the defendant's conduct; and (3) the injury must be 'redress[able] by a favorable decision.'" *Bearden v. Ballad Health*, 967 F.3d 513, 516 (6th Cir. 2020) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). At issue in this case is the injury in fact requirement. In cases dealing with declaratory and injunctive relief plaintiffs "must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *Grendell v. Ohio Sup. Ct.,* 252 F.3d 828, 832 (6th Cir. 2001) (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997)).

In order to satisfy the injury in fact requirement of Article III standing the "threatened injury must be *certainly impending*." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Speculative allegations "of possible future injury are not sufficient." *Id.* (quotation omitted). The Supreme Court has specifically noted that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (alteration in original) (quotation omitted).

The Clarks sued several CHFS employees in their official capacity, seeking prospective declaratory relief because they claim that they fear engaging in reasonable corporal punishment of their children. *See Ex parte Young,* 209 U.S. 123, 156 (1908) (allowing claims against state officials "who threaten and are about to commence proceeding . . . to enforce against parties affected an unconstitutional act."). Specifically, they challenge 922 KAR 1:330 § 2(5)(f) as unconstitutional. The challenged portion of the regulation reads as follows: "The following criteria shall be used in identifying a report of abuse, neglect, or dependency *not* requiring a child protective services investigation or assessment . . . Pursuant to KRS 503.110(1), corporal punishment appropriate to the age of the child, without an injury, mark, bruise, or substantial risk of harm . . . ." 922 KAR 1:330 § 2(5)(f) (emphasis added). The Clarks suggest that by negative implication this regulation establishes that any corporal punishment that leaves a "mark" constitutes evidence of abuse that requires further investigation.

They argue that this regulation violates the Due Process Clause of the Fourteenth Amendment as well as KRS § 503.110(1), which establishes a parental right to use reasonable corporal punishment on one's children. Moreover, they claim that 922 KAR 1:330 § 2(5)(f) too easily enables baseless prosecutions and therefore chills their ability to use corporal punishment on their children without fear of being investigated for abuse.

The district court correctly found that the Clarks lack standing to bring this claim. Existing case law makes clear that their claims are too speculative to satisfy the Article III standing requirements. In *Barber v. Miller*, the father of a minor child who had been removed from his custody after being interviewed by a social worker at school challenged a Michigan statute that authorized public schools to allow in-school interviews of minor children without parental consent. 809 F.3d 840, 843 (6th Cir. 2015). This court found that Barber lacked standing because he "provided no evidence that he ha[d] been threatened with further or repeated removals of [his child] or future proceedings in family court." *Id.* at 848. We found that "Barber's allegations fail[ed] to establish that this scenario certainly impends." *Id.* at 849. Indeed, though there was even a follow-up visit from a social worker after the minor had been returned to his father's custody, this court found that the risk of future harm from the statute was too speculative to confer standing. *Id.*

Similar to the plaintiffs in that case, the Clarks here have failed to demonstrate that their rights will certainly be violated in the future as a result of the

challenged regulation. While the previous actions of CHFS may be "'evidence bearing on whether there is a real and immediate threat of repeated injury.' . . . However, where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief.'" *Grendell*, 252 F.3d at 833 (quoting *Lyons*, 461 U.S at 102). To demonstrate certain future injury the Clarks must show it is likely that: (1) they will use corporal punishment on one or more of their children that will leave a mark or visible sign of injury; (2) someone will report the mark to CHFS; (3) CHFS will interpret the mark as evidence of child abuse; (4) as a result of learning about this mark CHFS will open a child abuse investigation into the Clarks; (5) the investigation itself will interfere with Jacob and Genetta Clark's rights to parent their children as they see fit.[3] This chain of events is simply too speculative to confer standing. *See Grendell* at 833 (finding that a four-step chain of events was too attenuated to demonstrate injury in fact). Here, there has been no sign that CHFS will further investigate the Clarks and they have not demonstrated the aforementioned chain of events is sufficiently certain to occur such that future injury is certainly impending.

The Clarks' argument that their parental rights have been chilled due to fear of false prosecution for child abuse is also unavailing because they have failed to demonstrate false prosecution with any level of

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[3] The inquiry does not end at step 4 because "[m]ere investigation by authorities into child abuse allegations without more . . . does not infringe upon a parent's right to custody or control of a child." *Kottmyer v. Maas*, 436 F.3d 684, 691 (6th Cir. 2006).

certainty. *See White*, 601 F.3d at 553–54 (finding that chicken breeders challenging anti-cockfighting legislation lacked standing where they alleged that they transported chickens for legal purposes but feared false prosecution for being mistakenly taken to be transporting illegal fighting gamecocks, because the "threat of injury . . . rest[s] on a string of actions the occurrence of which is merely speculative"). While there are instances in which "chill" is sufficient to establish an injury in fact, the Supreme Court has explicitly required that the "[challenged] government power [be] regulatory, proscriptive, or compulsory in nature, and [that] the complainant was either presently or prospectively subject to the regulations, proscriptions or compulsions." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The regulation the Clarks are challenging is neither proscriptive nor compulsory. The Clarks argue that the statutory language "[t]he following criteria shall be used in identifying a report of abuse, neglect, or dependency not requiring a child protective services investigation or assessment: . . ." demonstrates that this regulation goes beyond being internal guidance for CHFS workers. They are wrong. The challenged "mark" provision is one factor for CHFS workers to consider, and the guideline simply suggests that corporal punishment that does not result in a mark is appropriate corporal punishment. It does not require mandatory investigation of any report that does involve a mark, but merely advises that this should be one factor CHFS workers should consider when deciding whether to open an investigation. Their fear of being wrongfully prosecuted for lawful corporal punishment is analogous to the subjective fear of the gamecock breeders in *White*. The Clarks may well be

afraid of future investigations because of this provision, but "the mere subjective fear that [they] will be subjected again to an allegedly illegal action is not sufficient to confer standing." *Hange v. City of Mansfield*, 257 F. App'x 887, 891 (6th Cir. 2007).

Because standing is a threshold issue and the Clarks have failed to satisfy their burden of establishing subject matter jurisdiction, we affirm the district court's dismissal of the official capacity claims.

B. The District Court Did Not Abuse Its Discretion When It Decided not to Convert the Rule 12(c) Motion into a Motion for Summary Judgment on the Individual Capacity Claims

Both the Clarks and the individual capacity defendants attached and referred to documents outside of the pleadings in their motions. The Clarks therefore argue that the district court erred by not converting the Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion for summary judgment because they allege it considered some of the defendants' documents but not the Clarks'.

We review the district court's procedural decision not to convert the defendant's Rule 12(c) motion into a motion for summary judgment for an abuse of discretion. *See Bennett v. City of Eastpointe*, 410 F.3d 810 816 (6th Cir. 2005). Federal Rule of Civil Procedure 12(c) requires a court to convert a motion for judgment on the pleadings to a summary judgment motion "where matters outside the pleadings are presented to and not excluded by the court." Notwithstanding,

documents attached to the pleadings are considered a part of the pleadings and may therefore be "considered without converting a motion to dismiss into one for summary judgment." *Com. Money Ctr. Inc., v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007); *see also Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) ("In reviewing a motion to dismiss the Court 'may consider the [c]omplaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the [c]omplaint and are central to the claims contained therein.'" (quoting *Bassett v. Natl. Collegiate Athletic Ass'n.*, 528 F.3d 426, 430 (6th Cir. 2008))).

The district court listed numerous documents submitted outside of the pleadings by both parties but chose not to consider most of them. Of the seven attachments submitted by the defendants, it found that it could consider three of them without converting the motion into one for summary judgment: the CHFS records, color photos of N.C.'s arms, and the video recordings of the family court hearings. It explicitly stated that it could consider these exhibits because they "pertained to the underlying abuse cases," without which the Clarks would have no claims.[4] The Clarks claim that the court should have treated their own submitted documents similarly because, they argue, many of them also pertained to the abuse cases. Specifically, they suggest that the affidavit of Moore

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[4] Courts may take judicial notice of the proceedings of other courts of record. *See Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980).

speaks to the hostility towards the plaintiffs' religious beliefs, and that the affidavit of Jacob reaffirmed most of the factual allegations of the complaint.

The three documents examined by the district court all merely corroborate the facts alleged in the Clarks' complaint. In that complaint the Clarks alleged, amongst other things, that a child abuse investigation took place, that a photo was taken of N.C.'s arm, and that they participated in a hearing related to this investigation. The three exhibits considered by the district court all speak to the existence of that investigation and the events that took place. This is how they "pertain to the underlying abuse cases." The district court did not consider them as evidence of whether the Clarks' First, Fourth, and Fourteenth Amendment rights had been violated.

By contrast, the affidavits of Moore and Clark that were submitted by the plaintiffs pertain to the First, Fourth, and Fourteenth Amendment claims at issue in this case. They contained potentially relevant information about religious animus, perjury, and home searches— all pertinent facts for proof of the legal claims in *this* case— but did not speak to the underlying abuse cases directly. The same is true for the other documents submitted by defendants, which included redacted domestic violence records related to the Clarks, the affidavit of Judge Embry, an affidavit from Assistant County Attorney Durham, and the CHFS standards of practice, because those documents were offered to refute the legal claims in the instant case, not to provide a factual background for the underlying abuse cases themselves. Because the court

did not consider these other documents and instead limited its consideration to only those submitted documents that pertained directly to the facts of the underlying abuse cases, it did not abuse its discretion by declining to convert the motion to one for summary judgment.

"If we find no abuse of discretion in the district court's procedural decision, we review the decision substantively." *Bennett*, 410 F.3d at 816. As such, we must now consider whether dismissal on the pleadings was correct.

C. The District Court Did Not Err in Dismissing the Individual Capacity Claims

1. Standard of Review

As discussed, the district court dismissed the individual capacity claims on the pleadings under Federal Rule of Civil Procedure 12(c). This court reviews a judgment on the pleadings under the same de novo standard we apply to 12(b)(6) motions for dismissal. *Com. Money Ctr.*, 508 F.3d at 336. To survive a motion to dismiss a complaint must contain sufficient facts to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

We "construe the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law." *Comm. Money Ctr.,* 508 F.3d at 336. We need not, however, accept as true the "plaintiff's legal conclusions or unwarranted factual inferences." *Id*. Furthermore,

this court may take judicial notice of public records, and we are not required to accept as true factual allegations that are contradicted by those records. *Bailey v. City of Ann Arbor*, 860 F.3d 382, 387 (6th Cir. 2017).

2. Absolute Immunity

As an initial matter, we note which of the defendants' actions are not at issue here due to the doctrine of absolute immunity. As the district court held, Stone is absolutely immune for filing the initial abuse petitions on December 19 before Judge Embry because social workers are given absolute immunity for initiating judicial proceedings. *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 421 (6th Cir. 2001). Similarly, Stone's discussion and preparations of those petitions in conjunction with Assistant County Attorney Durham are also protected. *Holloway v. Brush*, 220 F.3d 767, 774–75 (6th Cir. 2000) (en banc). Any statements given under oath at that time or at subsequent court proceedings are shielded by absolute immunity. *Barber*, 809 F.3d at 844.

3. Qualified Immunity

The district court analyzed the remaining investigatory actions, including the home visits and subsequent proceedings, undertaken by Stone, Campbell, and Hazelwood under a qualified immunity framework. In the Sixth Circuit, when a defendant invokes qualified immunity it becomes the plaintiff's burden to demonstrate: (1) that the defendant violated a constitutional right and (2) that this right was clearly established at the time of the alleged violation. *Id.* If

the court finds that the plaintiff's right was not clearly established, we can start with the second factor and do not "need to determine whether the alleged conduct was in fact unconstitutional." *Schulkers v. Kammer*, 955 F.3d 520, 532 (6th Cir. 2020) (citing *Pearson v. Callahan*, 555, U.S. 223, 236–43 (2009)). When a qualified immunity defense is asserted at the pleading stage, we have historically found that the inquiry should be limited to the "clearly established" prong of the analysis if feasible. *See Barber* 809 F.3d at 844; *Lyons v. City of Xenia,* 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring).

In the qualified immunity context, a right is considered clearly established when existing precedent has placed the question "beyond debate" and "any reasonable official in the defendant's shoes would have understood that he was violating [the right]". *Schulkers*, 955 F.3d at 533 (quotation omitted). "When determining whether the right is clearly established, 'we look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal.'" *Barber*, 809 F.3d at 845 (quoting *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012)).

4. Fourteenth Amendment Claims

The Clarks argue that the defendants violated their substantive due process rights under the Fourteenth Amendment by depriving them of their parental liberty interest in disciplining their children. They assert that the no discipline order interfered with their right to use reasonable corporal punishment on their children. The defendants suggest that they are entitled to absolute

immunity for the court order because any deprivation of rights stemming from that order was perpetrated by the juvenile courts, not the defendants. They also argue that they are entitled to qualified immunity on this issue because there is no clearly established right to use corporal punishment on children.

When examining a substantive due process claim we apply a two-part test. We first "ask whether the plaintiff has shown a deprivation of a constitutionally protected liberty interest," then we consider "whether the government's discretionary conduct that deprived that interest was constitutionally repugnant." *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 756–66 (6th Cir. 2020) (cleaned up).

Defendants first argue that they cannot be liable for the no discipline order because to the extent that the Clarks were deprived of any fundamental rights it was the juvenile court, not the defendants, that burdened them. The defendants cite to *Pittman v. Cuyahoga County Department of Children & Family Services.*, where this court held that where the juvenile court has the ultimate authority to do something, social workers cannot be sued for substantive due process harms because the court, not the social workers, is the cause of the harms. 640 F.3d 716, 728–29 (6th Cir. 2011). However, as the district court recognized, there is a general exception to this absolute immunity where "the court order is based on a bad-faith child-services investigation." *Heithcock v. Tenn. Dep't of Children's Servs.*, No. 3:14-CV-2377, 2018 WL 1399586, at *6 (M.D. Tenn. Mar. 20, 2018). Because the Clarks have alleged bad faith on the part of Stone and the other

defendants in how they presented the investigation to the juvenile court, they have overcome this initial hurdle. We therefore must consider whether they have asserted a claim for a violation of a clearly established right.

While the plaintiffs cite an ample number of cases that support the general notion that the Due Process Clause protects the right to bring up one's children, they point to no case law from either the Supreme Court or this circuit that indicates there is a clearly established right to use corporal punishment that leaves marks. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (finding that there is no Fourteenth Amendment Due Process right to assisted suicide); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401–02 (1923) (finding that a law restricting foreign-language education violated the Fourteenth Amendment's Due Process Clause); *Pierce v. the Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (striking down a law that required all children to attend public school); *Ingraham v. Wright,* 430 U.S. 651, 681 (1977) (holding that reasonable "corporal punishment serves important educational interests" and is therefore permissible in public schools); *Troxel v. Granville*, 530 U.S. 57, 60, 66, 75 (2000) (finding that the Due Process Clause protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" and striking down a law that allowed any person to try to obtain visitation rights over parental objections); *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003) ("[T]he plaintiff parent's liberty interest in directing the upbringing and education of their children includes the right to

discipline them by using reasonable, nonexcessive corporal punishment.")

While all of the aforementioned cases consider a general right for parents to determine how to raise their children, only two consider the use of corporal punishment, and neither finds a right to use corporal punishment that leaves marks. In *Ingraham*, the Supreme Court found that public schools could engage in "limited corporal punishment" without running afoul of the Eighth and Fourteenth Amendments. 430 U.S. at 676. In *Heck* the Seventh Circuit found that parents had the "right to physically discipline their children, or to delegate that right to private school officials." 327 F.3d at 525–26.

The Clarks next cite to *Schulkers* as evidence that their right to use corporal punishment that leaves marks on their children is clearly established within this circuit. In that case, we found that a parent's due process rights were violated when a prevention plan limited her ability to decide when and where she could be alone with her children. 955 F.3d at 540. Notably, in that case the state found that there were no reasonable grounds to suspect child abuse at the time the order went into effect. *Id*.

The case before us is readily distinguishable from cases described above. First, *Schulkers* did not involve the use of corporal punishment at all. And, unlike the court there, the juvenile court in our case put the no discipline order in place after viewing photographs of N.C.'s arm and considering the evidence presented

from the interviews with the Clark children.[5] Second, it is important to note that both *Ingraham* and *Heck* allow for the use of *reasonable* corporal punishment. Nothing in Kentucky law conflicts with that premise. KRS §503.110 specifically provides that parents may use physical force when disciplining their children. However, 922 KAR 1:330, the regulation at issue in this case, merely offers guidance as to the limitations of that right. It allows for the use of "corporal punishment appropriate to the age of the child without an injury, mark, bruise or substantial risk of harm." This regulation is perfectly compatible with the Courts' holdings in *Ingraham* and *Heck*, which contain no indication that parents have an *unlimited* right to use *whatever* force they deem fit to discipline their children. The right that the Clarks are asserting, that is, the right to use corporal punishment even if it leaves more than fleeting marks on a child, is not clearly established.

While we can state with ease that there is a general right to use reasonable corporal punishment at home and in schools, that right is not an unlimited one. The Clarks have offered no authority that imposing corporal punishment that leaves marks is reasonable and is therefore a protected right. We find, therefore,

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[5] The Clarks allege that the order was fraudulently obtained because they claim that Stone perjured herself by telling the judge that N.C.'s arms had "lacerations" and "abrasions," which they claim is false. But, as stated earlier, Judge Embry provided in her affidavit, that she issued the no discipline order based purely on the evidence in the photographs and the children's accounts of how they were disciplined.

that the district court did not err in dismissing the Clarks' Fourteenth Amendment claims.

5. Fourth Amendment Claims

The Clarks contend that Hazelwood, Campbell, and Stone violated their Fourth Amendment rights when they entered their home without a warrant and without an applicable exception to the warrant requirement. The defendants contend that they did not violate the Fourth Amendment because they entered pursuant to the court orders from Judge Embry and Judge Goff, and they argue that if they did violate the Clarks' rights they are entitled to qualified immunity on this claim.

Social workers are generally governed by the Fourth Amendment's warrant requirement. *Andrews*, 700 F.3d at 859. Here, the court order fell well below the requirements of a valid warrant. The order contains no facts that detail probable cause, nor does it describe with any particularity the area of the home to be searched. *See United States v. Beals*, 698 F.3d 248, 264 (6th Cir. 2012) (detailing requirements for valid search warrants). The defendants do not assert that they entered the home due to exigency or under any other exception to the warrant requirement. The district court was therefore correct in finding that the entries into the Clarks' home were Fourth Amendment violations.

Our inquiry then becomes whether a reasonable social worker would have known based on these particular circumstances that their actions were violating the Clarks' constitutional rights. *See District*

of Columbia. v. Wesby, 138 S. Ct. 577, 590 (2018) ("[A] legal principle [must be settled law, and it must] clearly prohibit the officer's conduct in *the particular circumstances* before him") (internal citations omitted) (emphasis added); *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (explaining that plaintiffs must identify a case with a similar fact pattern to the circumstances at issue in order to show that officers had sufficient warning about what the law requires). And while it is established that a social worker does need a warrant to search a home, this court has recognized that the boundaries of that requirement are not clearly established. *Andrews*, 700 F.3d at 863 (finding that the law was "hazy" as to whether a social worker could rely on the good faith guidance from a police officer that entry was lawful because of the "lack of clarity" in the law surrounding social workers and the Fourth Amendment).

In *Kovacic v. Cuyahoga County Department of Children & Family Services.*, we found that it was clearly established that a social worker needs a warrant before *removing* a child from the home. 724 F.3d 687, 699 (6th Cir. 2013). However, we also recognized that there "remain unresolved issues related to the Fourth Amendment" and that there was a "lack of clarity" present in cases surrounding the warrantless *entry* of social workers into the home. *Id.* The most on-point case for the situation here is *Andrews,* where we found that social workers entering the home without a warrant do violate the Fourth Amendment, but that they may rely upon the good faith instruction of police officers about the legality of their entry. 700 F.3d at 863.

As the district court recognized, however, *Andrews* does not clearly establish that a reasonable social worker in *this situation* would know that his conduct was violating the Fourth Amendment. First, Judge Goff stated in open court that the Fourth Amendment did not fully apply in this context. While his statement may have been in error, it was not unreasonable for the defendants to rely upon instruction from a judge to conclude that their conduct was allowed. More importantly, each home visit by CHFS workers was conducted under the direct provenance of a court order issued specifically for this case. No such order existed in either *Andrews* or *Kovacic*, and it is significant in our assessment of what a social worker ought to have known about the legality of their conduct. Given that we have previously found that social workers may rely on police officers in assessing whether they are allowed to enter a home, it is hard to imagine that a reasonable social worker would not also believe that they could rely on an order from a judge, an even more authoritative source on the law. And indeed, at their first home visit Stone and Campbell were accompanied by a police officer. Despite Jacob's assertion that his rights were being violated, Stone and Campbell proceeded with the visit. If nothing else, this demonstrates an implicit endorsement from the police officer, upon which Stone and Campbell were entitled to rely. *Andrews*, 700 F.3d at 864.

Because the presence of the court order meaningfully distinguishes this case from *Andrews*, a reasonable social worker in the position of the defendants would not have understood that he was violating the Clarks' Fourth Amendment rights.

Indeed, this case represents precisely the type of haziness that *Andrews* alluded to in this area of law. Since the doctrine of qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law," we agree with the district court that the plaintiffs have not overcome the qualified immunity defense. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[6]

6. First Amendment Claims

a. Right to Film the Home Visits

The Clarks next assert that the district court erred in dismissing their First Amendment claim that they were retaliated against for exercising their right to record the defendants during the home visits. For their part, the defendants claim that this right is

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[6] Notably, Jacob was present in court when Judge Goff explained that the order required him to allow home visits. Though he did request a more detailed explanation of what the social workers would be looking for, Jacob did not indicate that he would require a warrant before allowing entry to his home, which at least implies that he may have been consenting to the search. While he did not immediately consent to the search when defendants arrived for the first home visit, it is not illegal for the defendants to have warned him that refusal to cooperate could result in Judge Goff finding him in contempt of court to secure his consent. *See United States v. Jones*, 647 F. Supp. 2d. 1055, 1059 (W.D. Wis. 2009) *aff'd*, 614 F.3d 423 (7th Cir. 2010) (finding that telling a non-consenting party to a search that officers would call Child Protective Services to remove the children if she did not consent was a fair tactic that did not render consent involuntary). Jacob claims that he was coerced into allowing the searches, but any coercion derives from the court order, not from the conduct of the defendants themselves.

nonexistent, or at least is not clearly established. They further argue that the Clarks are unable to demonstrate a causal connection between their request not to being recorded and the alleged retaliatory actions.[7] We note that Jacob *was* able to film the home visits and does not appear to have alleged a retaliatory action for doing so other than the continuation of the investigation beyond this first visit.

To assert a First Amendment retaliation claim, plaintiffs must establish that: (1) they engaged in constitutionally protected speech, (2) an adverse action taken against them caused an injury that would chill a person of ordinary firmness from continuing the speech, and (3) that action was motivated at least in part by the protected speech. *Ryan v. Blackwell*, 979 F.3d 519, 526 (6th Cir. 2020). Plaintiffs must "be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct." *Smith v. Campbell* 250 F.3d 1032, 1037 (6th Cir. 2001).

The Clarks assert that they had a clear First Amendment right to record the home visits conducted by Hazelwood, Stone, and Campbell. In doing so, they cite to numerous cases from other circuits and one from the Northern District of Ohio that stand for the

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[7] The defendants attempt to argue that they are absolutely immune from suit for subsequent further investigation of the Clark family following this first home visit, but this argument is unavailing because social workers do not enjoy absolute immunity from suit for actions that are investigatory in nature. *Holloway*, 220 F.3d at 774. Subsequent home visits and abuse investigations fall squarely within this camp.

proposition that there is a constitutional right to film an encounter with a police officer. *See Glik v. Cunniffe*, 655 F.3d 78, 84–86 (1st Cir. 2011) (finding a First Amendment right to film police officers performing their duties in public spaces); *Gericke v. Begin*, 753 F.3d 1, 7–10 (1st Cir. 2014) (same); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017) (same); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–90 (5th Cir. 2017) (adopting *Glik*); *ACLU v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012) (allowing the audio recording of the police in public spaces; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (permitting the filming of police conduct subject to reasonable time place and manner restrictions); *Crawford v. Geiger*, 131 F. Supp. 3d 703, 714–15 (N.D. Ohio 2015) (concluding that "there is a First Amendment right openly to film police officers carrying out their duties in public"),[8] *rev'd on other grounds*, 656 F. App'x 190 (6th Cir. 2016). The Clarks reason that because we have held that social workers are held to the same standard as police officers when it comes to other constitutional rights, the cases listed above are sufficient to demonstrate that the right to film interactions with a social worker is clearly established. We disagree.

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[8] This was the second time the district court considered this case. In *Crawford v. Geiger*, 996 F. Supp.2d 603, 616 (N.D. Ohio 2014), the court found not only that the right to film a public encounter with the police existed, but that it was also clearly established. It then reversed itself in part, finding that the right existed, but was not clearly established.

First and foremost, the Clarks have not cited a single case that applies this right to social workers. While we have clearly established that a social worker is not excepted from the Fourth Amendment, this concerns an entirely different set of rights. We should not take the equivalence of social workers and police officers in one context as determinative in a completely different area of civil rights law. Doing so would violate our mandate to avoid construing rights too generally. *See Hagans v. Franklin Cnty. Sheriff's Office*, 695, F.3d 505, 508 (6th Cir. 2012) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

Furthermore, the cases cited by the plaintiffs do not demonstrate that the right to film a social worker during a home visit was clearly established. A single district court opinion (and here, a district court opinion emanating from an entirely different district than where the events at issue took place) is not sufficient to demonstrate that a right is clearly established in this circuit for purposes of qualified immunity. *See Hall v. Sweet*, 666 F. App'x 469, 481 (6th Cir. 2019) ("A single district court opinion is not enough to pronounce a right is clearly established for purposes of qualified immunity.") And, as the district court recognized, other district courts in this circuit have found that the right is not clearly established. *See e.g., Williams v. City of Paris*, No. 5:15-108-DCR, 2016 WL 2354230, at *4 (E.D. Ky. May 4, 2016); *Davis-Bey v. City of Warren*, No. 16-CV-11707, 2018 WL 895394, at *6 (E.D. Mich. Jan. 16, 2018). The existence of this conflict is itself evidence that the right was not sufficiently established such that any reasonable social worker in the defendants' shoes would have clear notice of the right.

Moreover, the Clarks' arguments fail even if we do not find that the defendants are entitled to qualified immunity on this issue because they have failed to allege facts that would demonstrate that a retaliatory action was taken against them that was motivated by their demand to record the home visits. It is worth noting that despite the protests of the social workers, Jacob was allowed to film the home visits, and was never subject to arrest or legal sanctions for doing so.

It is not fully clear what the Clarks are alleging was the retaliatory action for filming the visits, but it appears that they suggest that the continuation of the investigation beyond the initial home visit was itself retaliatory. They offer no reason to think that the investigation would have ended after the first home visit but-for Jacob's demand to film the visit. Without such evidence, the Clarks cannot show the necessary causation that their assertion of their alleged right to film social worker visits is what caused the alleged retaliation. As stated earlier, while we must accept the plaintiff's factual allegations as true at the pleading stage, we need not accept their legal argument that the continuation of the investigation was somehow retaliatory. We therefore agree with the district court that the Clarks have failed to state a plausible First Amendment retaliation claim.

b. Free Exercise Claim

The Clarks allege that the defendants' institution of the investigation and continuation of it were acts of religious hostility that violate the First Amendment. The defendants point out that prior to the beginning of the investigation they were unaware of the Clarks'

religious beliefs (a fact uncontested by the Clarks), and further argue that the Free Exercise Clause of the First Amendment does not excuse the Clarks' from adhering to otherwise valid child-safety laws.

The Clarks did not allege which law violated their right to religious freedom, so the district court inferred that they were raising a Free Exercise challenge to the same regulation they challenged in the official capacity claims. The district court held that Clarks' allegations were "severely lacking." It was correct in finding as much.

The Supreme Court has repeatedly found that although targeting religious beliefs is never acceptable, a generally applicable law that incidentally burdens one's free exercise rights will typically be upheld. *See Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990) (listing cases), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488, *as recognized in Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). Laws are not neutral when their purpose is "to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). To the extent the plaintiffs are challenging 922 KAR 1:330(2)(5)(f), the same regulation they challenged in their claims for declaratory and injunctive relief, they have failed to state a plausible Free Exercise claim.[9] In addition to

[9] The plaintiffs do not specify the nature of their "religious hostility claim." The district court construed their complaint as being against the above-mentioned law. The Clarks do not

never actually referring to the law itself, the Clarks do not allege that the law was enacted with the intent of discriminating against religion. *See New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 591 (6th Cir. 2018) (explaining that the "incidental effect of suppression is permissible under the Free Exercise Clause absent restrictive intent").

Furthermore, any challenge to this regulation would likely survive strict scrutiny. If the object of a law is to restrict practices because of their religious motivation it is "invalid *unless* it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu*, 508 U.S. at 533 (emphasis added). Here, the state certainly has a compelling interest in protecting children from physical abuse, and the regulation is written such that it explicitly does not prohibit corporal punishment that does not leave marks, bruises, etc. Thus, the regulation is narrowly tailored and serves a compelling government interest.[10]

In their complaint the Clarks rely heavily upon the affidavit of former CHFS employee Moore. First, we

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challenge this characterization in their brief but generally claim the district court "simply ignored the relevant law."

[10] We also note that while there is a fundamental right for parents to raise their children as they see fit, there is no clearly established right to engage in corporal punishment that leaves marks. If such a right exists, and this regulation is seen to unduly burden it, then the defendants would be entitled to qualified immunity since it was not clearly established at the time this case took place.

reiterate that it was procedurally correct for the district court not to consider this affidavit. But even if it had considered it, the affidavit does not save the Clarks' claims. On the one hand, Moore's accusations that Jacob was routinely referred to at CHFS as "the crazy preacher" and that there was "extreme hostility" towards his religious briefs is deeply troubling. Had the Clarks alleged that they were treated differently from other families who engage in corporal punishment because of this hostility, their claims would carry significantly more weight. However, the very affidavit that the Clarks claim gives color to their religious hostility claim also says it was the practice of the local CHFS "to pursue as abuse, any instance of corporal punishment," and "[a]ny instances of corporal punishment that could be corroborated were considered and written up as abuse." In other words, even if we take as true that CHFS employees thought Jacob was a "crazy preacher," this testimony suggests that it did not color the decision to investigate since they were pursuing *any* allegation of corporal punishment as a potential abuse case. Thus, the Clarks have not even plausibly alleged the law has been discriminatorily applied against them because of their religious beliefs. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (finding that the disparity in treatment between bakers who refused to make anti-gay-marriage cakes and a baker who refused to make a custom wedding cake for a gay wedding reception was an indication of impermissible religious hostility).

Even taking the Clarks' allegations as true, as we are required to do when reviewing a Rule 12(c)

dismissal, the Clarks have not stated a claim for a violation of their Free Exercise rights, and the district court therefore did not err in dismissing this claim.

7. Supervisory Liability Claims

The Clarks argue that Campbell and Hazelwood should both be liable for the conduct stemming from Stone's actions during the investigation and before the juvenile court. While this court has held that the failure to supervise is actionable, we need not consider the issue here. Because Stone's conduct was not impermissible, there is nothing to hold Hazelwood and Campbell liable for. Because we have found for Stone on all the underlying claims, this claim for supervisory liability melts away.

IV. CONCLUSION

Because the Clarks lack standing to bring the official capacity claims, the district court was correct to dismiss the claims for lack of subject matter jurisdiction. Since the Clarks failed either to state a claim or to overcome qualified immunity on the remaining individual capacity claims, the court did not err in dismissing them on the pleadings. It was therefore also not error for the district court to dismiss the pendant state law malicious prosecution claim without prejudice. We **AFFIRM** the rulings of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO. 4:19-CV-00166-JHM

[Filed: July 28, 2020]

JACOB CLARK, et al.	)
	)
PLAINTIFFS	)
	)
V.	)
	)
BERNDAETTE STONE, et al.	)
	)
DEFENDANTS	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motions for Judgment on the Pleadings, or in the Alternative, for Summary Judgment. [DN 23; DN 27]. Fully briefed, these matters are ripe for decision. For the following reasons, the Defendants' Motions are **GRANTED**.

I. BACKGROUND

Plaintiffs Jacob and Genetta Clark, for themselves and as Next Friend and Guardian of H.C., a minor (collectively, the "Plaintiffs"), sued Bernadette Stone, Catherine Campbell, and Douglas Hazelwood in both

their official and individual capacities. [DN 1]. Additionally, Plaintiffs sued Marcus Haycraft and Adam Meier, succeeded by Eric Friedlander, in their official capacities. Plaintiffs allege they were deprived of their First, Fourth, Fifth, and Fourteenth Amendment rights by the Defendants in relation to an investigation by the Kentucky Cabinet for Health and Family Services ("CHFS") into suspected abuse of the Clark children. [DN 1 ¶ 2].

Jacob and Genetta Clark have three children together—C.C., age 16; N.C., age 14; and H.C., age 12. [DN 1 ¶ 3]. According to the Complaint, in December 2018, Mr. and Ms. Clark were experiencing disciplinary issues with their son, N.C., that extended to his behavior at school. [*Id.* ¶ 18]. His parents warned that if his conduct did not change, there would be consequences. [*Id.*]. In mid-December, the family was at home and Ms. Clark was helping N.C. treat his acne. At some point, N.C. became upset, stood up, and slammed the door in his mother's face. [*Id.* ¶ 22]. When Ms. Clark opened the door, N.C. began using threatening body language. [*Id.*]. Ms. Clark, concerned that N.C. was going to strike her, struck N.C. twice on his rear end with a wooden back scratcher. [*Id.*]. When N.C.'s behavior did not improve, Mr. Clark struck N.C. five or six times across his rear end with a belt. [*Id.* ¶ 23]. N.C., attempting to avoid the strikes, pushed his arm down, and his arm was struck by the belt. [*Id.*]. N.C.'s older brother, C.C., who attempted to intervene to stop his parents, was thereafter disciplined with the belt. [*Id.* ¶ 24].

The Complaint states that the next morning, N.C. apologized to his parents and acknowledged that the disciplinary measures taken were overdue given his outbursts. [*Id.* ¶ 25]. C.C., though, made a report to his school. The following day, Ms. Stone, a social worker from the CHFS, received information regarding the incident. [*Id.* ¶ 27]. Ms. Stone instructed the school staff to remove the children from their classrooms for interviews. [*Id.* ¶ 30]. According to the Complaint, the children were asked whether they were safe at home and whether they were being abused. [*Id.* ¶ 32]. During the interview, Ms. Stone noticed a red mark on N.C.'s arm which was photographed. [*Id.* ¶ 31]. Defendants dispute Plaintiffs' claim that the red mark on N.C.'s arm was the only basis for Ms. Stone pursuing an investigation in this case. [DN 10 at 2 n.4]. Defendants' Motion states that "C.C. also reported that his mother Genetta Clark punched him in his face and hit him in the crotch with a backscratcher." [*Id.*].

Following the interviews with the Clark children, on December 17, 2018, Ms. Stone contacted Mr. Clark. [DN 1 ¶ 39]. Mr. Clark informed Ms. Stone that his religious beliefs instruct him to reasonably discipline the children and that corporal punishment is used only when necessary. [*Id.*]. Ms. Stone directed Mr. Clark to bring his children into the CHFS to discuss the issue and to enter a prevention plan. [*Id.* ¶ 40]. Mr. Clark declined and said he would not do so unless required by court order. [*Id.* ¶ 41]. That same day, Ms. Stone filed three neglect/abuse cases in the District Court of Grayson County, Kentucky. [*Id.* ¶ 46]. The Plaintiffs claim there was no legal or factual basis for the cases filed by Ms. Stone because Kentucky law permits

reasonable and ordinary discipline recognized in the community where the child resides. [*Id.* ¶ 49]. Further, Plaintiffs claim that Ms. Stone knowingly made false statements in completing her investigation. [*Id.* ¶ 50].

The case was first heard by a court on December 19, 2018. [*Id.* ¶ 53]. Plaintiffs allege they were given notice of the hearing only minutes before it was set to begin and thus were unable to attend. [*Id.*]. The Plaintiffs claim Ms. Stone perjured herself at the hearing, which resulted in a court order that Mr. and Ms. Clark were not to use physical discipline on the children and were to cooperate with the CHFS. [*Id.* ¶¶ 56–57]. On January 9, 2019, a judge ordered Mr. and Ms. Clark to permit home visits according to Ms. Stone and her co-workers' wishes. [*Id.* ¶ 58]. Mr. Clark objected, claiming a Fourth Amendment right for a warrant to be issued before a search. The judge informed Mr. Clark that he did not have a Fourth Amendment right when CHFS was involved and that if the Clarks did not cooperate, he would remove the children from their home. [*Id.*]. Plaintiffs maintain that they have Fourth Amendment rights even when the CHFS is involved. [*Id.* ¶ 59].

On January 28, 2019, Ms. Stone and Ms. Campbell, along with a sergeant from the sheriff's office, came to the Clark's home. [*Id.* ¶ 60]. Mr. Clark posted the text of the Fourth Amendment to the home's front door and then videotaped the entire interaction with Ms. Stone and Ms. Campbell. [*Id.* ¶¶ 61–62]. Mr. Clark objected to the visitors' entry but eventually allowed them in and said he was doing so under duress and coercion. [*Id.* ¶ 63]. On January 30, 2019, another hearing was

held. Plaintiffs allege that at this hearing Ms. Stone explained to the judge that the Clarks were not cooperating because of Mr. Clark's use of the video camera. Plaintiffs allege this constitutes retaliation for the assertion of their First and Fourth Amendment rights. [*Id.* ¶ 66]. There was another home visit and another hearing before Plaintiffs' claim the CHFS terminated its investigation of the Clarks. Plaintiffs allege that on August 1, 2019, the claims against the Clarks were dismissed with prejudice upon finding the claims baseless. [*Id.* ¶ 73]. During the over seven-month pendency of the CHFS's investigation, the Clarks were ordered to cooperate with the CHFS and to not physically discipline their children. [*Id.* ¶ 74]. The Clark parents maintain that this order caused substantial interference with their ability to direct the education and upbringing of their children.

Plaintiffs filed their complaint on November 20, 2019. [DN 1]. Therein, they sought prospective declaratory and injunctive relief against the official capacity defendants based on a claim they feared engaging in reasonable corporal punishment of their children. [*Id.* ¶ 79]. Additionally, Plaintiffs sued Ms. Stone, Ms. Campbell, and Mr. Hazelwood for several individual capacity claims. Specifically, Plaintiffs sued the three individual capacity defendants for two First Amendment violations [*Id.* ¶¶ 82–84], two Fourth Amendment violations [*Id.* ¶¶ 85–87], a Fourteenth Amendment substantive due process violation [*Id.* ¶ 80], and a state law malicious prosecution claim [*Id.* ¶¶ 102–110]. Plaintiffs also sued Ms. Stone for a Fourteenth Amendment procedural due process violation. [*Id.* ¶ 81]. All five defendants previously

moved to dismiss the official capacity claims against them—specifically, the claims for declaratory and injunctive relief. [DN 10]. The Court granted the defendants' motion. [DN 34]. The three remaining individual capacity defendants now move for judgment on the pleadings, or in the alternative, for summary judgment on all remaining claims. [DN 23; DN 27]. Plaintiffs filed a joint response to Defendants' motions [DN 38] and Defendants filed a joint reply [DN 40].

II. STANDARD OF REVIEW

We must first determine whether to review Defendants' motions under FED. R. CIV. P. 56 or FED. R. CIV. P. 12(c). Rule 12(c) states that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Such a motion is analyzed under the same standard as a motion to dismiss. However, both Plaintiffs and Defendants have attached and referred to documents outside of the pleadings. Specifically, Plaintiffs submit a declaration of their daughter, H.C. [DN 36], portions of the juvenile court record [DN 37], a declaration of their attorney, Christopher Wiest [DN 38-1], a declaration of father, Mr. Clark [DN 38-2], and a declaration of a former CHFS employee, Tina Moore [DN 38-3]. Defendants submit the CHFS's standards of practice [DN 23-3], an affidavit of Assistant Grayson County Attorney, Sidney Durham [DN 23-4], an affidavit of retired Grayson County District Court Judge, Shan Embry [DN 23-5], a DVD of the state court hearings [DN 24; DN 25], CHFS records [DN 26-1–DN 26-13], color photos of N.C.'s wounds [DN 26-14], two newspaper articles pertaining to child

abuse in Kentucky [DN 27-2; DN 27-3], redacted domestic violence records related to Mr. and Ms. Clark [DN 27-4], and a pediatrics study focused on children exposed to corporal punishment [DN 27-5].

Federal Rule of Civil Procedure 12(c) requires a court to convert a motion for judgment on the pleadings to a motion for summary judgment where "matters outside the pleadings are presented to and not excluded by the court." Documents attached to a Rule 12 motion are considered part of the pleadings if they are referred to in the complaint and are central to the plaintiffs' claims. *See Weiner v. Klais & Co.*, 108 F.3d 86, 88–89 (6th Cir. 1997). If a court chooses to treat a Rule 12(c) motion as a motion for summary judgment under Rule 56, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." FED. R. CIV. P. 12(d). The decision of whether to consider evidence beyond the pleadings and convert a motion for judgment on the pleadings into one for summary judgment is committed to the discretion of the Court. *See Shelby Cty. Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 931 (6th Cir. 2000).

Taking into consideration the early stage of this litigation, the Court does not believe it to be prudent to convert the motion to one for summary judgment. This is so in spite of the fact that Plaintiffs also submitted documents not attached to their pleadings. That said, the Court finds that the CHFS records, the color photos of N.C.'s wounds, and the DVD containing video recordings of the juvenile court hearings may be considered without converting the motion to a motion

for summary judgment. These exhibits pertain to the underlying abuse cases. Without the underlying abuse cases, Plaintiffs would have no claims. Accordingly, the Court declines to convert the instant Motion to a motion for summary judgment but instead will rule on the Motion for Judgment on the Pleadings.

The standard of review for a Rule 12(c) motion for judgment on the pleadings "is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citations omitted); FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(c). Under Rule 12(b), a court "must construe the complaint in the light most favorable to plaintiffs," *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citation omitted), "accept all well-pled factual allegations as true," *Id.*, and determine whether the "complaint . . . states a plausible claim for relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Under this standard, the plaintiff must provide the grounds for its entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff satisfies this standard only when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint falls short if it pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct." *Id.* at 679. Instead, "a complaint must contain a 'short and plain statement of

the claim showing that the pleader is entitled to relief.'" *Id.* at 663 (quoting Fed. R. Civ. P. 8(a)(2)). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

III. DISCUSSION

At the core of Plaintiffs' suit are 42 U.S.C. § 1983 claims alleging violations of the First and Fourth Amendments, as well as the Fourteenth Amendment's Due Process Clause. To state a claim under § 1983, "a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Doe v. Miami Univ.*, 882 F.3d 579, 595 (6th Cir. 2018). Even if a plaintiff sufficiently pleads a § 1983 claim against a government official in their personal capacity, if raised, there is an additional hurdle a plaintiff must overcome—qualified immunity. *Dominquez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009). Additionally, Defendants assert absolute immunity for certain conduct. Though the Court does not consider the absolute immunity issue dispositive of any of the claims, Defendants' reliance on it warrants discussion. The Court begins with an overview of absolute immunity, proceeds to consider three claims under a qualified immunity analysis, and then addresses Plaintiffs' four remaining claims.

A. Absolute Immunity

Defendants first contend that Plaintiffs' claims are barred by absolute prosecutorial immunity. [DN 23 at 1; DN 27 at 2]. Indeed, social workers do enjoy a form of absolute immunity, though the immunity applies only in certain contexts. "[S]ocial workers are absolutely immune only when they are acting in their capacity as *legal advocates*—initiating court actions or testifying under oath—not when they are performing administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc) (emphasis in original). "The official seeking absolute immunity bears the burden of showing that immunity is justified in light of the function she was performing." *Id.* at 774. "When applied, [t]he defense of absolute immunity provides a shield from liability for acts performed erroneously, even if alleged to have been done maliciously or corruptly." *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 694 (6th Cir. 2013) (alteration in original) (internal quotation marks omitted).

As explained by the Sixth Circuit in *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, absolute immunity based on a prosecutorial function covers social workers' interactions with a court, such as "testimony or recommendations given in court concerning the child's best interests as she saw the matter." 640 F.3d 716, 725 (6th Cir. 2011) (internal quotation marks omitted). Additionally, "[s]ocial workers who initiate judicial proceedings against those suspected of child abuse or neglect perform a prosecutorial duty, and so are entitled to absolute

immunity." *Rippy v. Hattaway*, 270 F.3d 416, 421 (6th Cir. 2001).

This being the case, some of Defendants' actions are shielded by absolute immunity. Filing the complaint concerning child abuse on December 19, 2018, which initiated the formal court proceedings, is "clearly prosecutorial in nature under this standard and thus protected by absolute immunity." *Kovacic*, 724 F.3d at 694. Similarly, preparing the statement in support of the abuse petitions at the direction of Assistant County Attorney Sidney Durham was prosecutorial in nature and is thus also protected by absolute immunity. *Id.* Finally, any testimony by Defendants under oath is also protected by the shield of absolute immunity.

Again, each of Plaintiffs' claims warrants dismissal on separate grounds as discussed herein. But, to the extent that any claim is premised upon Defendants' above conduct—the filing of the three abuse petitions, the preparation of the statement in support thereof, and testimony under oath—the Defendants are entitled to absolute immunity.

B. Qualified Immunity

When a defendant invokes qualified immunity, it is the plaintiff's burden to show: (1) the defendant's acts violated a constitutional right and (2) the right was clearly established at the time of the defendant's alleged misconduct. *Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015). Although courts have discretion to determine which prong of the qualified immunity analysis should be addressed first, when faced with this defense at the pleading stage, the inquiry should

be confined to the "clearly established" prong if possible. *Id.* at 844–45.

For a right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 845 (quoting *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007)). When determining whether a right is clearly established, courts are instructed to consider the "specific context of the case" and to avoid construing rights too generally. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012). Once the right at issue is properly defined, the Court determines whether a right is clearly defined by examining cases from the Supreme Court, the Sixth Circuit, and other circuits. *Barber*, 809 F.3d at 845 (quoting *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012)). Defendants are entitled to qualified immunity on three of Plaintiffs' claims. The Court addresses each of those claims in turn.

1. First Amendment – Retaliation Towards Recording

Plaintiffs allege that Defendants retaliated against them for exercising their right to video and audio record Defendants during the home visits. [DN 1 ¶¶ 83–84]. Defendants respond that Plaintiffs assert a non-existent right to videotape social workers during home visits and argue that none of Plaintiffs' case law supports such a claim. [DN 23-1 at 18–21]. Defendants further claim the chain of causation between their actions and the continued abuse cases was broken by

the juvenile court judge's finding of probable cause at each stage. [*Id.* at 20–21].

"In general, retaliation claims involve a plaintiff engaged in conduct protected by the Constitution or by statute and a defendant who takes an adverse action against the plaintiff based, at least in part, on plaintiff's protected conduct." *Cohen v. Smith*, 58 F. App'x 139, 143 (6th Cir. 2003) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 386–87 (6th Cir. 1999) (en banc)). To be specific, to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) they were engaged in protected conduct; (2) an adverse action was taken against them that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Blatter*, 175 F.3d at 396–98. As to the last prong, a plaintiff must be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

"In inquiring whether a constitutional right is clearly established, [the Court] must 'look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (quoting *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir.1991), *cert. denied*, 502 U.S. 1060 (1992)).

Plaintiffs cite to several cases from different circuit courts in support of their claim that they had an "absolute First Amendment right to video and audio record" Defendants. [DN 1 ¶ 83 (citing *Glik v. Cuniffe*, 655 F.3d 78 (1st Cir. 2011); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–90 (5th Cir. 2017); *ACLU v. Alvarez*, 679 F.3d 583, 595–96, 599–600 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Crawford v. Geiger*, 131 F. Supp. 3d 703, 714–15 (N.D. Ohio 2015)]. Defendants, in turn, cite cases within our circuit which have found that the right to video record is not clearly established. [DN 23-1 at 19 n.45 (citing *Williams v. City of Paris*, 5:15-CV-108-DCR, 2016 WL 2354230, at *4 (E.D. Ky. May 4, 2016); *Davis-Bey v. City of Warren*, 16-CV-11707, 2018 WL 895394, at *6 (E.D. Mich. Jan. 16, 2018)]. The existence of conflicting caselaw suggests that an absolute right to video record is not clearly established.

Moreover, the *Crawford* case cited by Plaintiffs stands for a contrary position than that which Plaintiffs wish. In 2014, the Northern District of Ohio found "there is a First Amendment right to openly film police officers carrying out their duties." *Crawford v. Geiger (Crawford I)*, 996 F. Supp. 2d 603, 615 (N.D. Ohio 2014). But, a year later, the *Crawford* court conducted a more thorough analysis of the relevant case law and reversed itself on this issue. *See Crawford v. Geiger (Crawford II)*, 131 F. Supp. 3d 703, 715 (N.D. Ohio 2015) ("On further consideration in connection

with the instant motions, however, I believe the right openly to film police carrying out their duties is not so clear cut that it is proper in this case to withhold qualified immunity as to the First Amendment claim.").

Even more tellingly, the cases cited by the parties consider the issue of whether the First Amendment encompasses a right to film *police officers* carrying out their duties, not social workers. As abovementioned, for a right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Barber v. Miller*, 809 F.3d 840, 845 (6th Cir. 2015) (quoting *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007)). When determining whether a right is clearly established, a court must consider the "specific context of the case" and avoid construing rights too generally. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012). Plaintiffs have not pointed to any cases establishing a First Amendment right to videotape social workers during an in-home visit and the Court is not aware of any such case in this circuit. Based on the absence of cases establishing such a right, as well as the unsettled state of the law in the Sixth Circuit concerning a First Amendment right to video record police officers, it is reasonable to conclude that the right Plaintiffs' seek to invoke is not clearly established. Accordingly, Defendants' Motions are **GRANTED** as to this claim.

2. Fourth Amendment – Unconstitutional Home Searches Without a Warrant

Plaintiffs next allege their Fourth Amendment rights were violated when Defendants entered their home without a warrant and without consent or exigency. [DN 1 ¶¶ 86–87]. The Court, relying on the Complaint, has identified three dates on which the Defendants came to Plaintiffs' residence and requested entrance—Ms. Stone and Ms. Campbell on January 28, 2019, Mr. Hazelwood on February 25, 2019, and Mr. Hazelwood again on May 28, 2019. [*Id.* ¶¶ 60–64, 69, 71]. Defendants assert those events do not violate the Fourth Amendment because they were conducted pursuant to Judge Goff's order which, they argue, is tantamount to a warrant. [DN 23-1 at 20–21; DN 27-1 at 8, 18–19].

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend IV. The Supreme Court has noted that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972). That being the case, "searches and seizures inside a home without a warrant are presumptively unreasonable[.]" *Groh v. Ramirez*, 540 U.S. 551, 559 (2004). Thus, a warrantless search or seizure inside a home by a law enforcement officer violates the Fourth Amendment unless an exception to the warrant requirement applies. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). In 2012, the Sixth Circuit conclusively stated that a "social worker, like other state officers, is governed by the Fourth Amendment's

warrant requirement." *Andrew v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012). That being the case, the court explained that social workers "would have to obtain consent, have sufficient grounds to believe that exigent circumstances exist, or qualify under another recognized exception to the warrant requirement before engaging in warrantless entries and searches of homes." *Id.* at 859–60. The *Andrews* court also noted, however, that many contours of the right were not clearly established. *Id.* at 862. For example, the next year, the Sixth Circuit refused to extend "clearly established" status to the Fourth Amendment right not to have a social worker enter a home without a warrant. *Kovacic v. Cuyahoga Cnty. Dep't of Children and Family Servs.*, 724 F.3d 687, 699 (6th Cir. 2013).

Here, the social workers' actions were made pursuant to a court order issued by Grayson County Juvenile Court Judge Shan Embry. Sidney Durham, an Assistant County Attorney for Grayson County, authorized the defendants to file the abuse petitions in the juvenile court. To be clear, Judge Embry's order falls well short of a valid warrant. To be valid under the Fourth Amendment, a warrant must be issued by a neutral and detached magistrate, be supported by probable cause, and it must meet a particularity requirement—which requires the warrant to particularly describe the place to be searched or the things or persons to be seized. *United States v. Beals*, 698 F.3d 248, 264 (6th Cir. 2012). The orders related to the three children do not contain any facts supporting probable cause. [DN 26-11 at 19–20 JV 19–20; DN 26-12 at 19–20 JV 77–78; DN 26-13 at 20–21 JV 46–47]. The facts included in Ms. Stone's statement in

support of the cases are not included in the order. Additionally, the order lacks particularity—it merely requires the parents to "cooperate and actively participate in treatment or a social service program." *Id.* To be sure, at a hearing on January 9, 2019, Judge Kenneth Goff explained Judge Embry's order to cooperate. [Video of Jan. 9, 2019, Court Hearing]. In response to Plaintiffs' complaint that the order to "cooperate" was vague, Judge Goff explained that it meant they must permit the social workers access to their home. *Id.* Judge Goff expressly stated that two social workers would be out to the Plaintiffs' home before the next court hearing set for January 30, 2019. *Id.* Despite Judge Goff's explanation, the order clearly has deficiencies. That being the case, it is unlikely that either Judge Embry or Judge Goff intended for the order to serve as a valid warrant. Thus, the Court finds that any actions taken pursuant to the order were warrantless.

The question thus becomes whether a reasonable social worker would understand they were violating the Fourth Amendment based on these facts. This case is not the first time a court in the Sixth Circuit has considered this factual scenario. In *Barnett v. Hommrich*, No. 3:17-CV-155, 2018 WL 10195923 (E.D. Tenn. March 27, 2018), a district court in the Eastern District of Tennessee addressed a very similar situation. There, a juvenile court judge issued a written order requiring that the parents allow the social workers entrance to their home. *Id.* at *4. That court found that a reasonable social worker armed with a court order would not have realized that entering a home and searching it without a warrant violated the

Fourth Amendment. *Id.* at *5. The *Barnett* decision relied on the law's complexity concerning administrative searches. *Id.* (citing *Hall v. Sweet*, 666 F. App'x 469, 479 (6th Cir. 2016) (holding an administrative search into a children's care home without a warrant did not violate a clearly established right)). Further, the court noted that such a conclusion was "bolstered by the Sixth Circuit's repeated refusal to recognize that it is clearly established that social workers need a search warrant before entering a home." *Id.* (citing *Andrews v. Hickman Cnty.*, 700 F.3d 845, 859–60 (6th Cir. 2012); *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 698–700 (6th Cir. 2013)).

The Court finds persuasive the Eastern District of Tennessee's analysis and conclusion. Based on the above reasoning, the Court finds that it was not clearly established that a social worker entering a home and searching it based on a non-warrant court order violates the Fourth Amendment. Accordingly, Defendants are entitled to qualified immunity on this claim. Defendants' Motions are **GRANTED** as to this claim.

3. Fourteenth Amendment Violation – Substantive Due Process

Finally, in the qualified immunity analysis, Plaintiffs claim that the defendants violated their Fourteenth Amendment due process rights by depriving them of their parental liberty interest. Plaintiffs assert that the "no discipline order" from the Grayson County juvenile court constituted an interference with their right to reasonably parent their

children. [DN 1 ¶ 80; DN 38 at 18–19]. Plaintiffs argue that their right to use corporal punishment to discipline their children is a right clearly established under the Fourteenth Amendment. *Id.* Defendants respond that such a right is not clearly established as neither the Supreme Court nor the Sixth Circuit have ever held that parents have a constitutional right to use corporal punishment. [DN 23-1 at 16; DN 27-1 at 18].

For clarity's sake, it is important to nail down the exact right Plaintiffs are asserting. KRS § 503.110 provides that parents may use physical force on their children if they believe "the force used is necessary to promote the welfare of a minor" and "[t]he force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress." Kentucky regulations place a limitation on parents' ability to use physical punishment. 922 KAR 1:330 is an administrative regulation concerning child protective services. It provides that the CHFS shall "investigate or conduct an assessment upon the receipt of a report of physical abuse if the report alleges . . . [a]n injury that is, or has been, observed on a child that was allegedly inflicted nonaccidentally by a caretaker." 922 KAR 1:330(2)(4)(a)(1). The same regulation provides a non-exhaustive list of criteria that are used in identifying reports of abuse that do *not* require a child protective services investigation or assessment. 922 KAR 1:330(2)(5). If a report concerns "corporal punishment appropriate to the age of the child, *without* an injury, mark, bruise, or substantial risk of harm," that must be used to identify when an investigation is

not necessary. 922 KAR 1:330(2)(5)(f). That being the case, the Plaintiffs are essentially claiming that they have a right to use corporal punishment on their children even if the force used causes injury, marks, bruises, or substantial risk of harm. Now that the asserted right is properly understood, the Court can turn to whether Defendants are liable for the alleged violation of this right.

The Sixth Circuit has previously described substantive due process claims as coming in two varieties: "(1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience.'" *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011) (quoting *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997)). However, more recently, the Sixth Circuit has articulated the standard differently. The court has explained that when reviewing a substantive due process claim, "we first ask whether the plaintiff has shown 'a deprivation of a constitutionally protected liberty interest' and then ask whether 'the government's discretionary conduct that deprived that interest was constitutionally repugnant.'" *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 765–66 (6th Cir. 2020) (citing *Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011)).

Defendants first argue they cannot be liable for actions attributable to the juvenile court. [DN 23-1 at 7–12; DN 27-1 at 15–16]. Defendants essentially argue that to the extent that Plaintiffs suffered a deprivation of a fundamental right—which they contest—that

deprivation was perpetrated by the juvenile court, not by Defendants. Sixth Circuit case law confirms as much. In *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, the Sixth Circuit found that the defendant social workers were merely a party to the juvenile court proceeding, tasked with investigating the circumstances of a given case and presenting to the juvenile court their recommendations as to the appropriate course of action. 640 F.3d at 728–29. Because the juvenile court has the ultimate decision-making authority with respect to Plaintiffs' ability to use corporal punishment, it alone could deprive Plaintiffs of a fundamental right. *Id.*; *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 809 F. Supp. 2d 754, 781–82 (N.D. Ohio 2011), *aff'd*, 724 F.3d 687 (6th Cir. 2013).

The Sixth Circuit has recognized an exception to the general rule that the issuing court alone is responsible for the deprivation of a fundamental liberty interest—"there is an exception for when the court order is based on a bad-faith child-services investigation." *Heithcock v. Tenn. Dep't of Children's Servs.*, 2016 U.S. App. LEXIS 24392, at *11 (6th Cir. Oct. 4, 2016). Plaintiffs allege that Defendants pursued the abuse cases in bad faith. [DN 1 ¶¶ 43–45]. However, Defendants also assert that they are entitled to qualified immunity on this claim. Because of the allegation of bad faith, Defendants may be liable if there is in fact a Fourteenth Amendment violation. That being the case, it is necessary to consider whether Plaintiffs asserted a claim for a clearly established protected liberty interest.

Defendants contend that there is no clearly established right to use corporal punishment to raise, supervise, and discipline children. [DN 23-1 at 15–17; DN 27-1 at 16–18]. As stated above, "[i]n inquiring whether a constitutional right is clearly established, [the Court] must 'look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (quoting *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir.1991), *cert. denied*, 502 U.S. 1060 (1992)). Plaintiffs cite six cases in support of the position that there is a clearly established right to reasonably parent one's children—four Supreme Court cases, one case from the Eastern District of Kentucky, and one case from the Seventh Circuit. [DN 1 ¶ 80; DN 38 at 18–19].

In *Washington v. Glucksberg*, the Supreme Court unanimously held that a right to assisted suicide was not a right protected by the Fourteenth Amendment Due Process Clause. 521 U.S. 702 (1997). Plaintiffs cite this case for the proposition that the Due Process Clause protects the right to bring up one's children. [DN 1 ¶ 80]. *Meyer v. Nebraska* and *Pierce v. Society of Sisters*—both relied on by Plaintiffs—support this very general statement. In *Meyer*, the Supreme Court held that a Nebraska law restricting foreign-language education violated the Due Process Clause. 262 U.S. 390 (1923). In *Pierce*, the Supreme Court struck down an Oregon law that required all children to attend public school. 268 U.S. 510 (1925). Next, Plaintiffs cite to *Troxel v. Gainsville*. 530 U.S. 57 (2000). In *Troxel*, the Supreme Court stated that "the Due Process Clause

of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66. In so holding, the Court struck down a Washington law that allowed any person to petition state courts for child visitation rights over parental objections. *Id.* at 60, 75. These cases, while establishing a very broad right of parents to make decisions concerning the upbringing of their children, do not clearly establish the right Plaintiffs assert here—the right to use corporal punishment even if such punishment results in marks or bruises on the child.

The Court turns to cases within our circuit. Plaintiffs cite to *Schulkers v. Kammer* to support their contention that the right they assert is clearly established. 955 F.3d 520 (6th Cir. 2020) *aff'g* 367 F. Supp. 3d 626 (E.D. Ky. 2019). In *Schulkers*, the Sixth Circuit affirmed a decision of the Eastern District of Kentucky and found that the plaintiffs' substantive due process rights were violated by a prevention plan which limited the mother's ability to decide when and where she would be alone with her children. The court, recognizing the sacred nature of the family relationship, noted that "it is 'plain beyond the need for multiple citation' that a parent's 'desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Id.* at 540 (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981)). Though the defendants argued that the interest in family integrity was outweighed by the state's interest in preventing child abuse, the court

found that there was no reason to suspect the mother of child abuse at the time the restrictions were put into place. *Id.* The case at bar is distinguishable in a couple ways. First and foremost, *Schulkers* does not make any mention of a clearly defined right of parents to use corporal punishment to the point of leaving marks or bruises on a child. Further, in *Schulkers* the court found no reason to suspect child abuse, whereas, here, there was photographic evidence as well as statements from the children that supported Defendants' child abuse petitions. That evidence was also viewed by Assistant County Attorney Sidney Durham who then authorized the filing of the petitions.

Finally, Plaintiffs cite to a case out of the Seventh Circuit. [DN 38 at 19 (citing *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003)]. In *Heck*, the specific right at issue was "the plaintiff parents' liberty interest in directing the upbringing and education of their children includ[ing] the right to discipline them by using reasonable, nonexcessive corporal punishment . . . ." *Heck*, 327 F.3d at 523. The court found that the parents had the "right to physically discipline their children, or to delegate that right to private school officials." *Id.* at 525. This case's holding is not contrary to Kentucky law. Indeed, KRS § 503.110 provides that parents may use physical force on their children if they believe "the force used is necessary to promote the welfare of a minor" and "[t]he force that is used is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme mental distress." That right is merely limited by 922 KAR 1:330. Again, what *Heck* does not provide, is a statement that the Fourteenth

Amendment encompasses the right Plaintiffs assert—the right to use corporal punishment even if that punishment leaves marks on a child.

In the qualified immunity context, when determining whether a right is truly clearly established, a court must consider the "specific context of the case" and avoid construing rights too generally. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012). The cases cited by Plaintiffs do not address the factual scenario presented in this case but instead establish a general right of parents to direct the upbringing of their children—a right, which in the Seventh Circuit explicitly encompasses a right to use "reasonable, nonexcessive corporal punishment." *Heck*, 327 F.3d at 523. The Supreme Court has recently stated that to be clearly established, a "rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority[.]'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011)). Further, the high Court noted, "[t]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the *particular circumstances* before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* at 590 (quoting *Saucier*, 533 U.S. at 202). The cases Plaintiffs cite do not satisfy this high burden. And, the Court is not aware of any other case in this circuit establishing Plaintiffs' claimed right in these circumstances.

The Court need not reach the ultimate issue of whether Plaintiffs in fact have a protected liberty interest in the use of corporal punishment which leaves marks on the subject. It is enough that such a right, even if it does exist in the Sixth Circuit, is not clearly established. Accordingly, Defendants are entitled to qualified immunity on this claim. Defendants' Motion is **GRANTED** as to Plaintiffs' Fourteenth Amendment substantive due process claim.

C. First Amendment – Hostility Towards Religion

Plaintiffs allege Defendants were hostile in instituting the investigation and then in continuing the child abuse action. [DN 1 ¶¶ 82, 93]. The hostility, Plaintiffs claim, was motivated by a disagreement with Plaintiffs' religious beliefs and thus constitutes a violation of the First Amendment. [*Id.*]. Defendants respond and note that prior to the imitation of the investigation, they were not aware of Plaintiffs' religious beliefs. [DN 23-1 at 18]. Defendants argue further that the Free Exercise Clause of the First Amendment does not excuse Plaintiffs from compliance with an otherwise valid law. [*Id.*].

Plaintiffs' Complaint cites to two cases in support of this claim—one from the Supreme Court and one from the Sixth Circuit. [DN 1 ¶ 82 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993); *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012)]. Additionally, in their Response to Defendants' Motions, Plaintiffs claim that Defendants' conduct violated their clearly established rights regarding religious beliefs as set forth in those same two cases. [DN 38 at 21]. Both

cases concern the Free Exercise Clause of the First Amendment. Accordingly, the Court evaluates Plaintiffs' claim under that framework.

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Sixth Circuit recently explained that, "[i]n the constitutional context . . . only a law that is not neutral or of general applicability 'must be justified by a compelling governmental interest and must be narrowly tailored to advance than interest.'" *Doe v. Cong. of the United States*, 891 F.3d 578, 591 (6th Cir. 2018) (quoting *Lukumi*, 508 U.S. at 531–32). The Supreme Court has held that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015) (citing *Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 878–82 (1990)). "A law is not neutral 'if the object of [the] law is to infringe upon or restrict practices because of their religious motivation,' or if 'the purpose of [the] law is the suppression of religion or religious conduct.'" *Doe*, 891 F.3d at 591 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

Plaintiffs' allegations are severely lacking in terms of asserting a Free Exercise Clause claim. The allegations do not identify the challenged law, nor do they allege that any law was enacted with the specific

government intent to infringe upon, restrict, or suppress religious beliefs. The Court presumes the Plaintiffs challenge 922 KAR 1:330(2)(5)(f)—the regulation challenged in their claims for prospective declaratory and injunctive against the official capacity defendants. [DN 1 ¶ 79]. It may be the case that the law incidentally inhibits Plaintiffs' ability to exercise their religion to the extent they desire, but that is not enough to assert a Free Exercise claim. "[T]he incidental effect of suppression is permissible under the Free Exercise Clause absent restrictive intent: The laws must have been 'enacted because of, not merely in spite of their suppression.'" *Doe*, 891 F.3d at 592 (quoting *Lukumi*, 508 U.S. at 541). The regulation at issue is facially neutral. Plaintiffs have not alleged that the regulation was enacted with the intent to suppress any specific religion. Accordingly, Plaintiffs' Complaint fails to state a claim and Defendants' Motions are **GRANTED** as to this claim.

D. Fourth Amendment – Unlawful Custodial Interview

Plaintiffs initially sued Defendants for Ms. Stone's interview of H.C. at her school. [DN 1 ¶ 85]. However, in their Response to Defendants' Motions, Plaintiffs acknowledge that recent Sixth Circuit case law—specifically *Schulkers v. Kammer*, 955 F.3d 520 (6th Cir. 2020)—renders this claim meritless. In *Schulkers*, the Sixth Circuit found that, although the social workers who conducted in-school interviews of children violated the Fourth Amendment, the law surrounding in-school interviews by social workers was not clearly established. That being the case, the social

workers were entitled to qualified immunity. *Id.* at 533–34. Given that the conduct in this case took place before the Sixth Circuit's 2020 ruling, Plaintiffs voluntarily abandon this aspect of their Fourth Amendment claim. [DN 38 at 22–23].

E. Fourteenth Amendment – Procedural Due Process

As a preliminary matter it is worth noting that this claim, unlike the others discussed herein, is only against Ms. Stone. Plaintiffs claim their procedural due process rights under the Fourteenth Amendment were violated when Ms. Stone informed Plaintiffs of an imminent hearing mere minutes before it was to take place. [DN 1 ¶ 81]. Further, Plaintiffs allege Ms. Stone falsely informed the court that Plaintiffs were informed of the hearing and chose not to attend. [*Id.*]. As a result, Plaintiffs assert they were "unable to respond to the charges at a time and place when their response would likely have forestalled the entire chain of events that followed." [*Id.*]. Ms. Stone responds that she called Mr. Clark at 11:44 a.m. to tell him about the afternoon juvenile court motion docket, beginning at 1:00 p.m. that same day. [DN 23-1 at 17]. She states that she could not inform Mr. Clark earlier because the County Attorney only gave approval to file the petitions that morning and Ms. Stone needed time to prepare them. [*Id.*]. Further, Ms. Stone argues that Plaintiffs' rights were not violated because the hearing "did not result in the loss of any substantive liberty interest." [*Id.* at 18].

To establish a violation of procedural due process rights, a plaintiff must show "(1) that [they were] deprived of a protected liberty or property interest, and

(2) that such deprivation occurred without the requisite due process of law." *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. Of Shelby, Mich.*, 470 F.3d 286, 296 (6th Cir. 2006) (citing *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002)); *see also Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 809 F. Supp. 2d 754, 775 (N.D. Ohio 2011) ("A Fourteenth Amendment procedural due process claim depends upon the existence of a constitutionally cognizable liberty or property interest with which the state has interfered."), *aff'd*, 724 F.3d 687 (6th Cir. 2013). "[D]ue process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

Fatal to Plaintiffs' claim, Defendants were not tasked with notifying them of the hearing in the abuse cases. In *Pittman*, discussed above, the Sixth Circuit held that the plaintiff's procedural due process claims failed because he argued that the social worker had deprived him of notice and opportunity for a hearing before the juvenile court made child placement decisions. *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640 F.3d 716, 729–30 (6th Cir. 2011). The court found that under Ohio law it was the juvenile court's duty, and not the duty of the social worker, to give notice to the plaintiff. *Id.* Two years later, in *Kolley v. Adult Protective Servs.*, 725 F.3d 581 (6th Cir. 2013), the Sixth Circuit found the same thing with regard to Michigan's law. Plaintiffs asserted their

Fourteenth Amendment rights were violated when the social workers failed to notify them of the custody hearings regarding their child. *Id.* at 585. The court held that it was "the Michigan courts' duty to notify the appropriate parties to a custody hearing." *Id.* at 587 (citing Mich. Comp. Laws Ann. § 330.1614(3)). As in Michigan and Ohio, it is the Kentucky courts' duty to notify appropriate parties to a dependency, neglect, or abuse action. KRS § 620.070. In fact, the Kentucky statute is explicit that employees of the CHFS may *not* properly notify parents of such a hearing. KRS § 620.070(2). This being the case, Plaintiffs' procedural due process claim fails and Defendants' Motion is **GRANTED** as to this claim.

F. Malicious Prosecution

Plaintiffs' final claim is a state law claim for malicious prosecution. Plaintiffs allege the defendants maliciously instituted the abuse charges, "knowing that the charges were false, or with reckless disregard for the truth," and that the charges were made with the intent of injuring Plaintiffs. [DN 1 ¶¶ 102–108]. Plaintiffs further allege, in an effort to curb any claim of qualified immunity, that Defendants engaged in bad faith while initiating these child abuse cases. [*Id.* ¶ 109].

The Court has original jurisdiction over Plaintiffs' § 1983 claims. 28 U.S.C. § 1331. Because Plaintiffs' state law malicious prosecution claim arises out of the same incident and shares a common nucleus of operative fact, the Court could exercise its supplemental jurisdiction over the state law claim. 28 U.S.C. § 1367. However, the Court now must consider

whether it is prudent to grant such supplemental jurisdiction.

In *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court broadly authorized federal courts to assert jurisdiction over state law claims when there existed a "common nucleus of operative fact" compromising "but one constitutional 'case,'" so long as the court had original jurisdiction over at least one claim. *Gibbs*, 383 U.S. at 725. This decision recognized the discretion courts have in hearing such claims: "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over the state claims . . . ." *Id.* at 726. The Court provided scenarios where pendent jurisdiction may be denied: (1) "if the federal claims are dismissed before trial;" (2) if "it appears that the state issues substantially predominate;" or (3) if "the likelihood of jury confusion" would be strong without separation of the claims. *Id.* at 726–27.

Congress later codified the power of a federal court to hear state claims. 28 U.S.C. § 1367. Similar to the standards articulated in *Gibbs*, the statute recognizes a court's discretion to decline to exercise supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction

(3) the district court has dismissed all claims over which it was original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. Subsection three is applicable to the case at bar.

The Sixth Circuit has made clear that "[c]omity to state courts is considered a substantial interest," and therefore, there exists "a strong presumption against the exercise of supplemental jurisdiction once federal claims have been dismissed—retaining residual jurisdiction 'only in cases where the interests of judicial economy and the avoidance of multiplicity of litigation outweigh [the] concern over needlessly deciding state law issues.'" *Packard v. Farmers Ins. Co. of Columbus*, 423 F. App'x 580, 584 (6th Cir. 2011) (quoting *Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006)).

Here, the Court finds that comity favors dismissal. All federal claims have now been dismissed, and generally "[w]hen all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed." *Musson Theatrical v. Fed. Express Corp.*, 89 F.3d 1244, 1254–55 (6th Cir. 1996). Plaintiffs' state law malicious prosecution claim is dismissed without prejudice so that Plaintiffs may pursue these claims in a more appropriate forum. Defendants' Motions are **GRANTED**.

IV. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Defendants' Motions for Judgment on the Pleadings, or in the Alternative, for Summary Judgment [DN 23; DN 27] are **GRANTED.**

/s/ Joseph H. McKinley Jr.
Joseph H. McKinley Jr., Senior Judge
United States District Court

July 28, 2020

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO.: 4:19-CV-00166-JHM

[Filed: July 28, 2020]

JACOB CLARK, et al.	)
	)
PLAINTIFFS	)
	)
V.	)
	)
BERNDAETTE STONE, et al.	)
	)
DEFENDANTS	)
	)

JUDGMENT

This matter having come before the Court on dispositive motions filed by Defendants, and the Court having issued a Memorandum Opinion and Order on this date granting said motion,

IT IS HEREBY ORDERED that judgment be entered in favor of Defendants consistent with the Court's memorandum opinion and order and the Plaintiffs' complaint be dismissed with prejudice as to all claims except the claim for malicious prosecution.

/s/ Joseph H. McKinley Jr.
Joseph H. McKinley Jr., Senior Judge
United States District Court

July 28, 2020

cc: counsel of record

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-5928

[Filed: June 22, 2021]

JACOB CLARK AND GENETTA CLARK, INDIVIDUALLY AND AS NEXT FRIENDS AND GUARDIANS OF H.C., A MINOR,	)
Plaintiffs-Appellants,	)
v.	)
BERNADETTE STONE, CATHERINE CAMPBELL, AND DOUGLAS HAZELWOOD, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; ERIC FRIEDLANDER AND MARCUS HAYCRAFT, IN THEIR OFFICIAL CAPACITIES ONLY,	)
Defendants-Appellees.	)

ORDER

BEFORE: SUHRHEINRICH, GRIFFIN, and DONALD, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk