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United States Court of Appeals
for the Fifth Circuit

No. 21-50888

MEGAN MARIE MCMURRY, *Individually and as next friend of* J.M.;
ADAM SETH MCMURRY, *Individually and as next friend of* J.M.,

Plaintiffs—Appellees,

versus

KEVIN BRUNNER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CV-242

(Filed Dec. 7, 2022)

Before HIGGINBOTHAM, HIGGINSON, and OLDHAM, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ANDREW S. OLDHAM, *Circuit Judge*, concurring in the judgment.

App. 3

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Before HIGGINBOTHAM, HIGGINSON, and OLDHAM, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:*

Officer Kevin Brunner removed a child from her home during a child endangerment investigation. The

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

child and her parents sued Brunner, claiming the removal violated the child's Fourth Amendment rights and the parents' Fourteenth Amendment rights. Asserting qualified immunity, Brunner moved to dismiss. The district court denied Brunner's motion. We affirm.

I.

In October 2018, Megan and Adam McMurry lived in a gated apartment complex in Midland, Texas with their daughter and son, J.M. and C.M. Ms. McMurry was a teacher at Abell Junior High School, part of the Midland Independent School District. Mr. McMurry served in the National Guard and was then deployed to Kuwait and Syria. J.M. was fourteen years old and homeschooled online and C.M. was twelve years old and attended AJHS at the time of the events of this case.

While Mr. McMurry was deployed, Ms. McMurry was away exploring teaching opportunities in Kuwait from October 25 to October 30, 2018; she arranged for her neighbors, Gabriel and Vanessa Vallejos, to look after J.M. and C.M., as they had done before when she was away. Ms. McMurry also arranged for coworkers to take C.M. to school.

The day after Ms. McMurry left, the school counselor scheduled to drive C.M. to school fell sick and asked an MISD police officer, Alexandra Weaver, if she could drive C.M. while Ms. McMurry was out of town. Weaver did not take C.M. to school, but the counselor got another AJHS faculty member to drive C.M.

Meanwhile, Weaver opened an investigation into the children's welfare, and told her supervisor, Officer Kevin Brunner, of her conversation with the counselor. Brunner met in turn with other faculty members who, while confirming that Ms. McMurry was traveling, also told Brunner that neighbors were checking on the children.

Weaver meanwhile filed a complaint against Ms. McMurry with the Texas Department of Family and Protective Services (CPS). Brunner and Weaver then traveled to the McMurry apartment to conduct a welfare check on J.M. Brunner asked J.M. when Ms. Vallejos last checked on her and J.M. said Ms. Vallejos had been over that morning.[1] The officers told J.M. that they would be taking her to another location. J.M. texted her father that the police were at the McMurry apartment.

The officers took J.M. to the apartment complex's conference room for further questioning and ordered J.M. not to respond to her father who repeatedly called and texted her. J.M. told an apartment complex staff member that she wanted to reach her father, but when the staff member told the officers this, Brunner refused to let J.M. call her father. Brunner called Ms. Vallejos and asked her to meet them at AJHS. Brunner and Weaver then took J.M. to the junior high school in the

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[1] Although Brunner later learned that Ms. Vallejos had not checked on J.M. since the prior evening, this was not known to him when removed J.M. from the apartment. Brunner acted under the belief that Ms. Vallejos last checked on J.M. that morning.

backseat of their police car. Ms. Vallejos called J.M., but Brunner told J.M. that she could not take the call.

At the school, Brunner placed J.M. in an office. The Vallejoses came and spoke to Brunner, stating that they had last seen the children the night before. The Vallejoses were then allowed to see J.M. and they Facetimed Mr. McMurry. That afternoon, CPS investigated the status of the children but found no neglect or unreasonable risk of harm and sent the children home with the Vallejoses.

Brunner nonetheless continued his investigation and filed probable cause affidavits on December 2 and 4, 2018, to obtain an arrest warrant for Ms. McMurry. In January 2020, a jury acquitted Ms. McMurry of the charges of abandoning or endangering her children.

After the acquittal, the McMurrys sued Brunner under 42 U.S.C. § 1983. J.M. asserted that Brunner violated her Fourth Amendment right to be free from unreasonable seizures. Mr. and Ms. McMurry asserted that Brunner violated their rights to substantive and procedural due process under the Fourteenth Amendment by taking J.M. from their home. Brunner moved to dismiss, asserting qualified immunity.[2]

The district court concluded that Brunner was not entitled to qualified immunity as to J.M.'s Fourth Amendment claim and the McMurrys' Fourteenth

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[2] Brunner also raised a state statutory defense, which the district court denied. Brunner did not appeal the denial of his state statutory defense.

Amendment procedural due process claims but found that qualified immunity protected Brunner from the McMurrys' substantive due process claim. Brunner timely appealed.

II.

We review *de novo* the district court's denial of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[3] To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[4] We accept all facts as pleaded and construe them in the light most favorable to the plaintiff.[5] "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6]

III.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

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[3] *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc).

[4] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[5] *Reed v. Goertz*, 995 F.3d 425, 429 (5th Cir. 2021) (internal quotation omitted).

[6] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

known."[7] When a defendant asserts qualified immunity at the motion to dismiss stage, a plaintiff must "have alleged facts sufficient to plausibly show that (1) the defendant's conduct violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged misconduct."[8]

A.

The removal of J.M. was an unreasonable seizure in violation of the Fourth Amendment as a reasonable fourteen-year-old would not have believed she was free to leave when an officer removed them from her home for questioning while instructing her not to respond to calls from her father.[9] At the time of this alleged constitutional violation, our precedent in *Gates v. Texas Dep't of Protective & Regul. Servs*[10] and *Wernecke v. Garcia*[11] had clearly established that an officer could not reasonably remove a child from their home absent a court order, parental consent, or exigent circumstances.

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[7] *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (internal quotation omitted).

[8] *Harmon v. City of Arlington, Texas*, 16 F.4th 1159, 1163 (5th Cir. 2021).

[9] *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 271–77 (2011) (noting that a child's age must be considered in a *Miranda* custody analysis as children are more susceptible to outside pressure).

[10] 537 F.3d 404, 427–29 (5th Cir. 2008).

[11] 591 F.3d 386, 398 (5th Cir. 2009).

A right is clearly established if it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right at the time of the challenged conduct.[12] Brunner argues that Justice Kavanaugh's concurrence in *Caniglia v. Strom* undermines the clarity of the established law.[13] A single sentence from a justice's concurring opinion in 2021 does not erode the notice value of our precedent *at the time of the alleged misconduct* three years earlier in 2018. Brunner was on notice to the clearly established right given *Gates* and *Wernecke.*

Brunner had no court order or parental consent; to the contrary, he prevented J.M. from communicating with her father. Brunner claims exigent circumstances justified the removal of J.M. But "[e]xigent circumstances in this context means that, based on the totality of the circumstances, there is reasonable cause to believe that the child is in imminent danger . . . if [s]he remains in h[er] home."[14] The mere possibility of danger arising in the future is not enough.[15] Accepting the facts as pleaded, we see no indication of any imminent danger to J.M. At the time of the seizure, J.M. was in her family's apartment in a gated complex with staff

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[12] *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

[13] 141 S. Ct. 1596, 1605 (2021) (Kavanaugh, J., concurring).

[14] *Gates*, 537 F.3d at 429; *see also Roe v. Tex. Dep't Protective & Regul. Servs.*, 299 F.3d 395, 407 (5th Cir. 2002) (citing *Tenenbaum v. Williams*, 193 F.3d 581, 604–05 (2d Cir. 1999)) (holding exigent circumstances exist if there is reason to believe that life or limb is in immediate jeopardy).

[15] *See Gates*, 537 F.3d at 427 (citing *Tenenbaum*, 193 F.3d at 594).

present and Brunner believed that Ms. Vallejos had checked on J.M. that very morning. Absent exigent circumstance, Brunner's removal of J.M. was an unreasonable seizure that violated her clearly established Fourth Amendment right.

B.

Brunner invokes the independent intermediary doctrine to argue that the grand jury's indictment of Ms. McMurry for a charge of abandoning or endangering a child establishes that his actions were reasonable. In his brief's statement of the issues, Brunner asserted that the actions of the magistrate and district attorney were also findings by independent intermediaries, but then failed to develop the argument, only focused on the grand jury, thus waiving any argument on appeal relating to the magistrate and district attorney.[16] We address the independent intermediary doctrine only with regards to the grand jury.

Under the independent intermediary doctrine, a grand jury's indictment can shield an officer who violates the Fourth Amendment by breaking the causal chain, ratifying the reasonableness of the officer's actions.[17] To break the causal chain, all the facts must

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[16] *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

[17] *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc).

have been presented to the grand jury.[18] This doctrine applies even if the indictment occurred after the officer acts and even if no conviction ultimately occurs.[19] However, where misdirection of the independent intermediary "taints" its decision, the causal chain remains unbroken.[20]

Brunner's invocation of the independent intermediary doctrine is unavailing as his probable cause affidavit—presented to the grand jury—contained information that Brunner did not know when he removed J.M. The grand jury was presented with information obtained in an investigation that continued after Brunner removed J.M., namely how long it had actually been since Ms. Vallejos last checked on J.M.[21] And it is significant that the affidavit omitted the fact that Mr. McMurry was available and trying to communicate and Brunner knew this. Given the asymmetry of information presented to the grand jury and information known to Brunner at the time of the alleged misconduct, the indictment of Ms. McMurry did not ratify Brunner's actions as reasonable, a conclusion refuted with an acquittal by a fully informed jury. The independent intermediary doctrine does not apply.

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[18] *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988).

[19] Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548, 554 (5th Cir. 2016).

[20] *Hand*, 838 F.2d at 1428.

[21] Brunner believed Ms. Vallejos had been to the apartment earlier that morning when she had only visited the prior evening.

IV.

In child removal cases, the same misconduct that supports a child's Fourth Amendment claim can also support a parent's Fourteenth Amendment claim to their due process right to be free from interference with the care, custody, and management of their children.[22] The McMurry parents brought substantive and procedural due process claims against Brunner. The district court found that Brunner was entitled to qualified immunity as to the parents' substantive due process claim but not their procedural due process claim. Brunner appeals the denial.

In analyzing parents' Fourteenth Amendment claims arising from the removal a child, this Court has said that the same rule from *Gates* applies: "A child cannot be removed 'without a court order or exigent circumstances.' "[23] There was no court order, parental consent, or exigent circumstances to justify the removal of J.M. from the family apartment. Brunner's actions violated the parents' right to procedural due process under the Fourteenth Amendment, law that was clearly established as *Gates* placed officials "on notice that they violate procedural due process when they remove children without a court order or exigent circumstances."[24] Brunner was not entitled to qualified

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[22] *Romero v. Brown*, 937 F.3d 514, 521–23 (5th Cir. 2019).

[23] *Id.* at 521 (quoting *Gates*, 537 F.3d at 434).

[24] *Id.* at 523 (citing *Gates*, 537 F.3d at 434). Although *Romero* was published after the events at issue here, *Romero* concluded that *Gates* clearly established the law in 2008, a decade prior to Brunner's actions in 2018. Thus, the law with regards to the

immunity as to the Fourteenth Amendment claims at the motion to dismiss stage.

V.

We AFFIRM the district court's denial of Brunner's motion to dismiss on the basis of qualified immunity. Accepting the facts as pleaded, there was no justification for the actions of Brunner, which violated J.M.'s clearly established Fourth Amendment right and the McMurrys' Fourteenth Amendment rights to procedural due process. The law is clear, where an officer seeks to remove a child from their home, the officer must secure a court order, parental consent, or there must be exigent circumstances such that there is an imminent danger to the child.

ANDREW S. OLDHAM, *Circuit Judge*, concurring in the judgment:

In my view, two things differentiate this case from so many other qualified-immunity appeals that we handle on a weekly basis. First, this case does not involve a split-second decision by an officer who was trying to protect the public from violence; rather, according to the complaint, the officer in this case executed a deliberate and premeditated vendetta on the McMurry family. And second, the officer in this case

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Fourteenth Amendment was clearly established at the time of the misconduct here.

used his badge and gun to interfere with the McMurry's parental rights. Different parents might have different reactions to the decisions the McMurrys made. But qualified immunity provides no defense to an officer who so grossly misuses his governmental power to interpose himself between parents and their children.

I.

We are reviewing a motion-to-dismiss decision, so we must describe the facts as plaintiffs plausibly allege them, drawing every reasonable inference in their favor. *See Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020). At this stage, here's what we must accept as true:

At the time of the incident, Adam McMurry was serving in the Mississippi Army National Guard and was stationed abroad in Kuwait. Megan McMurry was a teacher at Midland Independent School District ("MISD"), specifically at Abell Junior High School ("AJHS") campus. They have two kids: JM (daughter) and CM (son). JM was 14 and CM was 12. JM was homeschooled through an online program; CM attended school at AJHS, which is the same place Mrs. McMurry taught. The McMurry family lived in a gated apartment complex in Midland, Texas.

Mrs. McMurry wanted to reunite her family. So in 2018, she applied for teaching positions in Kuwait. Later that year, she got an interview with an international school there. She then scheduled a trip to

Kuwait for the interview that would last five days (from October 25 to October 30). During the trip, JM and CM would stay in the family's apartment in Midland, Texas. Mrs. McMurry made arrangements with her "neighbors"—the Vallejos family—to take care of the kids. Mrs. McMurry also informed her colleagues at AJHS about her trip and arranged for coworkers to drive CM to and from school.

Defendants are Alexandra Weaver and Kevin Brunner. At the time of the incident, Weaver was a police officer for the school district and was stationed at AJHS. Brunner was Weaver's supervisor.

The series of unfortunate events started on October 26, one day into Mrs. McMurry's trip. At 8:00 a.m., the coworker who was supposed to take CM to school asked Officer Weaver to do so because the coworker was sick. An honest mistake. Who would've guessed that Weaver's reaction would be this: Weaver, after hearing that Mrs. McMurry was out of town through the weekend, called Brunner and started an investigation into Mrs. McMurry. Weaver and Brunner then talked to a couple of Mrs. McMurry's coworkers to confirm she was out of town through the weekend. Weaver called Texas Department of Family and Protective Services ("CPS").

Instead of investigating further, Weaver and Brunner decided to conduct a welfare check on JM at the McMurrys' apartment. (Weaver did not take CM to school; the coworker got another AJHS faculty member to drive CM to school.) The officers directed an

employee of the apartment complex to knock on the door, while the officers hid behind him. JM opened the door and was startled to see police. Brunner asked JM when Mrs. Vallejos last checked on her, and JM said that Mrs. Vallejos had been over that morning.

Brunner then told JM that "they were going to take her somewhere else to talk to her and that she needed to go back inside to change into warmer clothing." JM began to cry but reluctantly complied with the officer's order. Weaver then followed JM into the apartment and proceeded to search it. Weaver found nothing out of the ordinary during this unconstitutional search.

JM texted her father "Dad, I'm scared. The police are here." But Weaver and Brunner took JM to the apartment complex's conference room to ask JM some questions anyway. They even ordered JM not to respond to her father who had been repeatedly calling and texting her. After some questioning, Brunner and Weaver contacted CPS again. Then they put JM in the back of their police car and took her to AJHS. Mrs. Vallejos called JM, but Brunner told JM that she could not take the call. Brunner and Weaver contacted the Vallejos, and Mrs. Vallejos went to the school to talk to the officers.

In the afternoon, CPS arrived to investigate. The CPS investigator—who obviously understands these situations far better than Brunner or Weaver—then rebuked the officers' purported concerns. Specifically, CPS concluded that the "children's needs were being

met, that Ms. McMurry had made appropriate child care arrangements for the children and for C.M.'s transportation to school in her absence, that the children were able to respond to emergencies, that they faced no unreasonable risk of harm, and that there was no finding of abuse or neglect." CPS then let the children "leave with Ms. Vallejos to return to their home."

You might reasonably think that would be the end of the matter. Brunner and Weaver had snatched a fourteen-year-old girl from her home, held her incommunicado, searched her apartment without any form of suspicion or cause, and held her in the back of a police car and in a school she did not attend. But after CPS arrived and rebuked the officers, *then* they would surely stop.

Wrong. Brunner pressed a criminal investigation of Mrs. McMurry for child abandonment and endangerment. This investigation resulted in two significant consequences. First, when Mrs. McMurry returned to Midland, the school district put her "on administrative leave without pay pending the outcome of the 'current investigation' of the abandonment of children complaint." She was later fired. She "has not worked as a teacher since October 2018." Second, on December 4, Brunner sought an arrest warrant. And he somehow got one. Two days later, Mrs. McMurry "turned herself into the Midland County Jail," and she stayed in jail "for 19 hours while the staff there completed the processing of her bail bond." She was eventually acquitted by a jury.

Thereafter, the McMurry family sued, bringing numerous claims. JM sued Weaver and Brunner for unlawfully seizing her. The parents sued Weaver for an unlawful search and sued both officers for violating the parents' substantive- and procedural-due-process rights. Mrs. McMurry sued Weaver for defamation and invasion of privacy.

The officers moved to dismiss all claims. The district court granted in part and denied in part. After the court's decision, four claims remained: (1) the parents' claim for unlawful search against Weaver; (2) JM's claim for unlawful seizure against both officers; (3) the parents' procedural-due-process claim against both officers; and (4) Mrs. McMurry's claim for invasion of privacy against Weaver. Only Brunner timely filed a notice for interlocutory appeal, so Weaver is not before us.

There are thus two claims on appeal. The first is JM's claim based on a violation of her Fourth Amendment rights as incorporated by the Fourteenth Amendment ("Fourth Amendment claim"). The second is JM's parents' claim based on a violation of their procedural-due-process rights under the Fourteenth Amendment ("Due Process claim"). We have jurisdiction under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Our review is *de novo. Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

II.

I first (A) explain my understanding of qualified immunity, which differs somewhat from the majority's. I then (B) conclude that Brunner violated the parents' procedural-due-process rights under clearly established law. I then (C) conclude that Brunner violated JM's Fourth Amendment rights under clearly established law.

A.

Qualified immunity includes two inquiries. The first question is whether the officials violated a constitutional right. *Jackson v. Gautreaux*, 3 F.4th 182, 186 (5th Cir. 2021). The second question is whether the right at issue was clearly established at the time of the alleged misconduct. *Ibid.* The second question has caused some confusion.

Clearly established law is all about fair notice. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (Qualified immunity's "focus is on whether the officer had fair notice that her conduct was unlawful."). For there to be fair notice, the clearly-established-law standard "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). That is, 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." *Ibid.* (quotation omitted). There are

generally two different paths to show this: (1) an on-point case and (2) the obvious-case exception.

1.

Start with the on-point-case requirement. To show that the law is clearly established, the plaintiff must identify a Supreme Court decision before the time of the alleged misconduct that held there was a constitutional violation on fundamentally or materially similar facts.

There's a lot packed in there. So let's break that down. First, the on-point case must be a *Supreme Court* decision issued before the alleged misconduct. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[T]he court must decide whether the right at issue was 'clearly established' *at the time of defendant's alleged misconduct.*" (emphasis added)). The Supreme Court has never held that circuit precedent can clearly establish the law. *See Wesby*, 138 S. Ct. at 591 n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity."); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) ("assuming that Circuit precedent can clearly establish law for purposes of § 1983"); *Nerio v. Evans*, 974 F.3d 571, 576 n.2 (5th Cir. 2020) ("Although we know the Supreme Court's decisions can clearly establish the law, the Supreme Court has never held that our decisions can do the same."). Until they do, I would not rely on circuit precedent to deny qualified immunity.

Second, the plaintiff must identify a Supreme Court case with fundamentally or materially similar facts. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("Although earlier cases involving *fundamentally similar facts* can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with *materially similar facts*." (emphases added) (quotation omitted)); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."). Identification of such a case ensures that the rule has been defined with specificity.

Third, the "decision must at least hold there was some violation of the [relevant] Amendment." *Nerio*, 974 F.3d at 575; *see also City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) ("Neither the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity."); *White*, 137 S. Ct. at 552 ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.").

It makes sense for the plaintiff to have to point to a *holding* because "[d]ictum is not law, and hence cannot be clearly established law." *Morrow*, 917 F.3d at 875; *see also United States v. Vargas-Soto*, 35 F.4th 979,

997 (5th Cir. 2022) (Dicta has "no binding force."); *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019) (Thapar, J.) ("[O]nly holdings are binding, not dicta."). "And while officers are charged with knowing the results of [Supreme Court] cases . . . officers are not charged with memorizing every jot and tittle . . . writ[t]e[n] to explain them." *Morrow*, 917 F.3d at 875–76 (quotation omitted).

It also makes sense for that holding to be a constitutional *violation*. That's because the best way for a reasonable officer to understand a constitutional rule's contours is when it's applied to materially/fundamentally similar facts that result in a holding of a violation. It'd be difficult to say that facts are materially or fundamentally similar if the result in case *X* is no violation but the result in case *Y* is a violation. The difference in outcome shows that the facts are fundamentally/materially *different*, not similar.

In sum, to show that the law is clearly established, the plaintiff must identify a Supreme Court decision issued before the time of the alleged misconduct that held there was a constitutional violation on fundamentally or materially similar facts.

2.

The other path is the obvious-case exception. This exception has benefits but often-insurmountable burdens.

Benefits first. As best I understand it, the obvious-case exception excuses the on-point-case requirement. In other words, a plaintiff always must point to a Supreme Court decision issued before the time of the alleged misconduct holding a violation of the constitutional right with fundamentally or materially similar facts *unless* he satisfies the obvious-case exception. *See*, *e.g.*, *Rivas-Villegas*, 142 S. Ct. at 8 ("In an obvious case, these standards can clearly establish the answer, even without a body of relevant case law." (quotation omitted)); *Wesby*, 138 S. Ct. at 590 ("Of course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."); *Salazar v. Molina*, 37 F.4th 278, 285 (5th Cir. 2022) ("It's true *Hope* established that a plaintiff need not identify an on-point case to overcome qualified immunity when a violation is 'obvious.'"). The plaintiff may instead rely on "general statements of the law" from a Supreme Court decision to show that the officer had "fair and clear warning." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quotation omitted). Put another way, the plaintiff may rely on general statements to show that "the statutory or constitutional question [is] beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

But to get that benefit, the plaintiff must meet a heavy burden. The Supreme Court recently made clear that for the obvious-case exception, there are two necessary conditions: (1) "particularly egregious facts" and (2) "no evidence" that the official's actions "were

compelled by necessity or exigency." *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam); *cf. Kentucky v. King*, 563 U.S. 452 (2011) (explaining that reactions from police-created exigencies are not split-second decisions).[1]

B.

Under the above framework, the McMurrys have shown that (1) Brunner violated their procedural-due-process rights and (2) this is such an obvious case, on egregious facts, involving no exigency beyond the one Brunner himself created, that Brunner had ample fair notice of his personal liability.

1.

Start with the violation. The Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "standard analysis" is "two steps." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). "We first ask whether there exists a liberty or property interest of which a person has

[1] Such a result makes sense. When an officer has to make a split-second reaction, the clearly-established-law standard is extra rigorous: "[T]he law must be *so* clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876; *see also Gonzalez v. Trevino*, 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting) (suggesting that officers who do not make split-second decisions "should not get the same qualified-immunity benefits that cops on the beat might get").

been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Ibid.* Both are obviously met here.

a.

The McMurrys obviously have a fundamental liberty interest. It's well-established that parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). As Justice Alito put it: "In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children." *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2053 (2021) (Alito, J., concurring).[2] The Supreme Court has

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[2] *See also*, *e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious than property rights." (quotation omitted)); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations." (quotation

squarely held that age-old liberty interest is protected by the procedural guarantee of the Due Process Clause. *See*, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

Officer Brunner obviously deprived the McMurrys of their liberty interest. JM's parents ordered JM to continue her homeschooling (via online instruction) on October 26 (a weekday) while Mrs. McMurry was in Kuwait. By staying in the McMurrys' apartment during school hours, JM was following her parents' instruction. And while JM was in her parents' apartment acting lawfully, she was in her parents' custody. By removing JM from the apartment, Brunner forced JM to violate her parents' entirely lawful instruction and thus deprived the parents of their right to custody and

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omitted)); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("Drawing on enduring American tradition, we have long recognized the rights of parents to direct the religious upbringing of their children." (quotation omitted)); *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." (quotation omitted)); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011) ("Most of his dissent is devoted to the proposition that parents have traditionally had the power to control what their children hear and say. This is true enough."); *id.* at 834 (Thomas, J., dissenting) ("The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children.").

control of their daughter. Even more, Brunner stopped JM's father from further directing his daughter when Brunner prevented JM from answering his calls for no conceivable reason. Prong one is thus easily satisfied.

b.

The McMurrys also did not receive the process they were due. In fact, they received *no* process whatsoever. No *ex parte* court order, no warrant, no notice, no hearing. Nothing. Surely, the McMurrys had a right to at least *some* predeprivation process before their child was snatched from their home.

The Supreme Court has repeatedly explained that "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (quotation omitted)). Admittedly, there are "some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *James Daniel*, 510 U.S. at 53 (quotation omitted); *see also Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to

provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). For this reason, the Supreme Court has held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property." *James Daniel*, 510 U.S. at 62; *see also Connecticut v. Doehr*, 501 U.S. 1, 18 (1991) ("[B]y failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.").[3]

If predeprivation process is required for property unless there is an exigency, then the liberty interest here requires at least the same, if not more. After all, a "parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest *far more precious than any property right*." *Santosky*, 455 U.S. at 758–59 (emphasis added) (quotation omitted); *see also Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made 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." (quotation omitted)). Therefore, unless Brunner establishes

[3] Brunner did not get a court order of any kind, so I need not discuss whether an *ex parte* court order is sufficient process. The only question is whether the McMurrys had a right to any process.

an exigency, the McMurrys' procedural-due-process rights were violated.

Brunner cannot come close to establishing such an exigency. The mere fact a 14-year-old is home alone cannot possibly justify immediately removing the teenager from the home. At the time Brunner seized JM, he knew JM had been without adult supervision for less than a day. JM answered the door, squelching any concern that she was already seriously injured. And nothing from JM's appearance indicated that she was at risk of imminent injury.

Moreover, Brunner's colleague (Weaver) performed an unlawful search of the apartment and found nothing indicating that JM was in any danger—let alone imminent danger. If it was really Brunner's "decision to prioritize the confirmation of [JM's] safety over the continuance of the investigation," as he claims, then at least at that point, Brunner received the very confirmation he prioritized. Instead, he continued to deprive the McMurrys of their liberty interest without justification. For example, after receiving the confirmation, Brunner took JM to AJHS, even though by his own admission, he did so in substantial part for *his own* "convenience" and to solve a "logistical problem." **Blue Br. 8** (quoting **ROA.76 ¶ 33**); **ROA.508; Blue Br. 29.**

Brunner in his brief tries to smuggle in safety concerns he obviously didn't have. To begin with, seven of Brunner's eight purported reasons for seizing JM were not even facially exigent. And the eighth purported reason does not pass the straight-face test: Brunner

feigns concern that JM was at risk of "self-harm" because JM was crying and was worried her mother was in trouble. *See* **Blue Br. 30**. Besides the briefing, there is nothing in the record to suggest Brunner had this concern—let alone that he had it before he made the decision to remove JM from the apartment. He offers no reason to think JM would commit "self-harm" simply because she was crying. He offers no connection between his purported concern about "self-harm" to JM's mother. Plus, if Brunner really thought JM was considering "self-harm" because of her *mother*, he would've let JM talk to her *father*—who was repeatedly calling and texting her. And never mind that all of the fourteen-year-old's tears were created by Brunner's heavy-handedness.

In short, Brunner did precisely what the Supreme Court has forbade: "[T]he Due Process Clause does not permit a State [or one of its officers] to infringe on the fundamental right of parents to make child rearing decisions *simply because a state judge [or officer] believes a better decision could be made.*" *Troxel*, 530 U.S. at 72–73 (emphasis added). Brunner simply thought his idea was better than the one the parents made. Prong two is thus met.

2.

Next, clearly established law. The Supreme Court has not decided many cases on parents' rights to procedural due process. And I see none finding a violation on materially similar facts. So the McMurrys must

show that this is an obvious case to pass prong two. They do.

First, as explained above, there's *no* evidence of necessity or exigency compelling Brunner to make a split-second reaction. *See supra*, at 7. No officer could reasonably have believed that JM was at risk of serious injury any time in the near future. And obviously, neither Brunner himself nor any member of the public faced any danger whatsoever.

Second, the facts here are particularly egregious. Weaver performed an illegal search in front of her supervisor (Brunner). And instead of settling for one constitutional violation (the search), Brunner went on to commit two more (unlawfully seizing JM and violating the McMurrys' due-process rights). And after taking custody of JM, Brunner prevented JM from talking to her father and the Vallejos for a significant amount of time. All while JM was crying and confused. Then CPS told Brunner that his safety concerns were baseless. And *still*, inexplicably, Brunner persisted and pushed for criminal charges against Mrs. McMurry. Like CPS, a jury of Mrs. McMurry's peers squarely rejected Brunner's charges. But the damage was already done: Mrs. McMurry was already fired, was already prevented from teaching again, and had already spent 19 hours in jail.

Finally, the constitutional question is beyond debate. The Supreme Court has clearly held that for property, the Due Process Clause requires predeprivation process unless there is an exigency. The Court has

also clearly held that a parent's liberty interest is far greater than any ordinary property interest. There was no exigency beyond the one Brunner created on his own. So it's beyond debate that the Due Process Clause required some predeprivation process here, and the McMurrys got none.

C.

Finally, JM's Fourth Amendment claim. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment against the States). Under clearly established law, Brunner violated JM's Fourth Amendment rights.

On appeal, all agree that Brunner seized JM the moment she opened the door. That's when Brunner ordered JM to put on warmer clothes, Brunner declared that he was going to take her elsewhere for questioning, and JM began complying with Brunner's order. And all agree that unless there were exigent circumstances, that seizure was unreasonable.

There's no evidence of exigent circumstances to justify Brunner's seizure of JM. Brunner claims that there were exigent circumstances because (1) it was reasonable to believe that JM was in danger of serious injury and (2) it was reasonable to act when he did. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("One exigency obviating the requirement of a warrant is the

need to assist persons who are seriously injured or threatened with such injury. . . . Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."). Even assuming it was reasonable for Brunner to believe JM was at risk of serious injury when he arrived at the apartment complex, it was obviously unreasonable for him to seize JM when he did. Brunner seized JM the moment she opened the door. He did not ask JM any questions before the seizure. For a seizure of JM to be reasonable at that moment, there'd have to be some evidence to show, not just a risk of danger, but an *imminent* risk. And for the same reasons above, Brunner cannot come even close to showing an imminent risk. *See supra*, at 7.

The law is also clearly established under the obvious-case exception. There's no evidence of exigency, the facts are particularly egregious, and the law is beyond debate. *See supra*, at 7, 10–11.[4]

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[4] The independent-intermediary doctrine also provides no help to Brunner. Under that doctrine, "the chain of causation between the officer's conduct and the unlawful arrest 'is broken only where *all the facts* are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary.' " *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (quoting *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016)). It beggars belief that Brunner could demand child abandonment and endangerment charges while omitting the facts that (1) Mr. McMurry was available and eagerly trying to reach his daughter

For these reasons, I concur in the judgment rejecting Brunner's qualified-immunity defense.

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and (2) *Brunner himself* was the one who prevented McMurry from doing so.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

MEGAN MARIE MCMURRY and ADAM SETH MCMURRY, individually and as Next Friend of J.M.,	§	
Plaintiffs,	§	
v.	§	MO:20-CV-00242-DC
MIDLAND INDEPENDENT SCHOOL DISTRICT, ALEXANDRA WEAVER, and KEVIN BRUNNER,	§	
Defendants.	§	

ORDER GRANTING IN PART
OFFICERS' MOTIONS TO DISMISS

(Filed Sep. 3, 2021)

BEFORE THE COURT are the Motions to Dismiss First Amended Complaint filed by Defendants Alexandra Weaver (Officer Weaver) and Kevin Brunner (Officer Brunner). (Docs. 10, 11). Plaintiffs Megan Marie McMurry (Ms. McMurry) and Adam Seth McMurry (Mr. McMurry) (together, Plaintiffs), proceeding individually and as next friend of J.M., a minor child, filed responses to each Motion. (Docs. 17, 18). Officers Brunner and Weaver filed a reply to each response. (Docs. 21, 25). After due consideration, the Court **GRANTS IN PART** and **DENIES IN PART** Officer Brunner's

Motion to Dismiss (Doc. 10) and Officer Weaver's Motion to Dismiss (Doc. 11).

I. BACKGROUND

This is a civil rights case arising from an alleged search and seizure executed by Officers Brunner and Weaver of the Midland Independent School District (MISD) Police Department. (*See* Doc. 8). The incident involved the Plaintiffs' children, who were twelve and fourteen years old at the time. *Id.* The Court will set out the allegations upon which it relies in deciding the instant Motions to Dismiss, accepting all well-pleaded facts in the First Amended Complaint as true and viewing them in the light most favorable to Plaintiffs. *See Johnson v. Johnson*, 385 F.3d 503,529 (5th Cir. 2004).

At the time of the incident, Plaintiffs resided on the third floor of an "upscale apartment building in Midland, Texas." *Id.* at 3. The apartment complex "was gated." *Id.* Moreover, the twelve-year-old child, C.M., was enrolled at Abell Junior High School (AJHS). *Id.* The fourteen-year-old child, J.M., was homeschooled online through K-12's Texas Virtual Academy run by the Hallsville Independent School District. *Id.* 3–4. Officer Weaver knew that J.M. was not a student at MISD, was homeschooled, and stayed home alone throughout the school year while Ms. McMurry was at work. *Id.* at 8.

Ms. McMurry worked for MISD as a special education behavior teacher between 2017 and 2018. *Id.*

She specifically worked at AJHS. *Id.* In 2018, Mr. McMurry was in Kuwait and Syria, serving in the Mississippi Army National Guard. *Id.* at 3–4. Mr. McMurry remained involved in his children's daily care and regularly contacted them to discuss family business, schoolwork, and daily routines. *Id.*

During Mr. McMurry's deployment, Ms. McMurry planned to travel to Kuwait "to explore a job offer to teach at an international school in Kuwait." *Id.* at 4. Ms. McMurry informed AJHS about her travel plans; the staff also knew that Mr. McMurry was deployed. *Id.* at 5. Additionally, Ms. McMurry arranged for her neighbors, Gabriel (Mr. Vallejos) and Vanessa Vallejos (Ms. Vallejos) (together, the Vallejoses), with whom they socialized on occasion, to care for the two children in her absence. *Id.* She also arranged for several colleagues to drive C.M. to school while J.M. stayed at home completing her schoolwork. *Id.* The Vallejoses had full responsibility for the children, as had been the case on other occasions when Ms. McMurry went out of town. *Id.* The families agreed that the Vallejoses would take the children to a football game one evening and go out to dinner a few times. *Id.* Plaintiffs advised their children that they could not have visitors while Ms. McMurry was out of the country and that Mr. McMurry would be available by phone while Ms. McMurry was on her flight. *Id.*

Ms. McMurry left Midland, Texas, to fly out from Dallas, Texas, on October 25, 2018. *Id.* That afternoon, after completing her studies, J.M. looked after the Vallejoses' son when he arrived home from school

while the Vallejoses were still at work. *Id.* J.M. looked after the Vallejoses' son on several occasions before October 25. *Id.* Moreover, one of Ms. McMurry's colleagues (the school counselor) drove C.M. home from school. *Id.* Later in the evening, C.M. and J.M. agreed with the Vallejoses that they would stay in their apartment for the night rather than sleep on the Vallejoses' couch. *Id.*

On October 26, 2018, Officer Weaver, who was stationed at AJHS, was contacted by the school counselor to ask whether Officer Weaver could drive C.M. to school because she was feeling sick. *Id.* at 6. In response, Officer Weaver initiated an investigation into the children. *Id.* Officer Weaver prepared a police report misrepresenting the content of the communication from the school counselor to make it appear that the children would be left unattended all weekend. *Id.* Specifically, Officer Weaver indicated that the children were left home alone for the weekend. *Id.* C.M. was eventually driven to school by Ms. McMurry's teaching assistant, Ms. Nichola Bowers (Ms. Bowers). *Id.*

Officer Weaver contacted her supervisor, Officer Kevin Brunner (Officer Brunner), and informed him that she learned from the school counselor that Ms. McMurry left her children alone. *Id.* at 6–7. Officer Weaver told Officer Brunner that: Ms. McMurry was traveling to Kuwait for a job interview; Ms. McMurry worked as a teacher for MISD; the children were fourteen and twelve years old; and she was asked to drive

C.M. to school that morning.[1] (Doc. 10-1 at 4). Accordingly, Officer Brunner responded to AJHS. *Id.*

At AJHS, Officer Weaver informed Officer Brunner of his conversation with Ms. Bowers regarding Ms. McMurry's travel plans and the children's caregiving arrangements. *Id.* As a result, Officer Brunner met with Ms. Bowers himself. *Id.* at 5.

Ms. Bowers informed Officer Brunner that Ms. Vallejos, a tenant in the apartment complex where the Plaintiffs lived, checked on the children when Ms. Vallejos picked up her younger child, whom J.M. looked after while Ms. Vallejos worked. *Id.* Ms. Bowers confirmed that she drove C.M. to school that morning and that Ms. McMurry left her children unsupervised on more than one occasion. *Id.*

Officer Brunner also met with Jacqulyn Franco (Ms. Franco), a teacher at AJHS. *Id.* Ms. Franco provided Officer Brunner the same information as Ms. Bowers. *Id.* Ms. Franco added that another student asked her for a ride to the McMurry residence because she planned to stay overnight with J.M. *Id.* The student knew that J.M. and C.M. were home alone, and

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[1] The Court will consider Officer Brunner's affidavit "as an aid to evaluating the pleadings," seeing as Plaintiffs rely on the affidavit. *See Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015); *see also* (Doc. 8 at 10, 16, 18). However, the affidavit will "not control to the extent that [it] conflicts with [Plaintiffs'] allegations." *See Bosarge*, 796 F.3d at 440. Accordingly, Plaintiffs' objection to the Court's consideration of the affidavit is overruled.

Ms. Franco believed that the student's parents thought Ms. McMurry would be home. *Id.*

After that, Officer Brunner decided to conduct a "welfare check" on J.M., prioritizing "the confirmation of [J.M.]'s safety over the continuance of the investigation." (Docs. 8 at 8; 101 at 5). Before arriving at the apartment complex, Officer Weaver contacted the Texas Department of Family and Protective Services (CPS) in Austin, Texas, to file a complaint against Ms. McMurry. (Doc. 8 at 9). At the apartment complex, the officers approached the apartment complex's assistant manager and requested that she knock on the door to the apartment. *Id.* at 7. J.M. opened the door. *Id.* Among other things, J.M. indicated that Ms. Vallejos had last checked on her and C.M. at 7:30 a.m. that day. (*See id.*; *see also* Doc. 10-1 at 5). Officer Brunner informed J.M. that they would take her to another location to talk and asked her to change into warmer clothes. (Doc. 8 at 7). J.M. began to cry but complied with the officers' requests. *Id.*

Officer Weaver followed J.M. into the apartment with J.M.'s permission. (Doc. 10-1 at 5). While J.M. changed her clothes in the bedroom, J.M. saw Officer Weaver search the apartment, opening cabinets, drawers, and the refrigerator. (Doc. 8 at 9). At no point did Officer Weaver request consent to search. *Id.* J.M. sent Mr. McMurry a text message saying, "Dad, I'm scared. The police are here." *Id.* When Officer Weaver and J.M. returned to the door, Officer Weaver told Officer Brunner that the front door remained unlocked. (Doc. 10-1 at 5).

The officers escorted J.M. to the apartment complex's main office, where she was interviewed in a conference room. (Doc. 8 at 9). While the officers questioned J.M., Mr. McMurry tried to call J.M. by Facetime multiple times and sent her text messages asking why he could not Facetime her. *Id.* The officers ordered J.M. not to answer Mr. McMurry's calls or texts. *Id.* The officers also prohibited J.M. from contacting Mr. McMurry and answering a phone call from Ms. Vallejos. *Id.* at 10.

During the officers' interview with J.M., she informed them that Ms. McMurry went to Kuwait on a job interview and that she had last spoken to Ms. McMurry at roughly 6:00 or 7:00 p.m. the night before. (Doc. 10-1 at 5). She also advised them of Ms. McMurry's specific travel plans and that the reason she and C.M. stayed behind was that Ms. McMurry did not want C.M. to miss school. *Id.* J.M. confirmed that she looks after the Vallejos' child every day until approximately 6:30 p.m. when Ms. Vallejos picks him up from Plaintiffs' apartment. *Id.* Before visiting them the morning of October 26, Ms. Vallejos had last checked on J.M. and C.M. when she picked up her child the previous evening. *Id.* J.M. also informed the officers that Ms. McMurry drove for Uber from 7:00 p.m. to 2:00 a.m., but had recently gotten home around midnight. *Id.* Officer Brunner decided to transport J.M. to AJHS to continue his investigation. *Id.*

Before leaving the apartment complex, Officer Brunner contacted the local CPS office after confirming with CPS Agent Gilberto Villareal (Officer Villareal)

that the situation necessitated CPS involvement. (Docs. 8 at 9; 10-1 at 5). One of the officers informed CPS that Ms. McMurry left her children home alone, that her neighbor periodically checked on the children, and that the children did not go to school on October 26.[2] *Id.* at 9–10. J.M. was transported to AJHS in the backseat of a patrol unit. *Id.* At AJHS, J.M. was placed in an office while the officers spoke with the Vallejoses. *Id.* at 12.

Officer Brunner contacted Ms. Vallejos by telephone and informed her that he had to speak with her because J.M. and C.M. were home alone and that leaving the children home alone is a criminal offense. *Id.* Ms. Vallejos indicated that she had last seen the children the previous evening while the children were walking the dog, not the morning of October 26 like J.M. had advised the officers. (Doc. 10-1 at 6). After confirming Ms. Vallejos preferred to speak in person, Officer Brunner asked Ms. Vallejos to meet him at AJHS. (Doc. 8 at 10).

When Mr. and Ms. Vallejos arrived at AJHS, Officer Brunner did not question Ms. Vallejos regarding the caretaking arrangements for the children. *Id.* Instead, Officer Brunner clarified that Ms. Vallejos was not the target of the investigation. *Id.*

Mr. Vallejos confirmed that the last time he and Ms. Vallejos saw J.M. and C.M. was the previous evening. (Doc. 10-1 at 6). Mr. Vallejos also advised the

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[2] Plaintiffs allege the latter statement was false because the officers knew C.M. was driven to AJHS that morning and that J.M. was homeschooled. (Doc. 8 at 9–10).

officers that: Ms. McMurry would return the following Tuesday; he and his wife watched C.M. and J.M. when Ms. McMurry traveled to El Paso to visit her husband on a separate occasion; the children stayed in their apartment because they wanted to sleep in their own beds; and his younger child would be left with J.M. while he and his wife worked on Saturday. *Id.*

After the interview with the Vallejoses, the Vallejoses were placed in the same room as J.M., and Ms. Vallejos was allowed to Facetime Mr. McMurry so that J.M. could speak with him. (Docs. 8 at 12; 10-1 at 6). Mr. McMurry asked to speak with one of the officers, but neither officer wanted to talk with him. (Doc. 8 at 12).

Meanwhile, the officers interviewed C.M. (Doc. 10-1 at 6). C.M. confirmed that the last time the Vallejoses checked on him and J.M. was the previous evening. *Id.* C.M. advised that J.M. was responsible for preparing food. *Id.* Ms. McMurry told the children to contact Ms. Vallejos in case of an emergency. *Id.* C.M. further noted that Ms. McMurry had left town without taking him or J.M. on two prior occasions. *Id.* C.M. confirmed J.M.'s assertion that Ms. McMurry drove for Uber at night. *Id.*

After CPS conducted an investigation, including a call with Ms. McMurry, they closed the case promptly, finding no abuse or neglect. (Doc. 8 at 13–14). The CPS investigator informed the parties that the children could leave with Ms. Vallejos that same day. *Id.* at 14.

At approximately 5:00 p.m. on October 26, Ms. McMurry called Officer Brunner inquiring about the events that transpired that morning and afternoon. (Doc. 10-1 at 6). The parties agreed to meet in person on October 31. *Id.*

After the CPS investigation was closed, the officers interviewed the school counselor, who had driven C.M. home from school on October 25. (Doc. 8 at 13–14). The officers coached the counselor to answer questions in a way that negatively impacted Ms. McMurry. *Id.* When Ms. McMurry returned from Kuwait on October 30, the officers contacted her to obtain her statement. *Id.* At that time, Ms. McMurry realized the officers wanted to pursue abandonment charges against her. *Id.*

Officer Brunner did not hear from Ms. McMurry on October 31, and the e-mails the officer sent Ms. McMurry went unanswered. (Doc. 10-1 at 6). On November 5, Officer Brunner attempted to contact Ms. McMurry by telephone; however, Ms. McMurry answered the call and quickly hung up. *Id.* After several attempts, Officer Brunner was unable to schedule a meeting with Ms. McMurry. *Id.*

After the incident, Ms. McMurry and J.M. experienced sleeplessness, depression, anxiety, and disruption in their daily routines. (Doc. 8 at 14–15). Plaintiffs' marriage also suffered, prompting them to attend therapy from November 2018 through mid-2020. *Id.* J.M. became fearful and distrustful of law enforcement. *Id.* Mr. McMurry experienced anger and frustration with

his inability to be with his family during his mission in Kuwait. *Id.*

Officer Weaver spoke of the criminal investigation with other employees at MISD who were not involved in the investigation before charges were filed against Ms. McMurry. *Id.* The officer informed other employees that Ms. McMurry had abandoned her children, that it was difficult to set up a meeting with Ms. McMurry, that the officers were going to press charges against Ms. McMurry, and that Ms. McMurry would be going to jail. *Id.* Ms. McMurry complained about Officer Weaver to MISD, and, after an investigation, Officer Weaver was assigned to a different school campus within MISD. *Id.* Ms. McMurry also found out that Officer Weaver spoke of the events relevant to the criminal investigation with other AJHS employees who were not a part of the investigation. *Id.*

During this time, C.M. was asked by other children whether his mother would be arrested and whether she had abandoned him, making him uncomfortable and prompting C.M. to ask his parents to remove him from school. *Id.* at 16.

Officer Brunner filed a probable cause affidavit on December 4, 2018, to obtain an arrest warrant for Ms. McMurry. *Id.* at 18. Ms. McMurry turned herself into the Midland County Jail on December 6, 2018; she remained in jail for nineteen hours before Midland County Jail staff processed her bail bond. *Id.* On January 6, 2020, Ms. McMurry had a jury trial for

abandoning or endangering her children. *Id.* On January 9, 2020, Ms. McMurry was acquitted by a jury. *Id.*

On October 16, 2020, Plaintiffs filed the instant lawsuit under 42 U.S.C. § 1983 against MISD, Officer Weaver, and Officer Brunner. (Doc. 1). In their First Amended Complaint, Plaintiffs allege Defendants violated Plaintiffs' rights and privileges secured by the Fourth Amendment and the Fourteenth Amendment.[3] (Doc. 8 at 20–27). Finally, Ms. McMurry raises defamation and invasion of privacy claims against Officer Weaver. *Id.* at 30–31.

Officers Brunner and Weaver filed Motions to Dismiss on December 9, 2020, and December 11, 2020, respectively. (Docs. 10, 11). The Motions were fully briefed on January 4, 2021. (*See* Docs. 18, 17, 21, 25).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *See Johnson*, 385 F.3d at 529. Further, the court does not look beyond the face of the complaint to determine whether the plaintiff states a claim under Rule 12(b)(6). *See Spivey v.*

[3] Ms. McMurry also raises a breach of contract and lack of due process claim against MISD under the Texas Education Code and the Fourteenth Amendment. (Doc. 8 at 28–29). This claim is not relevant to the instant Motions.

Robertson, 197 F.3d 772, 774 (5th Cir. 1999). However, a district court may consider documents attached to a motion to dismiss if they are referred to in the complaint and are central to the plaintiffs claim. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). "[P]laintiffs must allege facts to support the elements of the cause of action in order to make out a valid claim." *See Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011). The court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *See Ferrar v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)); *see also DeMoss v. Crain*, 636 F.3d 145, 152 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plausibility requires more than "a sheer possibility that a defendant has acted unlawfully." *Id.* Likewise, threadbare recitals of a cause of action's elements supported by conclusory statements will not survive a motion to dismiss. *Id.* Factual allegations must raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. A plaintiffs failure to meet the specific pleading requirements should not automatically or inflexibly result in the dismissal of the

complaint with prejudice to re-filing. *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000).

III. DISCUSSION

Both officers raise the qualified immunity defense as to the § 1983 claims. (Docs. 10 at 8–19; 11 at 5–14). Officer Brunner also raises Texas statutory immunity as a defense. (*See* Doc. 10). Officer Weaver raises Texas statutory immunity as a defense only as to the state-law claims filed against her. (*See* Doc. 11). The Court will first consider the qualified immunity issue.

A. Qualified Immunity

"Government officials who perform discretionary functions are entitled to the defense of qualified immunity, which shields them from suit as well as liability for civil damages, if their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Bradyn S. v. Waxahachie Indep. Sch. Dist.*, 407 F. Supp. 3d 612, 622 (N.D. Tex. 2019) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity is an affirmative defense that must be pled. *Id.* (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Officers Weaver and Brunner raised the defense in the Motions to Dismiss. (Docs. 10, 11).

After a defendant asserts qualified immunity, the burden shifts to the plaintiff to "rebut this defense by establishing that the official's allegedly wrongful

conduct violated clearly established law." *See Pierce v. Smith*, 117 F.3d 866, 871–72 (5th Cir. 1997) (quoting *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992)). The Fifth Circuit does not require that "an official demonstrate that he did not violate clearly established federal rights." *Id.* (citing *Salas*, 980 F.2d at 306). That burden is solely on the plaintiff. *Id.*

Courts apply a two-part inquiry when deciding whether an officer is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The court must decide "whether the facts alleged or shown are sufficient to make out a violation of a constitutional or federal statutory right." *Id.* If there was no violation, no further inquiry is necessary. *Id.* However, if the plaintiff sufficiently pleads a constitutional violation, the court must then decide "whether the right at issue was clearly established at the time of the government official's alleged misconduct." *Bradyn S.*, 407 F. Supp. 3d at 622–23 (citing *Saucier*, 544 U.S. at 201). Under *Pearson v. Callahan*, district courts may exercise their discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. 223, 236 (2009). The second prong of the two-part inquiry involves two questions. *See Bradyn S.*, 407 F. Supp. 3d at 623 (citations omitted). The first inquiry is "whether the allegedly violated constitutional right[ ] [was] clearly established at the time of the incident." *Id.* (citations omitted) (alterations in original). If so, the second inquiry is "whether the conduct of the defendant[ ] [official] was objectively

unreasonable in light of that then clearly established law." *Id.* (citations omitted) (alterations in original).

When considering a qualified immunity defense at the pleading stage, the Court must answer two questions. *Romero v. Brown*, 937 F.3d 514, 519 (5th Cir. 2019). "First, does the complaint allege a constitutional violation?" *Id.* "If so, was the violation clearly established so that the government official would have known she was violating the law?" *Id.*

1. Officer Brunner

In count one, J.M. alleges Officer Brunner violated her Fourth Amendment right to be free from an unreasonable seizure when he and Officer Weaver removed her from her parents' home without notifying her parents and without a directive from CPS.[4] (Doc. 8 at 22). In count two, Plaintiffs allege Officer Brunner encroached upon Plaintiffs' substantive due process against interference with their right to family integrity when they temporarily detained J.M. *Id.* at 25. Plaintiffs also argue the officer failed to provide Plaintiffs with "any of the procedural due process protections

[4] It is not clear whether Mr. and Ms. McMurry raise a Fourth Amendment claim for unlawful seizure based on J.M.'s removal from her parents' home. (*See* Doc. 8). However, to the extent that they do, the claim is dismissed because the right to be free from unreasonable seizure under the Fourth Amendment is a personal right which may not be vicariously asserted. *See*, *e.g.*, they *Kalmus v. Zimmermann*, No. 1:15-CV-316-RP, 2016 WL 6462297, at *8 (W.D. Tex. Nov. 1, 2016) (dismissing parents' Fourth Amendment claim based on the alleged unlawful seizure of their minor child) (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

that would normally apply to state removal of a child. . . ." *Id.* at 25–26.

a. Alleged Fourth Amendment Violation

J.M. alleges that removing her from her parents' home was an unreasonable seizure because there was no indication that the conditions of the home were "precarious or that [she and C.M.] were physically harmed or distressed or that they were deprived of any resources." (Doc. 17 at 17). J.M. argues that Officer Brunner failed to inquire about the degree of the caretakers' role in supervising and managing the children in Ms. McMurry's absence. *Id.* J.M. also notes that CPS did not direct officer Brunner to remove her from the home. *Id.*

Officer Brunner responds that he was acting under Texas Family Code § 262.104, which allows law enforcement to take possession of a child without a court order. (Doc. 10 at 11) (citing Tex. Fam. Code § 262.104(a)(1) and (2)).

J.M.'s claim against Officer Brunner for a Fourth Amendment violation is based solely on the officers' removal of J.M. from her parents' apartment. (Doc. 8 at 22 ¶ 59). The Fourth Amendment protects a child's right to be free from unreasonable seizure. *See Wooley v. City of Baton Rouge*, 211 F.3d 913, 925 (5th Cir. 2000). The Court will first consider whether J.M. has pleaded with sufficient specificity that a constitutional

violation occurred. *See Backe*, 691 F.3d at 648 (citations omitted).

(i) *Alleged Constitutional Violation*

A seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Court opines that a fourteen-year-old would not have felt free to leave while being questioned by law enforcement officers outside the presence of their parents. *See J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011) ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."); *Gates v. Tex. Dept of Protective & Regal. Servs.*, 537 F.3d 404, 431 (5th Cir. 2008) (finding little doubt that the children were seized when they were removed from their school by state actors). Further, Officer Brunner does not dispute that J.M. was seized when he and Officer Weaver removed her from the apartment to interview her in the apartment complex's front office. (*See* Doc. 10). Accordingly, J.M. has pleaded sufficient facts to establish she was seized.

To constitute a constitutional violation, however, the seizure must have been unreasonable. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). The reasonableness of a seizure is assessed by balancing "the nature and quality of the intrusion on the individual's Fourth

Amendment interest against the importance of the governmental interest that justify the intrusion." *Gates*, 537 F.3d at 429 (citing United States v. Place, 462 U.S. 696, 703 (1983)). A child cannot be removed from their home without "a court order, parental consent, or exigent circumstances." *Id.* Officer Brunner does not argue that he had a court order or parental consent. (*See* Doc. 10). "Exigent circumstances in this context means that, based on the totality of the circumstances, there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if he remains in his home." *Gates*, 537 F.3d at 429; *see also Smith v. Tex. Dep't of Fam. & Protective Servs. CPS*, No. 05:08-CA940-XR, 2009 WL 2998202, at *10 (W.D. Tex. Sept. 15, 2009) (citation omitted).

In 2009, the Fifth Circuit adopted the *Gates* standard to fit child endangerment investigations. *See Wernecke v. Garcia*, 591 F.3d 386, 398 (5th Cir. 2009). In child endangerment investigations, courts must consider the time available "to obtain a court order, the risk that a parent might flee with the child, the availability of less extreme solutions, and any harm to the child that might arise from the removal." *Id.* Further, the Fifth Circuit reviews "the nature of the danger facing the child (its severity, duration, frequency, and imminence), the strength of the evidence supporting immediate removal, and the presence or absence of parental supervision." *Id.*

When the officers removed J.M. from her parents' home, based on Officer Brunner's affidavit, Officer Brunner was only aware of the following facts. (Doc.

10-1 at 4–5). First, Ms. McMurry was out of the country. *Id.* Second, J.M. and C.M. stayed in Midland, Texas, in Plaintiffs' apartment alone. *Id.* Third, J.M. was tasked with babysitting another child. *Id.* Fourth, the child J.M. was babysitting belonged to another tenant in Plaintiffs' apartment complex. *Id.* Fifth, Ms. McMurry arranged for the tenant to check on J.M. and C.M. when she picked up her own child from Plaintiffs' apartment. *Id.* Sixth, Ms. Bowers had taken C.M. to school that morning. *Id.* Seventh, Ms. McMurry left her children unsupervised on previous occasions. *Id.* Eighth, another student asked a teacher for a ride to Plaintiffs' apartment because she planned on staying the night with J.M. *Id.* Ninth, the student knew Ms. McMurry was not home, and the student's parents believed Ms. McMurry would be home. *Id.* Tenth, Ms. Vallejos had last checked on the children at 7:30 a.m. *Id.* Eleventh, the door to the apartment remained unlocked. *Id.* Finally, J.M. was homeschooled and stayed home alone throughout the school year while Ms. McMurry worked at AJHS.[5] (Doc. 8 at 8). Officer Brunner "decided to [take J.M.] to the common area of the apartment complex to continue the interview[,]" removing J.M. from her parents' home. (Doc. 10-1 at 4–5). Later, J.M. was taken from the apartment complex to AJHS. *Id.*

Few facts weigh toward the reasonableness of the removal—the absence of parental supervision for some

[5] In general, "police officers may act on the basis of information known by their colleagues in conducting searches and seizures." *Gates*, 537 F.3d at 430–31 (citations omitted).

days, several MISD employees corroborated that Ms. McMurry went out of town and left her children home alone, and Ms. McMurry had previously left her children home alone.[6] Most facts weigh against finding the seizure reasonable—the officers arrived at the apartment early in the morning and obtaining a court order would have been possible, there was no risk of flight because Ms. McMurry was out of the country, the home was in a gated community, J.M. was not deprived of basic needs, J.M. was fourteen years old,[7] there was no immediate threat to J.M.'s life or limb, and it does not appear that the officers explored a less extreme solution. Further, Officer Weaver knew that J.M. was homeschooled and stayed home alone during the school year while Ms. McMurry taught at AJHS. Thus, it does not appear that the need for removal was urgent.

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[6] Notably, citing Second Circuit case law, the Fifth Circuit has suggested that "the mere possibility of danger is not enough." *Gates*, 537 F.3d at 427 (quoting *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999)). Additionally, a sister district court has required state actors to "do more than demonstrate general concerns about [the child's] welfare." *Kalmus v. Zimmermann*, No. 1:15-CV-316-RP, 2016 WL 6462297, at *9 (W.D. Tex. Nov. 1, 2016).

[7] J.M. was fourteen years old at the time, and she had a cell phone and access to adults. (Doc. 8 at 4). The Court notes that the children's age is critical. *See Pate v. Harbers*, No. 1:15-CA-375-SS, 2015 WL 4911407, at *7 (W.D. Tex. Aug. 17, 2015), *aff'd*, 667 F. App'x 487 (5th Cir. 2016) (finding the child's age "highly relevant to the exigency analysis because age heavily influences the nature of the danger facing the child").

Considering the totality of the circumstances and evaluating the facts in light of the "flexible inquiry" required by *Gates*, no reasonable person would believe J.M. was in immediate danger to justify the seizure.[8] The Court rules J.M. has pleaded sufficient facts to state a constitutional violation.

The Court notes that the Fifth Circuit has found more severe circumstances fall short of exigent circumstances. *See Wemecke*, 591 F.3d at 398 (finding the presence of medications and syringes in the home, in child-proof containers, and under parental supervision, does not rise to the level of exigency).

For thoroughness, the Court acknowledges Officer Brunner's argument that he believed J.M. faced an immediate danger to her physical health or safety. (Doc. 10 at 11–12). And that § 262.104 of the Texas Family Code allows law enforcement to remove children from the home if the officer is aware of facts that "would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child." *Id.* (citing Tex. Fam. Code § 262.104(a)(1)). However, the Texas Family Code does

[8] Officer Brunner points to the issuance of an indictment by a grand jury for abandoning or endangering a child and argues that the indictment establishes, as a matter of law, that there was probable cause to believe that J.M. and C.M. were placed in imminent danger of death, bodily injury, or physical or mental impairment. (Doc. 10 at 12–13). However, the grand jury's indictment was premised on an investigation that occurred, in part, after the decision to remove J.M. from the home was made and executed. Accordingly, it is not relevant to the Court's inquiry in relation to the instant Motion.

not exempt law enforcement's actions from constitutional scrutiny, as the Fifth Circuit explained in *Gates*. 537 F.3d at 421–22. "A statutory command [to remove children in immediate danger] is not a license to ignore the Fourth Amendment. . . ." *Id.* (citing *Sibron v. New York*, 392 U.S. 40, 60 (1968)). Moreover, the Texas statute provides a framework that, like exigent circumstances, requires immediate danger before law enforcement removes a child from the home. *See* Tex. Fam. Code § 262.104(a)(1). Texas law explains that "[r]emoving a child from his home and parents on an emergency basis . . . is an extreme measure that may be taken only when the circumstances indicate a danger to the physical health and welfare of the child." *In re Pate*, 407 S.W.3d 416, 419 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citations omitted). The need for the child's protection must be "so urgent that immediate removal from the home is necessary." *Id.*

In sum, J.M.'s claim for a violation of her right to be free from an unreasonable seizure against Officer Brunner survives the first prong of the qualified immunity analysis.

(ii) *Whether the Right was Clearly Established*

As to the second prong of the qualified immunity analysis, the Court must determine whether the right allegedly violated was clearly established at the time of the incident. See Bradyn S., 407 F. Supp. 3d at 623. "The central purpose of the 'clearly established' inquiry

is to determine whether 'prior decisions gave reasonable warning that the conduct at issue violates constitutional rights.'" *See Pate v. Harbers*, No. 1:15-CA-375-SS, 2015 WL 4911407, at *8 (W.D. Tex. Aug. 17, 2015), *aff'd*, 667 F. App'x 487 (5th Cir. 2016) (quoting *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004)). However, the "clearly established" inquiry must be considered "in light of the specific context of the case, not as a broad general proposition." *Id.* (citing *Gates*, 537 F.3d at 429). Therefore, the Court must consider whether the law put Officer Brunner on notice that his conduct violated the Fourth Amendment. *See id.*

It is clear that law enforcement officers cannot remove a child without a court order or parental consent unless exigent circumstances exist. *See id.* The rule is violated unless there is immediate danger to the child. *See Gates*, 537 F.3d at 428–29. Although J.M. does not point to a case applying the standard to an identical factual scenario, alleged child abandonment, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). However, there must be "sufficient indicia that the conduct in question was illegal." *See Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 410 (5th Cir. 2009) (citing *Freeman v. Gore*, 483 F.3d 404, 415 (5th Cir. 2007)). Relevant to this case, the *Gates* decision unequivocally "articulated a standard for determining when some evidence of danger rises to the level of an emergency justifying immediate removal." *Wernecke*, 591 F.3d at 400. In the instant case, the alleged facts do not indicate J.M. was in immediate

danger. Instead, Plaintiffs plead that J.M. was a capable and mature fourteen-year-old and that the apartment was safe. (*See* Doc. 8). The fact that the fourteen-year-old would have stayed home alone does not create such an urgency that J.M. needed to be removed before a court order could be obtained.

Also relevant is the Fifth Circuit's *Wernecke* decision in 2009, which incorporates the parent's absence or presence as a factor to be considered in deciding exigent circumstances. Thus, although the Fifth Circuit has not evaluated whether a fourteen-year-old child is in immediate danger when she is home alone, it has provided a standard that contemplates these factual circumstances. Thus, there were sufficient indicia that Officer Brunner's actions were illegal.

The Court holds Officer Brunner's actions were objectively unreasonable considering the clearly established law.

In sum, at this time, Officer Brunner is not entitled to qualified immunity on J.M.'s unlawful seizure claim.

b. Alleged Fourteenth Amendment Violation

Plaintiffs argue Officer Brunner violated Plaintiffs' right to family integrity when he detained J.M., a right that the Fourteenth Amendment protects. (Doc. 8 at 24–25). Plaintiffs allege a violation of both their procedural and substantive due process. *Id.*

(i) *Substantive Due Process*

"The constitutional right to family integrity was well established in 1992." *Morris v. Dearborne*, 181 F.3d 657, 671 (5th Cir. 1999). Specifically, "a parent's custody and control of her children is a fundamental liberty interest, the government may violate substantive due process when it takes away that right." *Romero*, 937 F.3d at 519 (citations omitted). The right is not absolute. *See McCullough v. Herron*, 838 F. App'x 837, 842 (5th Cir. 2020). The state also has an interest in protecting the health, safety, and welfare of children. *Id.* (citing *Morris*, 181 F.3d at 669; *Wooley*, 211 F.3d at 924).

The Fifth Circuit created a test to determine "whether the conduct of state actors violated the constitution by analyzing claims of state interference with the right to family integrity 'by placing them, on a case-by-case basis, along a continuum between the state's clear interest in protecting children and a family's clear interest in privacy.'" *Id.* (quoting *Morris*, 181 F.3d at 671). Therefore, the Court must determine whether Officer Brunner's "individual actions were arbitrary or conscience shocking on the continuum between private and state interests." *Id.* If the interests of the state and the family overlap, "the right to family integrity is considered too 'nebulous' to find a clearly established violation." *Romero*, 937 F.3d at 520 (quoting *Morris*, 181 F.3d at 671). However, if it is clear that the state's interest is "negligible" and "the family privacy right is well developed in jurisprudence . . . qualified immunity is not a defense." *Id.* (quoting *Morris*, 181 F.3d at 671).

Accordingly, overcoming qualified immunity on a family integrity claim is dependent on "the degree of fit between the facts of [the] case and [the Fifth Circuit's] prior opinions." *Id.* (citations omitted) (internal quotation marks omitted).

The Court rules that the fit is lacking in this case. Specifically, there is no Fifth Circuit caselaw involving an investigation into child abandonment, and the Plaintiffs do not cite any. *See Romero*, 937 F.3d at 521 (noting the state's interest in preventing child abuse was attenuated but recognizing the state's interest in protecting children). Further, here, the temporary removal lasted only several hours. (*See* Doc. 8). The Fifth Circuit has found "clear violations of substantive due process only when the removal measured in months or years." *Romero*, 937 F.3d at 521 (citations omitted). For example, the Fifth Circuit held that a one-day removal was a "less substantial interference with the right to control a child's upbringing than [] far lengthier removals." *Id.* (citing *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988)). This fact further confirms that this case falls in the nebulous zone of the substantive due process continuum.

The Court finds qualified immunity protects Officer Brunner from the Plaintiffs' substantive due process claim.

(ii) *Procedural Due Process*

Before a parent is deprived of their liberty interest in the custody and management of their children,

procedural due process must be provided. *See Romero*, 937 F.3d at 521–22 (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1972); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Gates*, 537 F.3d at 435). State actors must follow specific procedures that, at a minimum, include providing notice and an opportunity to be heard in a meaningful time and manner. *Id.* Further, "unlike the fuzzy continuum that governs substantive due process in this area, there are bright lines when it comes to the procedural safeguards." *Id.*

As noted in relation to J.M.'s Fourth Amendment claim, children cannot be removed from the home without a court order, parental consent, or exigent circumstances. *Gates*, 537 F.3d at 434. The Fifth Circuit equates "the procedures required under the Fourteenth Amendment with those required under the Fourth Amendment for searches and seizures related to child [endangerment] investigations." *Id.* (quoting *Doe v. Kearney*, 329 F.3d 1286, 1299 (11th Cir. 2003)).

Officer Brunner did not have a court order to remove J.M. from the home. (*See* Docs. 8, 10–1). Additionally, as previously noted, there was no reason to believe that J.M. faced immediate danger if she was not "immediately removed." Further, immediately returning J.M. to Ms. Vallejos, whom Ms. McMurry charged with the care of her children, "lends further support to a procedural due process claim under the clearly established *Gates* standard." *Romero*, 937 F.3d at 522.

In sum, because the First Amended Complaint plausibly alleges that Officer Brunner violated Plaintiffs'

procedural due process and that the right was clearly established such that Officer Brunner was aware that his conduct was illegal, said claim against Officer Brunner survives the Motion to Dismiss.

2. Officer Weaver

In count one, Plaintiffs allege Officer Weaver entered the apartment and conducted a search without a warrant or consent. (Doc. 8 at 21). J.M. also alleges that Officer Weaver violated her Fourth Amendment right to be free from an unreasonable seizure when he and Officer Brunner "seized" her. *Id.* at 22. In count two, Plaintiffs allege Officer Weaver encroached upon Plaintiffs' substantive due process against interference with their right to family integrity when he and Officer Brunner temporarily detained J.M. *Id.* at 25–26. Finally, Plaintiffs claim Officer Weaver failed to provide Plaintiffs with "any of the procedural due process protections that would normally apply to state removal of a child. . . ." *Id.* at 25–26.

Plaintiffs' § 1983 claims against Officer Weaver are premised on the same allegations against Officer Brunner, except for the unlawful entry and search claim. (*See* Doc. 8). Accordingly, J.M.'s § 1983 claim for illegal seizure[9] and Plaintiffs' claim for violation of

[9] Officer Weaver's argument regarding J.M.'s seizure focuses on the alleged danger J.M. faced being home alone. (Doc. 11 at 9–10). However, Officer Weaver does not argue that the danger was immediate such that J.M.'s removal from the home was necessary without a court order. *Id.* Further, as previously explained in this

their procedural due process[10] survive Officer Weaver's Motion to Dismiss for the same reasons they overcome Officer Brunner's Motion to Dismiss. Likewise, Plaintiffs' § 1983 claim for violation of their substantive due process does not pierce Officer Weaver's immunity.

The only § 1983 claim remaining against Officer Weaver is based on the alleged illegal entry and search. The Court will conduct the two-prong inquiry to determine whether the remaining § 1983 claim pierces Officer Weaver's qualified immunity.

The Fourth Amendment protects against unreasonable searches. *Wernecke*, 591 F.3d at 398. In assessing the reasonableness of a search, the Court must "balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interest alleged to justify the intrusion.'" *Id.* (quoting *Wooley*, 211 F.3d at 925). "Warrantless searches of a person's home are presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances

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Order, the officers' reliance on the grand jury indictment against Ms. McMurry is misplaced.

[10] Officer Weaver argues she had a duty to report suspected neglect. (Doc. 11 at 7). And that she acted in accordance with the law when she reported suspected neglect. *Id.* at 8. However, that duty is not relevant to J.M.'s seizure. Moreover, although Plaintiffs include Officer Weaver's alleged misrepresentations to various parties, including CPS, Plaintiffs do not raise a § 1983 claim based on Officer Weaver's report of neglect. (*See* Doc. 8 at 21–31) (listing and explaining the basis of their claims). Thus, the Court will not address arguments related to Officer Weaver's alleged misrepresentations.

justify the search." *United States v. Gomez-Moreno*, 479 F.3d 350, 354 (5th Cir. 2007) (citing *United States v. Jones*, 239 F.3d 716, 719 (5th Cir. 2001)). Further, there is a "special need" exception that applies in few instances. *Gates*, 537 F.3d at 420 (citing *Roe v. Tex. Dept of Protective & Regulatory Servs.*, 299 F.3d 395, 404 (5th Cir. 2002)).

In the instant case, it is undisputed that the officers did not have a warrant to enter and search the apartment. Plaintiffs plead that the officers did not ask J.M. for consent to talk to her, "nor did they make clear she could refuse their entry into the apartment door. . . ." (Doc. 8 at 8). Further, Plaintiffs plead that "Officer Weaver followed J.M. in the apartment" and that Officer Weaver began to search the apartment, opening "cabinets, drawers, and the refrigerator . . . without J.M.'s consent." *Id.* at 9. Officer Brunner's affidavit indicates that J.M. permitted Officer Weaver to escort her inside the apartment. (Doc. 10-1 at 5).

The Court will first consider Officer Weaver's entry into the apartment.[11]

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[11] Count one does not assert a Fourth Amendment claim against Officer Brunner in relation to Officer Weaver's conduct—entering and searching the home. (Doc. 8 at 21–24). Rather, in paragraph fifty-six, Plaintiffs generally allege that the officers and MISD violated their Fourth Amendment rights. *Id.* at 21. In paragraph fifty-seven, Plaintiffs specifically claim Officer Weaver conducted an illegal search. *Id.* In paragraphs fifty-eight and fifty-nine, Plaintiffs specifically claim both officers unlawfully seized J.M. *Id.* at 21–22. Paragraphs sixty, sixty-one, sixty-two, and sixty-three concern MISD's actions and alleged fault. *Id.* at 22–23. Finally, paragraph sixty-four concerns damages. *Id.* at 24. At

a. The Entry

Plaintiffs do not plead that J.M. did not consent to Officer Weaver's entry. (Doc. 8 at 89). Instead, they merely allege that she was not advised that she could refuse their entry into the apartment. *Id.* at 8 ¶24. Officer Brunner's affidavit indicates Officer Weaver followed J.M. into the apartment with J.M.'s permission. (Doc. 10-1 at 5). Because the affidavit does not contradict the First Amended Complaint, the Court may consider it "as an aid to evaluating the pleadings." *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015).

The pleadings indicate that Officer Weaver had J.M.'s consent to enter the apartment. Accordingly, the Court finds no constitutional violation when Officer Weaver entered Plaintiffs' home with J.M.'s permission. Further, Plaintiffs do not argue that J.M. could not consent to Officer Weaver's entry into the apartment.

However, even if they had, under Texas law, there is no "per se rule that children, may or may not, consent to entry into a residence." *Green v. State*, No. 02-10-00082-CR, 2011 WL 3426278, at *3 (Tex. App.—Fort Worth Aug. 4, 2011, pet. ref'd) (citing *Limon v. State*, 340 S.W.3d 753, 756 (Tex. Crim. App. 2011)). Further, Plaintiffs do not point to Fifth Circuit case law

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no point do Plaintiffs argue Officer Brunner "sanctioned" Officer Weaver's conduct as they appear to claim in their briefing. Thus, to the extent Plaintiffs raise a claim against Officer Brunner for Officer Weaver's search, the claim is dismissed.

establishing that minors cannot consent to an officer's entry into the home when a parent is not present. Neither was the Court able to locate case law on the topic, either from the Fifth Circuit or the Supreme Court.[12] Accordingly, the Court rules that it was not clearly established that J.M. could not consent to Officer Weaver's entry.

Plaintiffs' § 1983 claim based on the entry does not overcome Officer Weaver's qualified immunity.

b. The Search

Plaintiffs also plead Officer Weaver did not have consent to search the home. (Doc. 8 at 8–9). Specifically,

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[12] The Court located other circuit court cases discussing the issue. The Sixth Circuit held that a search conducted with the consent of the defendant's children (who were fourteen, twelve, and ten years old at the time) was valid. *See United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990). The Eleventh Circuit held that a nine-year-old child had authority to consent to her guardian ad litem's entry into her grandparent's home and that the child's age was not relevant, relying on *Matlock*, a Supreme Court case. *See Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995). The Tenth Circuit upheld the constitutionality of a search conducted with the permission of the defendant's fourteen-year-old daughter. *See United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998). *But see United States v. Sanchez*, 608 F.3d 685, 693 (10th Cir. 2010) (Lucero, J., concurring) (arguing that *Matlock* supports finding that, in many situations, "a minor child in a parent's home lacks both actual and apparent authority" to consent to a search). However, these cases are not relevant because, when considering qualified immunity, the right must be "well developed in jurisprudence from [the Fifth Circuit] and the Supreme Court[.]" *Romero*, 937 F.3d at 520.

Plaintiffs allege that Officer Weaver searched the apartment "without J.M.'s consent." *Id.* at 9.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend W. "Warrantless searches of a person's home are presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify the search." *Gates*, 537 F.3d at 420 (citation omitted). "[I]dentical [F]ourth [A]mendment standards apply in both the criminal and civil contexts." *Wooley*, 211 F.3d at 925. Deciding whether a search is reasonable requires that the Court balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.*

Plaintiffs sufficiently plead that Officer Weaver engaged in a search when she entered Plaintiffs' home and looked inside cabinets, drawers, and the refrigerator. (Doc. 8 at 9). The search was not executed under a warrant. Accordingly, the Court must determine whether probable cause and exigent circumstances justified the search. *See Gates*, 537 F.3d at 420.

Exigent circumstances exist during a hot pursuit, "when there is a genuine risk that officers or innocent bystanders will be endangered," or when there is a possibility that evidence will be destroyed. *See United States v. Menchaca–Castruita*, 587 F.3d 283, 289 (5th Cir. 2009); *see also United States v. Albarado*, 555 F.

App'x 353, 356 (5th Cir. 2014) (per curiam). The state actors must have reason to believe that "life or limb is in immediate jeopardy" and that intrusion is reasonably necessary to ease that threat. *Wernecke*, 591 F.3d at 400 (citing *Roe*, 299 F.3d at 407); *see also Gates*, 537 F.3d at 421 (quoting *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1094 (3d Cir. 1989)). The facts alleged do not establish, as a matter of law, the existence of exigent circumstances sufficient to justify a warrantless search, however minor the intrusion. At the time Officer Weaver conducted the search, the officers were already in the process of removing J.M. from the home. Thus, it is not relevant whether Officer Weaver executed the search to investigate the conditions of the home to ensure J.M.'s safety. Further, the pleaded facts indicate there was sufficient time to obtain a warrant to investigate and pursue criminal charges against Ms. McMurry for child abandonment or endangerment. Finally, there is no indication that there was a threat that evidence would be destroyed if the officers waited for a search warrant, nor that J.M.'s or the officers' life or limb was in immediate danger.

Officer Weaver argues that searching the home to confirm J.M. had adequate food was not unreasonable. However, Officer Weaver does not cite case law suggesting police officers can search a home for that purpose without a court order or authorization. (Doc. 11 at 11). Moreover, "[r]egardless of what Texas law may authorize, entry into a house . . . must satisfy Fourth Amendment standards." *Gates*, 537 F.3d at 422. To the extent that Officer Weaver raises the "special needs"

exception to investigate possible child abuse, the Court notes that it is clearly established that the exception does not apply in this context. *See id.* at 424–25 (noting the social worker's visit to the home to investigate possible child abuse was not separate from general law enforcement; thus, the special needs doctrine could not justify a Fourth Amendment violation).

For these reasons, the Court holds that Plaintiffs have pleaded sufficient facts to establish a constitutional violation based on the illegal search. Further, Plaintiffs' right to be free from unreasonable searches, in these circumstances, was clearly established such that it was unreasonable for Officer Weaver to believe that she was not violating the law. Accordingly, Officer Weaver's Motion to Dismiss Plaintiffs' § 1983 claim for the alleged illegal search is denied.

B. Other Defenses

1. Officer Brunner

In a conclusory fashion, Officer Brunner argues he is entitled to statutory immunity under § 262.003 of the Texas Family Code and immunity for professional school district employees. (Doc. 10 at 18–19). Both defenses are based on Texas statutes. However, "state law cannot provide immunity for claims asserted under federal law." *Alonzo v. San Antonio Police Dept Headquarters*, No. 5-17-CV-0913-FB-RBF, 2018 WL 9875252, at *8 (W.D. Tex. June 14, 2018), *report and recommendation adopted*, No. 05:17-CA-913-FB-RBF, 2018 WL 9877856 (W.D. Tex. Aug. 2, 2018). Accordingly, Texas

statutes conferring immunity do not bar J.M.'s and Plaintiffs' § 1983 claims against Officer Brunner.

2. Officer Weaver

Ms. McMurry raises defamation and invasion of privacy claims against Officer Weaver. (Doc. 8 at 30–31). Officer Weaver asserts that she is immune from Ms. McMurry's state law claims. (Doc. 11 at 13–18).

a. Defamation

A defamation claim has three elements: "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (citations omitted). "A private individual need only prove negligence," not actual malice. *Id.* (citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)).

In count four, Ms. McMurry generally pleads that "Officer Weaver made defamatory statements about [her] to fellow co-workers," that Officer Weaver "impugned the integrity and character of Ms. McMurry, which exposed her to contempt, ridicule, and financial injury, and that she "suffered damages as a result." (Doc. 8 at 30–31). These allegations alone are not sufficient to state a defamation claim.

Ms. McMurry also pleads that Officer Weaver "gossiped about the criminal investigation with other

employees . . . even though Ms. McMurry had not been charged with a crime." *Id.* at 15. Officer Weaver informed other MISD employees that "Ms. McMurry had 'abandoned' her children, that she was tired of the difficulty in setting up a meeting with Ms. McMurry," and that the officers were going to press charges against Ms. McMurry. *Id.* Officer Weaver also told other employees that Ms. McMurry would be going to jail. *Id.* Ms. McMurry pleads that Officer Weaver's conversation with other MISD employees was not related to Officer Weaver's investigation into Ms. McMurry and had no connection to her duties as an officer. *Id.*

Although Ms. McMurry pleads that Officer Weaver "engaged in idle gossip," she does not allege that the statements Officer Weaver made were false, a necessary element of a defamation claim. *In re Lipsky*, 460 S.W.3d at 593. Accordingly, the Court grants Officer Weaver's Motion to Dismiss the defamation claim against her.

b. Invasion of Privacy

An invasion of privacy claim has two elements: "(1) the defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs; and (2) the intrusion would be highly offensive to a reasonable person." *Beaumont v. Basham*, 205 S.W.3d 608, 614 (Tex. App.—Waco 2006, pet. denied) (citing *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Russell v. Am. Real Estate Corp.*, *8*9 S.W.3d 204, 212 (Tex. App.—Corpus

Christi 2002, no pet.); *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied)).

As noted above in relation to the defamation claim, Ms. McMurry pleads that Officer Weaver divulged some details of the criminal investigation into Ms. McMurry to other employees. (Doc. 8 at 15–16, 30–31). These factual allegations are sufficient to establish an invasion of privacy cause of action at the pleading stage. *See*, *e.g.*, *Halloran v. Veterans Admin.*, 874 F.2d 315, 320 (5th Cir. 1989) ("There can be no clearer example of an unwarranted invasion of privacy than to release to the public that another individual was the subject of [a criminal] investigation.").

Officer Weaver argues she is entitled to official immunity. (Doc. 11 at 14–15). "Texas law grants official immunity to an officer who was (1) performing discretionary duties; (2) in good faith; and (3) while acting within the scope of his authority." *Little v. Rutledge*, No. 1:05CA-509 LY, 2008 WL 11413484, at *6 (W.D. Tex. Jan. 14, 2008), report and recommendation approved, No. 1:05-CA-509-LY, 2008 WL 11413498 (W.D. Tex. Feb. 5, 2008). Officer Weaver bears the burden of establishing official immunity as it is an affirmative defense. *See Kassen v. Halley*, 887 S.W.2d 4, 8 (Tex. 1994) (discussing official immunity in Texas). In this case, it is impossible to determine whether Officer Weaver is entitled to official immunity at the pleading stage.

At this time, the Court must take Ms. McMurry's well-pleaded facts as true.[13] Ms. McMurry pleads that Officer Weaver divulged information concerning the criminal investigation into Ms. McMurry's alleged abandonment of her children to other MISD employees who were not involved or relevant to the criminal investigation. According to the pleadings, Officer Weaver was not acting within the scope of her authority when she gossiped with other MISD employees concerning the criminal investigation. The Court finds official immunity does not warrant dismissal of Ms. McMurry's invasion of privacy claim at this time.

Officer Weaver also moves to dismiss the invasion of privacy claim, raising professional immunity as a defense. (Doc. 11 at 15–16).

School employees are afforded professional immunity "for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee." Tex. Educ. Code § 22.0511(a). As noted above, the facts in the First Amendment Complaint indicate that Officer Weaver was not acting within the scope of her duties as an MISD police officer when she divulged private information concerning the investigation of Ms. McMurry. Accordingly, professional immunity does not support

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[13] Accordingly, the Court does not consider Officer Weaver's argument that she was speaking with MISD employees as part of her investigation. (Doc. 21 at 5–6).

dismissing the invasion of privacy claim against Officer Weaver.

For these reasons, Officer Weaver's Motion to Dismiss the invasion of privacy claim is denied.

IV. CONCLUSION

Based on the above discussion, the Court **GRANTS IN PART** and **DENIES IN PART** Officer Weaver's Motion to Dismiss (Doc. 11) and Officer Brunner's Motion to Dismiss. (Doc. 10).

The Court **DISMISSES WITH PREJUDICE** the following claims:

1) Plaintiffs' claim for violation of the Fourth Amendment premised on Officer Weaver's entry into Plaintiffs' home against Officer Weaver.

2) Plaintiffs' Fourth Amendment claim premised on Officer Weaver entering and searching Plaintiffs' home against Officer Brunner.

3) Plaintiffs' Fourth Amendment claim premised on J.M.'s seizure against both officers, to the extent that they raised such claim.

4) Plaintiffs' claim for violation of Plaintiffs' substantive due process against both officers.

5) Ms. McMurry's defamation claim against Officer Weaver.

Accordingly, the following claims remain:

1) Plaintiffs' claim for violation of the Fourth Amendment premised on Officer Weaver's search of the home against Officer Weaver.

2) J.M.'s claim for violation of the Fourth Amendment premised on the seizure against both officers.

3) Plaintiffs' claim for violation of Plaintiffs' procedural due process against both officers.

4) Ms. McMurry's claim for invasion of privacy against Officer Weaver.

The Court further **DENIES** Plaintiffs' request to amend the First Amended Complaint as futile.

The Court finally **OVERRULES** Plaintiffs' objection to the affidavit attached to Officer Brunner's Motion to Dismiss.

It is so **ORDERED**.

SIGNED this 3rd day of September, 2021.

/s/ David Counts
DAVID COUNTS
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 21-50888

MEGAN MARIE MCMURRY, *Individually and as next friend of* J.M.;
ADAM SETH MCMURRY, *Individually and as next friend of* J.M.,

Plaintiffs—Appellees,

versus

KEVIN BRUNNER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CV-242

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 25, 2023)

Before HIGGINBOTHAM, HIGGINSON, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no

member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

MEGAN MARIE McMURRY, Individually and a/n/f of J.M., and ADAM SETH McMURRY, Individually and a/n/f of J.M.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 7:20-cv-00242-DC
MIDLAND INDEPENDENT SCHOOL DISTRICT, ALEXANDRA WEAVER and KEVIN BRUNNER,	§	
Defendants.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

(Filed Dec. 8, 2020)

Megan Marie McMurry, Individually and a/n/f of J.M., and Adam Seth McMurry, Individually and a/n/f of J.M. (hereinafter collectively referred to as "Plaintiffs"), bring this, their First Amended Complaint against Midland Independent School District (hereinafter referred to as the "Midland ISD"), Alexandra Weaver, Individually, and Kevin Brunner, Individually (collectively termed the "Defendants"), and in support thereof, Plaintiffs would respectfully show the following:

I. Nature & Purpose of the Action

1. Plaintiffs bring claims against Defendants pursuant to 28 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments to the U.S. Constitution arising out of their acts and omissions occurring on and after October 26, 2018. They further bring forth state claims pursuant to the common law claims of breach of contract, defamation, and invasion of privacy.

II. Jurisdiction

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C.A. §§ 1331 and 1343 because the matters in controversy arise under the United States Constitution and laws of the United States of America.

3. This Court also has supplemental jurisdiction over various state and common law claims pursuant to 28 U.S.C. § 1367.

III. Venue

4. Under 28 U.S.C. § 1391, venue is proper before this Court because the events and omissions giving rise to the Plaintiffs' claims occurred in the Western District of Texas.

IV. Parties

5. Megan Marie McMurry and Adam Seth McMurry are citizens of the State of Texas and currently reside in McKinney, Texas.

6. J.M., a Minor Child, is the daughter of Megan Marie McMurry and Adam Seth McMurry who resides with her parents in McKinney, Texas.

7. Defendant Midland Independent School District is a school district organized under the laws of the State of Texas and responsible for the care, management and control of all public school business within its jurisdiction and also for the acts and omissions of its staff, such as Alexandra Weaver and Kevin Brunner. It can be served by and through their Interim Superintendent, Dr. Ann Dixon, at 615 W. Missouri Avenue, Midland, Texas 79701, or through Rick Davis, President of its Board of Trustees, at 615 W. Missouri Avenue, Midland, Texas 79701.

8. Defendant Alexandra Weaver is an individual who has already entered an appearance in this cause.

9. Defendant Kevin Brunner is an individual who can be served with process at the Midland Independent School District Police Department, 615 W. Missouri Avenue, Midland, Texas 79701.

V. Background Facts

10. Megan McMurry and Adam "Seth" McMurry are husband and wife. Between 2017 and 2018, Megan

McMurry worked at Midland ISD as a special education behavior teacher and had an unblemished service record while serving in that role at the school district's Abell Junior High School campus. Ms. McMurry has also had a successful career in special education prior to Midland ISD, serving as a consultant in her field in various international schools around the world. Adam Seth McMurry works in the oil and gas industry. He served in the Mississippi Army National Guard for more than 20 years before transferring to the U.S. Army Reserves in March 2020.

11. The McMurrys have two children—J.M. and C.M.—who do well academically and are described as being mature for their ages. The family has at various times lived overseas when Ms. McMurry worked in special education consulting. In 2018, Mr. McMurry was deployed to Kuwait and then to Syria with the Mississippi Army National Guard. Despite his being out of the country, Mr. McMurry was stationed in a location that offered reliable cellular and internet service. Mr. McMurry was able to maintain continuous contact with his family by text, email, and Facetime, and he remained involved in his children's care each day as he regularly contacted them to discuss family business, school work, and their daily routines.

12. The McMurrys lived on the third floor of an upscale apartment building in Midland, Texas that was gated and had off-duty police officers who lived within the compound. In the 2018-2019 school year, C.M., who was 12 at the time, attended Abell Junior High School and maintained a perfect attendance

record. Meanwhile, J.M., who was 14 at the time, was homeschooled online through K-12's Texas Virtual Academy run by the Hallsville Independent School District, which required her to stay home in the apartment each day to perform her online instruction. Therefore, at the time of the incident at issue in this case, J.M. was not a student of Midland ISD. When she was not in school, J.M. worked part-time as a babysitter for many families, including neighbors, and made good money in this role. Both children knew how to perform household chores and generally take care of themselves when their parents were not home. In addition, they considered themselves fully capable of attending to emergencies if any parent were gone because they had cell phones to contact their parents and emergency responders, had access to adult neighbors who were friends of the family, kept two large dogs to protect them, and knew how to administer CPR.

13. In the summer of 2018, Ms. McMurry began to explore a job offer to teach at an international school in Kuwait where the McMurrys had lived before. In furtherance of that, Ms. McMurry scheduled a trip to Kuwait to visit the school to determine if she wanted to take the position and made travel arrangements for the period of time between October 25, 2018 and October 30, 2018. Though the McMurry children were invited to accompany their mother, they told their parents that they preferred to stay in Midland. Because Ms. McMurry sent an email to the junior high school staff about her trip, it was common knowledge at the school that she would be out of the country for

several days. School district employees also knew that Mr. McMurry was deployed overseas at this time.

14. Though the McMurrys did not have relatives in the Midland area, they were friends with neighbors Gabriel and Vanessa Vallejos. The two families would socialize on occasion, and J.M. babysat their son after school and on weekends until they got home from work. Ms. McMurry made arrangements for Mr. and Ms. Vallejos to care for the children in her absence and lined up several colleagues at work to drive C.M. to and from school. Mr. and Ms. Vallejos were given full responsibility for the McMurry children when Ms. McMurry was gone as had been the case in other instances when they watched the McMurry children while Ms. McMurry had to go out of town. It was agreed that the Vallejoses would take the children to a football game one evening and go out for dinner a few times. The McMurrys made sure their children understood they could have no visitors while Ms. McMurry was gone and that Mr. McMurry would be readily accessible by phone when Ms. McMurry was traveling by air. The McMurrys felt confident that their children were in good hands when Ms. McMurry left for her trip.

15. In the afternoon of October 25, 2018, Ms. McMurry drove to Dallas, Texas to catch her plane for the long trip. Meanwhile, J.M. finished her studies and babysat the Vallejoses' son after he came home by school bus. One of Ms. McMurry's colleagues, a school counselor, drove C.M. home from school. In the early evening, the McMurry children and the Vallejoses

mutually agreed that the children would simply stay in their own apartment for the night because they could sleep in their own beds and watch their dogs instead of sleeping on couches in the Vallejoses' apartment. Ms. Vallejos testified at trial that she felt confident the children were safe to sleep overnight in the McMurry's apartment.

16. The incident at issue in this case occurred on October 26, 2018. In 2018, Alexandra Weaver served as a police officer for the Midland ISD Police Department along with her supervisor, Kevin Brunner. Ms. Weaver was stationed at Abell Junior High School and knew Megan McMurry and her children. A school counselor—one of the individuals with whom Ms. McMurry arranged to take C.M. to and from school during her absence—contacted Officer Weaver by text to say she was sick and to ask if Officer Weaver could take C.M. to school knowing that she lived near the McMurrys. (The counselor ended up getting another co-worker, Ms. McMurry's teaching aide, to take C.M. to school that morning.)

17. This fateful text triggered a series of events that would turn the lives of the McMurrys upside-down because of Officer Weaver's excessively eager investigation into the McMurry children out of alleged "concern" for their welfare. Eventually, the investigation would lead to a seizure of the McMurry's daughter by the Midland ISD police in violation of state law and the pursuit by the school district police officers of abandonment charges against Ms. McMurry—a complaint

that would later lead to a criminal trial in Midland, Texas ending with Ms. McMurry's acquittal by a jury.

18. According to Officer Weaver's police report, the catalyst of the investigation happened when the school counselor allegedly told Ms. Weaver that the children were left at home *alone* for the weekend while Ms. McMurry was gone. Upon information and belief, Officer Weaver misrepresented the content of this communication in her police report to make it appear that the children would be left unattended all weekend because the school counselor would later testify at Ms. McMurry's criminal trial that she had no personal knowledge of Ms. McMurry's caretaking arrangements in her absence, that she only heard that the children would be cared for by neighbors and that is all she really knew.

19. Officer Weaver then contacted Officer Brunner, telling him (according to his police report about the incident) that she had learned that Ms. McMurry had left her children home alone and had in fact been told of this fact by another (i.e., by the school counselor who said she was sick).

20. Before trying to contact Mr. McMurry, the Vallejoses, or J.M. herself, who was not even a student of the school district at this time, Officer Weaver and Officer Brunner questioned Ms. McMurry's teaching aide at the school about Ms. McMurry's trip. Though the aide later testified at Ms. McMurry's trial that she had no personal knowledge of Ms. McMurry's caretaking arrangements and that she did not believe Ms.

McMurry had neglected her children, she told the officers in their meeting at the school that she "had heard" that a neighbor was "checking on" the children, which Officer Weaver said in her police report necessarily "implied" that the children were not going to be residing with adults in this interim. Significantly, the employee told the officers that she had taken C.M. to school that morning and so it was abundantly clear to them that J.M., who was not enrolled in the school district, was the only child back at the McMurry's apartment on this morning doing her online, homeschool lessons.

21. What is notable about this interview is that the police officers questioned the teaching aide in tandem with two employees of the school district—the junior high school principal at the time and an assistant principal. Thus, the school district administration took upon itself to assist the two police officers in their investigation of an alleged complaint about child abandonment, assuming one had been made in the first place by this point in time.

22. Officer Weaver and Officer Brunner decided to conduct their own off-campus welfare check on J.M. without contacting another law enforcement agency to handle the matter, setting in motion a series of events during which they flagrantly violated the rights of J.M. and her parents and which made clear they were agitating for the criminal prosecution of Ms. McMurry for abandonment of children. It should be noted that Officer Weaver had already met and knew J.M. from the middle school where the young girl attended school the

previous school year and worked as an office assistant and was cognizant that J.M. was not a student of Midland ISD, that she was homeschooled, and that she had typically stayed at home alone each day since the beginning of the school semester as Ms. McMurry went to work at the school district.

23. The officers traveled to the McMurry apartment and prompted an assistant manager of the apartment complex to knock on the door. The manager testified at Ms. McMurry's criminal trial that the police officer's request made her feel uncomfortable. The officers kept out of sight of the door peephole when the employee knocked. When J.M. opened the door, the officers appeared and asked about the whereabouts of Ms. McMurry. Mr. Brunner told J.M. that they were going to take her somewhere else to talk to her and that she needed to go back inside to change into warmer clothing. Startled by the appearance of the officers at her doorstep, J.M. became upset and began to cry and she would continue to cry for the next several hours as these events unfolded.

24. During this brief exchange, no officer asked for J.M.'s consent to talk to her, nor did they make clear she could refuse their entry into the apartment or her removal by them from the premises. While standing at the threshold of the apartment door, neither officer asked J.M. detailed questions about her caretaking arrangements or about any matter that might enable them to assess any risk she might face. The presence of the police in their regalia on this date signaled to J.M. that her liberty of movement was restricted and

restrained and that she was compelled to accompany them to wherever they planned to take her.

25. Officer Weaver followed J.M. in the apartment, and as J.M. changed in a bedroom at the officer's request, J.M. could see from a partially open door that Officer Weaver began to search the apartment and opened up cabinets, drawers, and the refrigerator, which occurred without J.M.'s consent. J.M. sent a quick text to her father that read, "Dad, I'm scared. The police are here." After dressing, J.M. was escorted by the officers out of the apartment, down the stairs, and to the nearby apartment office building where the officers started to question J.M. in a conference room without notifying her of her Miranda rights.

26. Oddly, the officers failed to ask J.M. detailed questions about her caretaking arrangement while they were with her in the apartment office. Lt. Brunner simply asked J.M. about when Vanessa Vallejo last "checked on" her. As this was happening, Mr. McMurry repeatedly called J.M. by Facetime and sent her multiple texts to try to learn what was happening, asking by text, "Why can I not FaceTime audio you? . . . Can you not FaceTime audio? Are you there?" But the officers ordered J.M. not to text or call anyone, and the officers made no attempt to contact Mr. McMurry who remained in the dark about what was going on between the police and his daughter until many hours later when the officers finally let them talk. Officer Weaver conceded at Ms. McMurry's trial that she barred J.M. from contacting her father.

27. Although it seems that the officers failed to clarify the facts about the caretaking arrangements from persons with personal knowledge, they were not deterred from contacting the Texas Department of Family and Protective Services (CPS) to file a complaint about Ms. McMurry and misrepresent facts about this matter. Officer Weaver contacted the CPS hotline in Austin, Texas before the officers arrived at the apartment complex, and Officer Brunner contacted the local office of CPS when he was at the apartment complex. One or both of them told CPS that Ms. McMurry had left the children home alone, that a neighbor would only "periodically check" on them, and that the *children* did not go to school that day (despite the fact both officers had already been told that C.M. was sitting in class at the junior high school and even though Officer Weaver knew that J.M. was homeschooled and not enrolled in Midland ISD). Lt. Brunner later stated in his Affidavits for Probable Cause to indict Ms. McMurry that he told the agency he would be taking J.M. to Abell Junior High School for "safety purposes," thus indicating that he made a decision to transport J.M. to the school without receiving a request or directive from CPS.

28. Thereafter, Lt. Brunner contacted Vanessa Vallejos by telephone telling her, "I've got to speak to you because a 14-year old and a 12-year old being left home alone is a criminal offense." In their short conversation, Lt. Brunner asked Ms. Vallejos no questions about the caretaking arrangements for the McMurry children and clarified to Ms. Vallejos that she was

not the target of their investigation. He asked if Ms. Vallejos preferred to speak with him in person. When she said yes, he directed her to meet him at Abell Junior High School because he said that they would be taking J.M. to the school.

29. J.M. told the office staff at the apartment complex that she wanted to reach her father. When one of the apartment employees informed the officers that J.M. wanted to speak to Mr. McMurry, Lt. Brunner again refused to let J.M. call him.

30. Afterwards, the officers took J.M. to their police car, placed her in the back seat, and drove her to Abell Junior High School, about a six-mile drive. Lt. Brunner would later explain in his Affidavits for Probable Cause that this was done so that J.M. would not be home alone in the apartment. When Lt. Brunner saw J.M. start texting on her phone, he commanded that she put down her phone. During the ride, J.M noticed a call coming from Vanessa Vallejos. J.M. asked if she could answer the call and again Lt. Brunner told her no. J.M. remained tearful and distraught during the ride, telling the officers, "I'm very scared."

31. There are few circumstances under Texas law that allow a law enforcement officer to seize a child. This was not one of them. For example, an officer may detain a child to assist an injured party, pursuant to the laws of arrest, or when the officer suspects probable cause of delinquent conduct. Additionally, a law enforcement officer may detain a child when exigent circumstances exist that reasonably cause the officer

to believe the child is in imminent danger of physical or sexual abuse if she remains in the home. The latter ground is apparently the premise upon which the officers relied to detain J.M. At Ms. McMurry's criminal trial, Ms. Weaver later claimed that she found alcohol in the refrigerator which heightened her concerns about the children, even though she mentioned nothing of this in her police report. More telling, Officer's Weaver body camera video of her unlawful search of the house showed no alcohol in the refrigerator, and Ms. McMurry did not usually keep alcohol in the apartment and she had left none there before her trip to Kuwait. Officer Weaver testified that her "concern" was also heightened when J.M. left the apartment because she did not lock the door. But Ms. Weaver neglected to inquire about how the locking mechanism even worked. Had she done so, she would have learned that the apartment complex used a Smart Lock mechanism for all doors that connect to cell phones via Bluetooth. In other words, when a resident leaves the apartment with a cell phone on their person, the door automatically locks.

32. At Abell Junior High School, the officers walked J.M. through the school's main front door as she sobbed in full sight of employees and students, leaving her feeling humiliated and distressed. One student texted J.M. to ask why she was being detained. The officers confined J.M. in one of the administration offices so they could leave to question others. The junior high school principal, meanwhile, continued in her effort to lend support to the police officers' action,

sitting in during their interviews with the Vallejoses and with C.M., whom they had pulled out of class.

33. At Ms. McMurry's trial, the Vallejoses testified that Lt. Brunner did most of the talking during his 12-minute conversation with them at Abell Junior High School and that they barely spoke. During one exchange, Lt. Brunner said, "From my rationale, there's a difference between being at work and letting the kid be at home a couple of hours versus being in a different country." The Vallejoses remained confused as to why J.M. had been detained in the first place and taken to the school, but Lt. Brunner explained, "I felt it was a safer environment than for her being home alone." Contradictorily, the officers did not accuse the Vallejoses themselves of abandoning the children because of their previous night stay in the McMurry apartment (seemingly, the main fact that triggered the officers' "concerns"). Even more strangely, Lt. Brunner told the couple—despite their having custodial care of J.M. and C.M. during this time—that they could leave the middle school before the CPS investigator arrived to talk to the children. Mr. Vallejos testified at trial that it seemed like Mr. Brunner did not want them there. But the two indicated that they refused to leave until the investigation was done so they could take the children back into their custody and take them home.

34. When the officers were finished, Vanessa Vallejos met up with J.M. in the principal's office and asked if J.M. could call her father. Remarkably, the school district employees did not contact Mr. McMurry directly to inform him that J.M. was detained at the

school and that police officers would be interviewing C.M. even though they had his contact information given that the school district's handbook requires such parental notice except for abuse investigations. Not until several hours after the officers first seized J.M. did they allow her to call her father. Mr. McMurry and J.M. finally connected via a Facetime call with Vanessa Vallejos nearby. Mr. McMurry asked the two to summon one of the school district employees or officers to speak with him. Though they asked, none wanted to speak with him.

35. It bears mention that Ms. McMurry was still on a plane that began its descent into Kuwait City while most of this was occurring. Once the plane landed and Ms. McMurry reactivated her phone, she immediately received calls from CPS and others, but none from the police officers or any administrators from Midland ISD. When Ms. McMurry later contacted Officer Weaver that afternoon, the officer told her that she had received an "anonymous", "credible" tip about the children, that J.M. was removed from the "situation," and that it was protocol for the police to "remove" a child "from an endangered situation and to take them to a safe place."

36. In the afternoon, a special investigator from CPS arrived to investigate the officers' complaint. At Ms. McMurry's trial, several employees of CPS testified about the agency's investigation of the Midland ISD complaint, including the special investigator who went to Abell Junior High School (himself a former police officer), a program director for the agency's

investigations unit, and the unit's supervisor. After conferring with the children at the school, the Vallejoses, the police officers, Ms. McMurry who they promptly reached by telephone, and the school counselor who was supposed to take C.M. to school that morning, the department promptly closed the investigation. CPS witnesses at trial testified that they had determined that the children had not been left unattended without adult supervision. Overall, the testimony of the witnesses and the report of the agency showed that the McMurry children's needs were being met, that Ms. McMurry had made appropriate child care arrangements for the children and for C.M.'s transportation to school in her absence, that the children were able to respond to emergencies, that they faced no unreasonable risk of harm, and that there was no finding of abuse or neglect. The special investigator on the scene notified the parties that the children could leave with Ms. Vallejos to return to their home to the apparent chagrin of Officers Brunner and Weaver.

37. Despite the outcome of the CPS investigation, Officer Weaver and Lt. Brunner persisted in trying to build a criminal case against Ms. McMurry. The following Monday, Officer Weaver conducted an interview with the counselor who said she was sick the previous Friday and who could not take C.M. to school. On the Friday before, the same school counselor had told CPS that she had no concerns for the children about their caretaking arrangements during Ms. McMurry's trip. Upon information and belief, however, Officer Weaver coached the counselor about how to answer

questions before she started the recorded interview and prompted the counselor to say negative things about Ms. McMurry, most of which had little to do with the weekend at issue.

38. Meanwhile, Ms. McMurry cancelled her visit with the international school in Kuwait and spent the remaining days there trying to catch an early flight home to no avail. She finally returned to Midland on October 30, 2018. As the police officers told Ms. McMurry they wanted to obtain her statement, despite her being cleared by CPS, Ms. McMurry realized that the officers still wanted to pursue abandonment charges against her.

39. The month of November 2018 was especially trying for the McMurry family. J.M. was rattled and frightened by the experience and remained distraught and upset. Megan McMurry was likewise disturbed, upset, and anguished by what her daughter had been put through, as well as the shame and embarrassment of being accused of abdicating her caretaking responsibilities. Both she and J.M. began to experience sleeplessness, depression, anxiety, and disruption in their daily routines. Ms. McMurry's marriage with her husband suffered. Ms. McMurry and J.M. entered therapy in November 2018 that would continue through the middle of 2020. J.M. became fearful and distrustful of law enforcement, and she panicked during an episode months later when she was pulled over by police for a moving violation. Mr. McMurry felt angry and frustrated that he was separated from his family by distance during this time, and he struggled to stay

focused over the next seven months during his dangerous mission for the Mississippi Army National Guard.

40. Making matters worse, Officer Weaver gossiped about the criminal investigation with other employees at the school district even though Ms. McMurry had not been charged with a crime. In one situation, Ms. Weaver decided to chat with employees in the junior high school front office about Ms. McMurry on or about November 7, 2018 after a lawyer called for Ms. McMurry and left a message for Officer Weaver to return the call. Officer Weaver told the assembled group who included administrative staff, a teacher and a teacher's aide that Ms. McMurry had "abandoned" her children, that she was tired of the difficulty in setting up a meeting with Ms. McMurry, that they would go ahead and press charges against Ms. McMurry and that Ms. McMurry would be going to jail. But Officer Weaver's conversation with them was unrelated to her investigation into Ms. McMurry's alleged abandonment of children and had no connection to the discharge of her duties. The four employees present had no personal knowledge of Ms. McMurry's caretaking arrangements when she left the country, were wholly uninvolved in the events of October 26, 2018 relating to the McMurrys or their children, were not individuals who were questioned by or were providing statements or information to Ms. Weaver in connection with abandonment charges or who had any need to know about the investigation. (Officer Brunner's Affidavit of Probable Cause, which came about one month later to initiate Ms. McMurry's

criminal matter, fails to show that the police officers collected any new evidence in connection with the charges during the month of November 2018).

41. When Ms. McMurry later found out about Officer Weaver's discourse with fellow school district employees, she complained to the school district administration which apparently conducted an investigation afterwards and which led to Officer Weaver being assigned to a different school campus within the district. Around the same time, Ms. McMurry also learned that Officer Weaver also gossiped with coworkers and coaches on other occasions throughout the Abell Junior High School campus and other places where she had told those who were within earshot that Ms. McMurry had "abandoned" her children and that a "federal arrest warrant" would be issued for her arrest and that she would be "going to jail." Like her chatter in the front office, Weaver's repeated discussion about this matter throughout the campus was wholly unrelated to her investigation into Ms. McMurry's handling of her children's care and had no connection to the discharge of her duties. Officer Weaver interviewed no new witnesses on these occasions, collected no evidence for her investigation, and spoke to no individuals who had a need to know about the criminal investigation; she merely engaged in idle gossip to vilify Ms. McMurry.

42. Students at Abell Junior High School began to ask C.M. if his mother might soon be arrested and if she had abandoned him. C.M. began to feel so

uncomfortable there that he asked his parents to remove him from school.

43. Officer Weaver's defamation of Ms. McMurry and her announcing to others at Abell Junior High School that McMurry would be charged with a crime and sent to jail tarnished her reputation there.

44. Furthermore, the police officers' sustained effort to charge Ms. McMurry with a crime undermined her employment relationship with the school district. When Ms. McMurry decided to travel to Kuwait to view the international school that had offered her a job, she resigned as a teacher for the 2018 to 2019 school year with the consent of the school district. However, the two parties later agreed that Ms. McMurry could continue to teach in the school district until she made a final decision about whether to stay at Midland ISD or not, and the school district continued to keep Ms. McMurry in her position as a special education teacher with the same compensation and benefits that she received before.

45. When Ms. McMurry returned to Midland, she met with Midland ISD's chief of human capital management at his request on October 31, 2018. During this meeting, the chief notified Ms. McMurry verbally and in writing that the school district was putting her on administrative leave without pay pending the outcome of the "current investigation" of the abandonment of children complaint. He further told Ms. McMurry that her job would be waiting for her once the investigation was completed and she was

cleared of any wrongdoing. The school official then informed Ms. McMurry that she was barred from appearing on campus or attending school-related events, even though her son was still enrolled in the junior high school, and he instructed her to refrain from discussing the leave with others.

46. As such, the school district continued to maintain control over Ms. McMurry and issue directives to her as an employee in the interim, which it would not have done if Ms. McMurry had been an at-will educator with no employment contract under chapter 21 of the Texas Education Code. These actions revealed that the school district rescinded its previous action to accept Ms. McMurry's resignation, that Ms. McMurry's contract was reinstated, and that Ms. McMurry resumed her duties as a special education teacher under contract for the 2018 to 2019 school year.

47. Though the school district continued to pay her salary through the end of 2018, Ms. McMurry's role vis-à-vis the school district remained in flux because it did not ask her to return to the classroom, nor did it ever tell her that it intended to terminate her as a teacher. Upset by how the school district police handled the seizure of her daughter and lacking clarity about her job status, Ms. McMurry filed a grievance against Midland ISD on November 16, 2018 pursuant to the school district's board policy manual, complaining about J.M.'s detention and seeking formal reinstatement of her job, among other things.

48. On December 4, 2018, Officer Brunner filed two separate Affidavits for Probable Cause to initiate arrest warrants for Ms. McMurry for "abandoning or endangering" her children. However, the affidavits contained no new details about the McMurrys' caretaking arrangements for their children than what was already known on October 26, 2018. Under state law, the crime of abandonment occurs when a person, having custody or care of a child under 15, intentionally leaves the child in a place without providing reasonable and necessary care so that it exposes the child to an unreasonable risk of harm. Tex. Penal Code § 22.041. In the affidavits, Mr. Brunner acknowledged that he brought J.M. to Abell Junior High School where C.M. was located because he had anticipated that CPS would be taking the children into custody after it conducted its investigation. At the trial on the abandonment charge, Officer Weaver justified the probable cause affidavit by stating that in her opinion, the children were left for an extended period of time without reasonable and proper care *immediately* available to the children because they had spent the night of October 25, 2018 in their apartment, even though the word "immediately" is not embedded in the Penal Code section on abandonment. She further admitted at trial that the law does not place an age limit of when a child may sleep in a residence overnight without an adult.

49. Faced with the outstanding arrest warrant, Ms. McMurry turned herself into the Midland County Jail on December 6, 2018 and she remained in jail for

19 hours while the staff there completed the processing of her bail bond.

50. The school district took up Ms. McMurry's grievance the following year. The administrative process for grievances has three stages of review. The parties held a grievance hearing for the first stage, known as Level 1, on January 8, 2019. On January 21, 2019, the school district's executive director for secondary education issued a written decision denying Ms. McMurry's grievance. Regarding the detention of J.M., he said, "I have determined that it was *not* inappropriate to transport your daughter to Abell [Junior High School]. The decision was made because . . . Abell was a safe environment where an administrator could be present and where your daughter could be supervised." As for Ms. McMurry's teaching job, the executive director claimed that Ms. McMurry was only a temporary employee and that the district had not extended her teaching contract, thus denying her claim for reinstatement. But the school official failed to explain why the school district continued to pay Ms. McMurry her salary through the end of the 2018 calendar year.

51. Ms. McMurry appealed this decision to the next stage. The parties held a Level 2 hearing on February 22, 2019, and the school district's chief academic officer issued a written decision dated March 7, 2019 denying Ms. McMurry's requested relief. He said, "It appears the officers acted in good faith to ensure [the McMurry] children were safe and secure. . . . Once it was determined that [the] children did not have

adequate supervision, Abell was the best place to continue the inquiry."

52. Unhappy with this decision, Ms. McMurry took her grievance to the Midland ISD Board of Trustees in what is known as a Level 3 Appeal. There, Ms. McMurry made a presentation to the board through an attorney on June 24, 2019. The school district's counsel told the board in the same meeting that the McMurry children were interviewed at the school "to find out what *we needed to do as a school district* to best take care of our students and make sure they were safe." After considering the matter, the board unanimously voted to deny the grievance, thus ratifying acts and omissions of subordinates, including Officers Weaver and Brunner and other school district personnel and staff.

53. These events further harmed Ms. McMurry because they resulted in the termination of Ms. McMurry's employment with Midland ISD, even though the school district did not follow the Texas Education Code's procedures to terminate an educator's contract, depriving Ms. McMurry of her salary through the end of the school year. Additionally, these events interfered with Ms. McMurry's ability to get a new teaching job. Because the Texas State Board of Educator Certification learned of Ms. McMurry's arrest, the agency placed an investigative flag on Ms. McMurry's teaching certificate, preventing her from seeking a job in the teaching field with another school district. Ms. McMurry has not worked as a teacher since October 2018. This has further adversely impacted her ability

to comply with the conditions of TEACH Grant assistance that she received in college requiring her to work in the teaching field for a minimum period of time after graduation. With the approach of her performance deadline, the grant will be converted into a loan that Ms. McMurry will be forced to pay back.

54. The fallout from Ms. McMurry's trip to Kuwait finally culminated in a criminal trial in a district court in Midland County, Texas that started on January 6, 2020. The McMurrys were forced to spend substantial funds to hire counsel to defend Ms. McMurry through the criminal case. At the end of the trial on January 9, 2020, Ms. McMurry was promptly acquitted by a jury. Several months later, the Texas State Board of Educator Certification removed its investigatory flag on Ms. McMurry's teaching certificate.

VI. Count I

Violations of the Fourth Amendment of the U.S. Constitution

55. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.

56. Midland ISD, Weaver, and Brunner, acting under color of law and pursuant to the customs and policies of the school district, jointly and severally deprived Megan McMurry, Adam Seth McMurry, and J.M. of rights and privileges secured to them by the Fourth Amendment of the U.S. Constitution.

57. The Fourth Amendment protects citizens from unreasonable searches and seizures. As described previously, Officer Weaver entered into and conducted a search of the McMurry apartment without a warrant and without the consent of J.M., much less that of an adult, thus invading the rights of J.M. and her parents.

58. Moreover, the Fourth Amendment applies in the context of the removal of a child from a home. The seizure of a child is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances to cause police officers to have reason to believe that life and limb are in immediate jeopardy. A seizure occurs when a reasonable person facing a show of authority believes she is not free to leave and her liberty of movement is restricted or restrained.

59. As indicated in the facts beforehand, Officer Weaver and Officer Brunner falsely imprisoned J.M. willfully and without authority of law. None of the factors that would allow a law enforcement officer to take temporary custody of a child on an emergency basis under the Texas Family Code were present here. The two officers detained and transported J.M. without notifying her parents and without following any instruction or mandate from CPS to do so. Apparently, the officers' chief aim was to manufacture an indictment against Ms. McMurry for abandonment and to incentivize CPS to take custody of her children.

60. Midland ISD ratified the acts and omissions of the two police officers and of other school district personnel who aided them in allowing J.M.'s constitutional rights to be violated or by acquiescing to the police officer's conduct in their detention and interrogation of J.M. outside of her home. Furthermore, Midland ISD ratified the acts and omissions of the police officers through its high-ranking personnel who endorsed the officers' conduct through Ms. McMurry's grievance complaint and by their repeated defense of the police officers' actions to Ms. McMurry during the grievance process. When the Board of Trustees, the school district's highest lawmaking body, validated and ratified the police officers' conduct during a board meeting in June 2019 that heard Ms. McMurry's grievance complaint, the school district officially adopted and sanctioned the police officers' interactions with J.M., converting the conduct at issue into the official policy of the school district.

61. In addition, the acts and omissions resulted from the official custom of the school district so as to fairly represent its policy. School district officials endorsed and validated the police officers' actions throughout this episode, from the assistant principal and principal of the Abell Junior High School, to the school district's director of secondary education, to the district's chief academic officer, and finally to the Board of Trustees. In effect, all continually assented to the conduct at issue and concluded that the school district's police officers could detain children and remove children from their homes outside the parameters

allowed for custodial seizures of children under state law, including children not present on school grounds and children who are not even students of the school district itself. They further failed to take steps to reign in Officer Weaver who defamed Ms. McMurry and invaded her privacy in the school district about this incident.

62. The acts and omissions complained of were a moving force of the violations against Megan McMurry, Adam McMurry, and J.M. with the policy and custom of the school district operating as the direct cause of their harm. The policy and custom mentioned above was unconstitutional on its face. Assuming it could be characterized as facially innocuous, then the policy or custom was promulgated with deliberate indifference to the known or obvious consequences that violations of federally-protected rights would result since it was reasonably foreseeable that there was a risk for the school district to allow its police officers to operate with impunity and that their actions might bring harm to J.M. and others. Midland ISD acquiesced to and rationalized the misconduct of its police officers and formally authorized it when Ms. McMurry complained about it through the grievance process. Further, the school district failed to take steps to rectify Ms. Weaver's defamation of Ms. McMurry and the invasion of her privacy.

63. Midland ISD is further liable to Plaintiffs on the basis of supervisory liability. Midland ISD failed to properly supervise or train its police officers and that its lack of training and supervision resulted in the

police officers' failure to understand their powers as peace officers, their professional duties to diligently investigate complaints, and their duty to accurately report and not misrepresent information they collect in connection with criminal investigations. Also, the school district's lack of training resulted in Officer Weaver gratuitously disclosing information about a pending investigation to others before indictment. Upon information and belief, the police officers at issue have been the subject of other complaints by parents with students enrolled in the school district casting doubt on their understanding of their professional responsibilities as police officers for the school district. The need for more training and supervision was obvious, and the school district's failure to properly train or supervise its personnel made it likely that the police officers would ultimately intrude on the rights of parents, students, and others, such as in this case.

64. Plaintiffs contend that Defendants' violation of their Fourth Amendment rights have caused them economic damages, medical costs, out-of-pocket attorneys' fees, and mental anguish damages for which they now sue. Because Defendants acted recklessly and with callous indifference to the federally-protected rights of others, Plaintiffs further seek to recover punitive damages. Finally, Plaintiffs seek to recover their attorneys' fees pursuant to 42 U.S.C. § 1988.

VII. Count II

Violations of the Fourteenth Amendment of the U.S. Constitution

65. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.

66. Midland ISD, Weaver, and Brunner, acting under color of law and pursuant to the customs and policies of the school district, jointly and severally deprived Megan McMurry, Adam Seth McMurry, and J.M. of rights and privileges secured to them by the Fourteenth Amendment of the U.S. Constitution.

67. The right of family integrity has been recognized as a fundamental liberty interest protected by the Fourteenth Amendment, which applies to all family members, including parents and children. The Amendment guards against government interference with such interests, and it requires that the government provide procedural due process before making a decision to infringe on a person's life, liberty, or property interest.

68. Given that the police officers did not have reasonable cause to believe J.M. was in imminent danger of physical or sexual abuse, then no exigent circumstances existed to justify their temporary detention of her for protection.

69. Accordingly, Officer Weaver and Officer Brunner encroached upon the McMurry's substantive due process against interference with their right to

family integrity. The officers impinged upon the parents' interests in making decisions regarding the care of their children, and they interfered with the family members' interest in remaining together as a family unit. The officers had no compelling interest to warrant the removal of J.M. from the McMurry home. They did not ask CPS to step in to take over their initial investigation. Assuming the officers had cause to believe J.M.'s caretaking situation needed to be scrutinized, they did not employ the least restrictive means to undertake their investigation. They ordered J.M. out of the house, interrogated her in an apartment office, and then transported her to a school where she was not enrolled as a student for further interrogation and held her there for hours.

70. Moreover, the police officers and school district personnel failed to provide the McMurrys with any of the procedural due process protections that would normally apply to state removal of a child, such as notice, full hearing, the right to legal counsel, and the presence of a neutral official presiding over the hearing. Indeed, the two police officers prohibited J.M. from contacting Mr. McMurry during her detention and he was left to wonder for several hours what crisis beset his daughter after she told him that police had just arrived at their apartment. They also stopped her from communicating with her neighbors who were their caretakers for that weekend. The officers distorted information that they acquired during their investigation and neglected to ask witnesses with personal knowledge important questions to clarify the

caretaking arrangements. Early on, they had made up their minds that Ms. McMurry had abandoned the children and continued to seek information that might support their preordained conclusions. All in all, Officer Weaver and Officer Brunner arbitrarily and unfairly deprived the McMurrys of their right to familial integrity.

71. Midland ISD ratified the acts and omissions of the two police officers and of other school district personnel who aided them in allowing J.M.'s constitutional rights to be violated or by acquiescing to the police officer's conduct in their detention and interrogation of J.M. outside of her home. Furthermore, Midland ISD ratified the acts and omissions of the police officers through its high-ranking personnel who endorsed the officers' conduct through Ms. McMurry's grievance complaint and by their repeated defense of the police officers' actions to Ms. McMurry during the grievance process. When the Board of Trustees, the school district's highest lawmaking body, validated and ratified the police officers' conduct during a board meeting in June 2019 that heard Ms. McMurry's grievance complaint, the school district officially adopted and sanctioned the police officers' interactions with J.M., converting the conduct at issue into the official policy of the school district.

72. In addition, the acts and omissions resulted from the official custom of the school district so as to fairly represent its policy. School district officials endorsed and validated the police officers' actions throughout this episode, from the assistant principal

and principal of the Abell Junior High School, to the school district's director of secondary education, to the district's chief academic officer, and finally to the Board of Trustees. In effect, all continually assented to the conduct at issue and concluded that the school district's police officers could detain children and remove children from their homes outside the parameters allowed for custodial seizures of children under state law, including children not present on school grounds and children who are not even students of the school district itself. Making matters worse, they failed to take steps to reign in Officer Weaver who defamed Ms. McMurry and invaded her privacy in the school district.

73. The acts and omissions complained of were a moving force of the violations against Megan McMurry, Adam McMurry, and J.M. with the policy and custom of the school district operating as the direct cause of their harm. The policy and custom mentioned above was unconstitutional on its face. Assuming it could be characterized as facially innocuous, then the policy or custom was promulgated with deliberate indifference to the known or obvious consequences that violations of federally-protected rights would result since it was reasonably foreseeable that there was a risk for the school district to allow its police officers to operate with impunity and that their actions might bring harm to J.M. and others. Midland ISD acquiesced to and rationalized the misconduct of its police officers and formally authorized it when Ms. McMurry complained about it through the grievance process. Further, the school

district failed to take steps to rectify Ms. Weaver's defamation of Ms. McMurry and the invasion of her privacy.

74. Midland ISD is further liable to Plaintiffs on the basis of supervisory liability. Midland ISD failed to properly supervise or train its police officers and that its lack of training and supervision resulted in the police officers' failure to understand their powers as peace officers, their professional duties to diligently investigate complaints, and their duty to accurately report and not misrepresent information they collect in connection with criminal investigations. Also, the school district's lack of training resulted in Officer Weaver gratuitously disclosing information about a pending investigation to others before indictment. Upon information and belief, the police officers at issue have been the subject of other complaints by parents with students enrolled in the school district casting doubt on their understanding of their professional responsibilities as police officers for the school district. The need for more training and supervision was obvious, and the school district's failure to properly train or supervise its personnel made it likely that the police officers would ultimately intrude on the rights of parents, students, and others, such as in this case.

75. Plaintiffs contend that Defendants' violation of their Fourteenth Amendment rights have caused them economic damages, medical costs, out-of-pocket attorneys' fees, and mental anguish damages for which they now sue. Because Defendants acted recklessly and with callous indifference to the federally-protected

rights of others, Plaintiffs further seek to recover punitive damages. Finally, Plaintiffs seek to recover their attorneys' fees pursuant to 42 U.S.C. § 1988.

VIII. Count III

Breach of Contract/Lack of Due Process under the Texas Education Code and the Fourteenth Amendment of the U.S. Constitution (By Megan McMurry Against Midland ISD)

76. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.

77. By virtue of her contract of employment with Midland ISD, Ms. McMurry had a property right in her contract of employment through the end of the term of the 2018 to 2019 school year. The Fourteenth Amendment prohibits the deprivation of property rights without due process of law.

78. Because Midland ISD failed to pay Ms. McMurry and provide her with the fringe benefits of her employment for the duration of the school year, it breached its contract with Ms. McMurry in prematurely ending the term of her employment. Though Midland ISD took the position that it had ended Ms. McMurry's employment in October 2018, the school district continued to issue directives to Ms. McMurry after this period of time and pay her the same salary and benefits as before, and it assured her that her job position would resume after it concluded its investigation into the accusation of abandonment of children.

Because of the reinstated employment contract, Midland ISD could have only discharged Ms. McMurry on the basis of good cause or financial exigency as required by chapter 21 of the Texas Education Code. However, the school district did not follow these procedures to discharge Ms. McMurry, and it simply stopped paying Ms. McMurry her salary and benefits after 2018. Midland ISD further failed to provide Ms. McMurry with procedural due process rights to excuse the early termination of her employment, such as the right of notice and an opportunity to be heard in a pre-termination hearing pursuant to chapter 21 of the Texas Education Code and the Fourteenth Amendment.

79. Plaintiff Megan McMurry now sues Midland ISD for her economic damages, and she sues to recover her attorneys' fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001 and 42 U.S.C. § 1988.

IX. Count IV

Defamation and Invasion of Privacy (By Megan McMurry Against Alexandra Weaver)

80. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth.

81. Officer Weaver made defamatory statements about Ms. McMurry to fellow co-workers at Abell Junior High School. She impugned the integrity and character of Ms. McMurry, which exposed her to contempt,

ridicule, and financial injury. Ms. McMurry suffered damages as a result. Therefore, Officer Weaver is liable to Ms. McMurry for defamation.

82. Officer Weaver is also liable to Ms. McMurry for invasion of privacy because Officer Weaver went around and openly discussed the fact there was a pending investigation into Ms. McMurry to others. While the fact of an investigation might have been true, Officer Weaver caused unreasonable publicity to be given to the private life of Ms. McMurry when there was no legitimate public concern to reveal the same, as this occurred before Ms. McMurry's criminal indictment. Officer Weaver's conduct likely violated confidentiality laws to protect the identity of minors found in federal law and in Tex. Fam. Code § 58.008. Ms. Weaver's discussions about the investigation occurred without Ms. McMurry's knowledge or consent and in violation of her right of privacy. The disclosure of such confidential and highly personal information was offensive to any person of ordinary sensibilities, and Ms. McMurry suffered damages as a result.

83. A state cause of action for defamation is actionable under section 1983 when it connected to and reasonably related to an infringement of another right. As described above, Officer Weaver violated Ms. McMurry's right against unreasonable searches and right to family integrity in this incident, and she invaded Ms. McMurry's personal privacy.

84. Because Officer's Weaver's defamatory statements and invasion of privacy did not relate to her

performance of duties requiring the exercise of judgment or discretion, then she is not shielded by Texas' statutory immunity for school district employees as she unmistakably acted outside the scope of her regular duties in committing the intentional torts.

85. Plaintiff Megan McMurry contends that Officer Weaver's commission of defamation and invasion of privacy have caused her damages for which she now sues. Because Defendant Weaver acted recklessly and with callous indifference, Ms. McMurry further seeks to recover punitive damages. Finally, Ms. McMurry seeks to recover her attorneys' fees pursuant to 42 U.S.C. § 1988.

X. Demand for Jury Trial

86. Pursuant to Fed. R. of Civ. P. 38, Plaintiffs demand a jury trial for all issues in this matter.

PRAYER

WHEREFORE, Plaintiffs pray that Defendants Midland Independent School District, Alexandra Weaver, and Kevin Brunner be cited to appear and answer and that, upon final trial, the Court enter judgment granting Plaintiffs the following relief against Defendants, jointly and severally:

1. Actual damages;
2. Punitive damages;

3. Plaintiffs' reasonable and necessary attorneys' fees and expenses incurred in pursuing this claim together with conditional awards of additional attorneys' fees in the event of the filing post-verdict motions and/or appeals;

4. Prejudgment interest as allowed by law;

5. All costs of court;

6. Post judgment interest as allowed by law; and

7. Such other and further relief, at law or in equity, to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

BLUMBERG BAGLEY PLLC

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ATTORNEY FOR PLAINTIFFS

[Certificate Of Service Omitted]