Appendix A

United States Court of Appeals for the Eighth Circuit

No. 21-2433

J.T.H.; H.D.H.

Plaintiffs – Appellees

v.

Missouri Department of Social Services Children's Division

Defendant

Spring Cook

Defendant – Appellant

Appeal from United States District Court for the Eastern District of Missouri – Cape Girardeau

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Submitted: January 13, 2022
Filed: July 1, 2022

Appendix A

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Two parents sued a child-welfare investigator for allegedly retaliating against them for exercising their First Amendment rights. The magistrate judge, acting by consent of the parties, concluded that neither absolute nor qualified immunity applied. We reverse.

I.

A sheriff's deputy sexually abused J.T.H.'s 15-year-old son. J.T.H., who also worked in law enforcement, threatened to sue for the abuse. Before long, Spring Cook, a child-welfare investigator, showed up at his door after someone had apparently called the child-abuse hotline and accused him (and his wife) of neglect. The parents asked for the case to be reassigned to an investigator from another county, but Cook kept it for herself.

From there, the investigation took several twists and turns. After conducting several home visits, Cook allegedly told J.T.H. that she would "get[]" his peace-officer's license, which led the family to "refuse[] further home visits." Not long after, Cook issued a preliminary written finding of neglect. *See* Mo. Rev. Stat. § 210.152.2(1). She relied on two incidents of sexual abuse: the one involving the sheriff's deputy and another involving a martial-arts instructor. Cook

additionally noted that the parents had permitted their son to go on a date in another state with a teenage boy. If the finding had become final, the parents would have been placed on Missouri's Child Abuse and Neglect Registry. *See* Mo. Rev. Stat. § 210.109.3(1), 210.110(3).

Unsatisfied with the outcome, the parents requested a formal administrative review. *See* Mo. Rev. Stat. § 210.152.4 (providing that "[a]ny person named in an investigation as a perpetrator . . . may seek an administrative review by the child abuse and neglect review board"). At the first step, the circuit manager decides whether to uphold the preliminary finding. *See* Mo. Code Regs. Ann. tit. 13, § 35-31.025(2)(B) (2008). As it happens, Cook was the circuit manager, so she reviewed and upheld her own finding. The second step required Cook, the parents, and their attorney to appear before Missouri's Child Abuse and Neglect Review Board. *Id.* § 35-31.025(2)(C). Following that meeting, the Board concluded that Cook's findings of "neglect were unsubstantiated."

After clearing their name, the parents sued Cook on a First Amendment retaliation theory. *See* 42 U.S.C. § 1983. According to them, the investigation and its aftermath were a direct response to their earlier threat to sue. Cook filed a motion to dismiss on both absolute- and qualified-immunity grounds, but the magistrate judge concluded that neither was available.

Appendix A

II.

Questions about absolute and qualified immunity at the motion-to-dismiss stage are reviewed de novo. *See Sandknop v. Mo. Dep't of Corr.*, 932 F.3d 739, 742 (8th Cir. 2019). Our review "is limited to the facts alleged in the . . . [c]omplaint, which we accept as true and view most favorably to the plaintiffs." *Stanley v. Finnegan*, 899 F.3d 623, 625 (8th Cir. 2018); *see also Sandknop*, 932 F.3d at 742.

Absolute immunity, the "strong[er] medicine," is available only in limited circumstances. *Forrester v. White*, 484 U.S. 219, 230 (1988) (quotation marks omitted). It covers "judicial or adjudicative" acts, *id.* at 229; legislative acts coming within the Speech and Debate Clause, *see id.* at 224; and, as relevant here, prosecutorial acts, *see Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976). If absolute immunity existed for a particular government function in 1871, when Congress passed 42 U.S.C. § 1983, then it still does today. *See Forrester*, 484 U.S. at 225– 26; *see also Imbler*, 424 U.S. at 417–18. As its name suggests, absolute immunity applies absolutely and without qualification.

Qualified immunity is different. On the one hand, it covers a vast array of actions, from split-second judgment calls to carefully crafted decisions. *See Goffin v. Ashcraft*, 977 F.3d 687, 691 (8th Cir. 2020); *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 873–74, 881 (8th Cir. 2020). In other ways, it is narrower: government actors only benefit from it if their actions did not violate a clearly established right. *See McManemy v. Tierney*, 970 F.3d 1034, 1038

(8th Cir. 2020). As the Supreme Court has put it, "the right's contours [must have been] sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014)).

A.

Differentiating between the two can be tricky. Determining which applies depends on "'the nature of the function performed, not the identity of the actor who performed it.'" *Schenk v. Chavis*, 461 F.3d 1043, 1046 (8th Cir. 2006) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)).

Applying the "functional approach," our starting point is the investigation itself, which involved interviewing witnesses and collecting evidence. *See Forrester*, 484 U.S. at 224 (noting that "[r]unning through our cases, with fair consistency, is a functional approach to immunity questions" (internal quotation marks omitted)). Purely investigative activities, even those conducted by a social worker, "do not qualify for absolute immunity." *Schenk*, 461 F.3d at 1046; *see also Beltran v. Santa Clara Cnty.*, 514 F.3d 906, 908–09 (9th Cir. 2008) (en banc) (per curiam) ("[S]ocial workers conducting investigations have no [absolute] immunity."); *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989) (holding that a social worker's "decision to 'open a case' was not entitled to absolute immunity" because the "decision was only investigatory or administrative in nature").

Nor does filing an "investigation report," the final step in Cook's investigation. *See* Mo. Rev. Stat. § 210.152.1, 2(1). Like a probation officer who files a violation report, Cook's task was to make a preliminary "finding" on the issue in front of her. Mo. Code Regs. Ann. tit. 13, § 35-31.025(2) (2008); *see Ray v. Pickett*, 734 F.2d 370, 373–75 (8th Cir. 1984); *Nelson v. Balazic*, 802 F.2d 1077, 1079 (8th Cir. 1986). To be sure, the setting was different: a child-welfare investigation rather than a criminal one. And the standard was different: a preponderance of the evidence instead of probable cause. But the "function" was more or less the same, meaning that neither is a "prosecutorial" act subject to absolute immunity. *See Ray*, 734 F.2d at 373–75 (holding that there is no absolute immunity for filing a probation violation report); *see also Millspaugh v. Cnty. Dep't of Pub. Welfare of Wabash Cnty.*, 937 F.2d 1172 (7th Cir. 1991) (explaining that a social worker's application for a child-custody order "was much like a police officer's affidavit seeking a search warrant, . . . which . . . falls outside the scope of absolute immunity"); *Austin v. Borel*, 830 F.2d 1356, 1362 (5th Cir. 1987) (concluding that the same act was "functionally comparable to a police officer seeking an arrest warrant").

B.

Qualified immunity is another story. It is available if the parents' complaint did not state "a plausible claim for violation of a constitutional or statutory right" or the "right was [not] clearly established at the

time of the alleged infraction." *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013).

Here, the complaint falls short of establishing that Cook violated a clearly established right. *See id.* Even assuming that the facts in the complaint are true and drawing all reasonable inferences in the parents' favor, "existing precedent" does not "place[] . . . the constitutional question beyond debate." *Kisela*, 138 S. Ct. at 1152 (citation omitted). After all, we have never recognized a retaliatory- investigation claim of this kind. Nor have other courts around the country, which have either rejected the possibility outright or concluded, like we do today, that the law is still in flux.[1] It is safe to say, in other words, that the law is anything but clear.

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[1] *See Villarreal v. City of Laredo, Tex.*, 17 F.4th 532, 542 n.1 (5th Cir. 2021) (holding that "this circuit does not recognize" a retaliatory-investigation claim); *Lincoln v. Maketa*, 880 F.3d 533, 540 (10th Cir. 2018) ("The Supreme Court has declined to consider whether a retaliatory criminal investigation entails a constitutional violation. Other circuits disagree with one another on the issue." (citation omitted)); *Archer v. Chisholm*, 870 F.3d 603, 620 (7th Cir. 2017) ("There is no clearly established rule of law under which an official pursuing a lawful investigation, based on probable cause, has been found liable under the First Amendment to a target."); *Rehberg v. Paulk*, 611 F.3d 828, 850–51 (11th Cir. 2010) (noting that "[t]he Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional tort, and neither has this Court," and holding that the "right to be free from a retaliatory investigation is not clearly established" (citation omitted)).

It makes no difference that, "as a *general* matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . on the basis of . . . constitutionally protected speech." *Solomon v. Petray*, 795 F.3d 777, 787–88 (8th Cir. 2015) (quotation marks and brackets omitted) (emphasis added). The Supreme Court has instructed us "not to define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152 (quotation marks omitted). So even if there is a *general* right to be free of retaliation, the law is not clearly established enough to cover the "*specific* context of the case": retaliatory *investigation*. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (emphasis added). Cook is entitled to qualified immunity for both investigative acts.

C.

By the time she reviewed her own finding as circuit manager, however, there was no longer an open investigation. To the contrary, her job at that point was to review the report and either "uphold or reverse" it. Mo. Code Regs. Ann. tit. 13, § 35-31.025(2)(B) (2008). Unsurprisingly, she stood by her own work.

We have already held that absolute immunity is available for functions like this one. *See Stanley v. Hutchinson*, 12 F.4th 834 (8th Cir. 2021). In *Stanley*, two parents sued after a child-welfare investigator made a "'find[-]true' determination," which had the effect of upholding the initial allegations of child abuse. *Id.* at 844. We concluded, as relevant here, that "[t]he true findings may have initiated the administrative hearings regarding child abuse, but this was a

prosecutorial decision meriting absolute immunity." *Id.*; *see also Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015) ("[S]ocial workers enjoy absolute immunity when acting in their capacities as legal advocates," which includes "initiating court proceedings" and "filing child-abuse complaints.").

Little separates Cook's decision to uphold her own preliminary finding from the find-true determination in *Stanley*. Elsewhere in their brief, the parents point out that *Stanley* did not involve a First Amendment claim. But as we have explained, the availability of absolute immunity depends on "the nature of the function performed," not the type of claim brought. *Forrester*, 484 U.S. at 229.

III.

We accordingly reverse the judgment and remand for dismissal of the parents' First Amendment retaliation claim.

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

SOUTHEASTERN DIVISION

J.T.H. and H.D.H., Plaintiffs, v. MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, et al., Defendants.	Case No. 1:20 CV 222 ACL

MEMORANDUM AND ORDER

This matter is before the Court on the Complaint of Plaintiffs asserting various civil rights and state law claims against Defendants Missouri Department of Social Services ("DSS"), Children's Division ("CD") and Spring Cook, arising out of a CD investigation concerning Plaintiffs' minor son. Presently pending before the Court is Defendants' Motion to Dismiss. (Doc. 11.) Also pending are Plaintiffs' Motion for Preliminary Injunction (Doc. 13) and Motion for Leave to

File a Sur-Response in Opposition to Defendants' Motion to Dismiss (Doc. 44).

I. Background

A. The Complaint

The Complaint alleges that Plaintiff's minor son was sexually abused by Scott County Sheriff's Deputy Brandon Cook in May 2018. Cook was a colleague of the Plaintiff Father, who was also a Scott County deputy. Cook groomed the minor for sexual abuse through various social activities and a smartphone app called Grindr. The sexual abuse took place in Cook's marked patrol car while Cook was in uniform. Shortly after the incident, Cook was arrested by the Missouri State Highway Patrol ("MSHP") for second-degree statutory sodomy.

In September 2018, Plaintiff Father, through counsel and as a next friend of his minor son, asserted a claim against Scott County for the incident with Cook.

On November 7, 2018, Spring Cook, a CD director/circuit manager, appeared at Plaintiffs' family home with a deputy juvenile officer ("JO") and MSHP troopers reporting that there had been a hotline call regarding Plaintiffs' minor son. Plaintiffs state that Spring Cook routinely works "hand-in-glove" with certain Scott County Sheriff's Deputies. (Doc. 1 at 4-5.) Cook and the troopers interviewed Plaintiffs' minor son at that time, and on three other occasions—November 9, 2018, November 10, 2018, and November

13, 2018. Plaintiffs then refused further home visits by Defendant Cook.

By letter from Plaintiffs' counsel dated November 23, 2018, and by telephone call from counsel, Plaintiffs requested that Spring Cook recuse herself from investigating the parents and refer the investigation to a CD office in another county. Plaintiffs allege that such recusal is customary for matters involving local law enforcement families, "because of the reality that local law enforcement routinely works hand-in-glove with the local county Children's Division office." (Doc. 1 at 6.) Plaintiffs declined a referral to SEMO-NASV for a physical examination of the son on the basis that there had been no recent assault, and any such inspection would traumatize the boy. Cook also proposed that the parents submit a parenting plan.

On January 7, 2019, Cook made a preliminary finding under a preponderance of evidence standard of parental child neglect. Cook's finding was based on the following three incidents: (1) Brandon Cook's sexual abuse of the son; (2) the son's Facebook messaging about sex and alleged sexual abuse by another adult, a local Tae Kwan Do instructor ("Instructor"); upon learning of the abuse, Plaintiff Father confronted the Instructor while Plaintiffs' daughter and her friend were nearby in a car, the Instructor responded by assaulting Plaintiff Father; Plaintiff Father de-escalated the situation by not responding with physical force and retreating; Plaintiff Father did not report the assault; and (3) a benign, age-appropriate out-of-state date the minor son went on with his mother's permission. Cook focused her findings of neglect on

the fact that Plaintiffs allowed the minor son—who was sixteen at the time—usage of the internet on his iPhone, and permitted him to drive a vehicle across state lines to go on an age-appropriate date.

Cook referred the matter to a JO, who conducted his own independent investigation and found there was "no evidence" to support an allegation of parental neglect. *Id.* at 10. The JO's finding had no effect on Cook's finding.

Plaintiffs timely filed an administrative appeal of Cook's finding. As part of the administrative review triggered by Plaintiffs' appeal, Cook reviewed her own investigatory work and upheld her finding of neglect.

Plaintiffs next sought review by the CD's Child Abuse and Neglect Review Board ("CANRB"). On August 27, 2019, the CANRB conducted a hearing in Jefferson City, Missouri, in which Spring Cook participated by telephone and without counsel, and Plaintiffs appeared in person and with individual counsel. Two days later, the CANRB issued letters holding that the findings of neglect were unsubstantiated as to each parent under a preponderance of the evidence standard.

Neither Plaintiff was listed on the Missouri Child Abuse and Neglect Registry ("Central Registry").

Plaintiffs allege they were subject to an investigation by the FBI concerning "substantially similar charges" regarding their minor son in March 2020. (Doc. 1 at p. 16.) Plaintiffs believe that two FBI agents

visited Spring Cook's office. One of the FBI agents then questioned Plaintiffs' daughter at length about the minor son's sexuality and sexual conduct. Plaintiffs' daughter was told that she was the only member of the family who was known by "the authorities" to be cooperative. *Id.* at 17. The FBI never followed-up with any other family members, and eventually closed the investigation. Plaintiffs allege that Spring Cook contacted the FBI in frustration that the CANRB did not substantiate her earlier allegation and/or in retaliation against Plaintiffs.

The Complaint set forth five counts. In Count I, Plaintiffs request prospective, declaratory relief against CD for violating Plaintiffs' procedural due process rights. Count II seeks to enjoin CD from enforcing allegedly unconstitutional procedures in resolving reports of abuse made to the State of Missouri's Child Abuse and Neglect Hotline. In Count III, Plaintiffs allege Defendant Spring Cook, in her individual capacity, retaliated against Plaintiffs for making allegations against Scott County and its Sheriff by investigating and making a finding of child neglect against Plaintiffs in violation of their rights under the First Amendment to the United States Constitution. Count IV alleges that Spring Cook, in her individual capacity, violated Plaintiffs' right to procedural and substantive due process under the Fourteenth Amendment. In Count V, Plaintiffs assert a state law malicious prosecution claim against Spring Cook for investigating and making findings against Plaintiffs for child neglect.

Appendix B

B. Missouri Child Abuse and Neglect Report Procedure

The Court's summary of the State procedure was taken primarily from Defendants' Memorandum in Support of their Motion to Dismiss (Doc. 12 at 7-23), and is provided for background.

CD is a Division within DSS charged by law with "establish[ing] a child protection system for the entire state" of Missouri. § 210.109.1 RSMo. Reports of child abuse or neglect are called in to the central Child Abuse Hotline and recorded in the information system. § 210.145.1 RSMo. After the Central Abuse Hotline receives the report and determines that there is enough information to merit an investigation or family assessment, the report and any relevant information is transmitted to the local CD office. § 210.145.2 RSMo. Reports of child abuse or neglect that, if true, would constitute a suspected violation of a crime under chapter 566 if the victim is a child less than eighteen years of age merit a CD investigation and trigger CD's obligation to report to law enforcement. § 210.145.3 RSMo.

The local office then determines if the case should be handled as an investigation or family assessment and services, and commence that process within certain time frames. §§ 210.145.3, 210.145.8 RSMo.; 13 CSR 35-31.025. Local CD can decide to handle a case as an assessment rather than investigation by assessing the needs of the family and offering services; however, if CD determines that the child is at risk of abuse or neglect and the family declines to accept

voluntary services, CD may commence an investigation. §§ 210.145.15, 210.145.16 RSMo. If local CD decides to handle the case as an investigation, CD is required to contact and work with law enforcement in all aspects of the investigation. § 210.145.7 RSMo. If the local office decides to proceed, a timely investigation must be commenced. § 210.145.8 RSMo.; 13 CSR 35-31.020(6). In most cases, this includes directly observing the child within 24-72 hours. *Id.* Section 210.145.10 RSMo defines the scope of the investigation as follows:

> The investigation shall include but not be limited to the nature, extent, and cause of the abuse or neglect; the identity and age of the person responsible for the abuse or neglect; the names and conditions of other children in the home, if any; the home environment and the relationship of the subject child to the parents or other persons responsible for the child's care; any indications or incidents of physical violence against any other household or family member; and other pertinent data.

Once CD has completed the investigation and decided whether to make a finding of child abuse or neglect, it must update the information system and give timely written notice of the decision to the alleged perpetrator and the child's parents. § 210.152.2 RSMo. If CD determines that a preponderance of the evidence supports a finding of child abuse or neglect it will issue a preliminary finding, copies of which are sent to the alleged perpetrator and the child's parents. § 210.152.2 RSMo.; 13 CSR 35-31.025(2). CD will not

list the individual as a perpetrator of child abuse or neglect in the Central Registry until the alleged perpetrator has been given notice and opportunity for administrative review. 13 CSR 35-31.025.

The Central Registry is "a registry of persons where the division has found probable cause to believe prior to August 28, 2004, or by a preponderance of the evidence after August 28, 2004, or a court has substantiated through court adjudication that the individual has committed child abuse or neglect or the person has pled guilty or has been found guilty of a crime pursuant to section 565.020, 565.021, 565.023, 565.024, 565.050, 566.030, 566.060, or 567.050 if the victim is a child less than eighteen years of age, or any other crime pursuant to chapter 566 if the victim is a child less than eighteen years of age and the perpetrator is twenty-one years of age or older, a crime under section 568.020, 568.030, 568.045, 568.050, 568.060, 568.080*, 568.090*, 573.023, 573.025, 573.035, 573.037, 573.040, 573.200, or 573.205, or an attempt to commit any such crimes. Any persons placed on the registry prior to August 28, 2004, shall remain on the registry for the duration of time required by section 210.152." § 210.110(3) RSMo.

When notified that CD has issued a preliminary finding of child abuse or neglect, the alleged perpetrator has three options. First, do nothing and waive his or her right to administrative or judicial review; in which event, CD will list the individual in the Central Registry. Second, if they disagree, he or she may request administrative review of the decision. 13 CSR 35-31.025 and §210.152.4 RSMo. In these cases, CD

will not list the individual in the Central Registry unless and until the CANRB upholds the CD's findings. When an alleged perpetrator requests CANRB review, the CANRB's decision is the CD's decision, and the preliminary findings of the investigator or Circuit Manager is not. 13 CSR 35-31.025(11). Third, the alleged perpetrator can waive administrative review and file a Petition for Circuit Court de novo review. § 536.100 RSMo. In these cases, CD will list the alleged perpetrator's name in the Central Registry, because the individual has waived his or her right to administrative review. *Id.* The individual, however, can ask the court to stay CD's decision and stay Central Registry listing pending resolution of the judicial review. § 536.120 RSMo.30.

When CD receives a request for administrative review, the local circuit manager or her designee will review the report to decide to uphold or reverse the finding. 13 CSR 35- 31.025(2)(B). If the Circuit Manager reverses the finding, the matter is concluded. 13 CSR 35- 31.025(2)(C). If the Circuit Manager upholds the finding, the case goes to the CANRB. *Id.*

The CANRB is a nine-member board within DSS responsible for providing an independent review of child abuse and neglect determinations where the alleged perpetrator is aggrieved by CD's preliminary finding. § 210.153.1 RSMo. Members are appointed by the Governor with the advice and consent of the Senate. § 210.153 RSMo. CANRB members include various professionals with training or expertise in child abuse/neglect, and may include parents, foster parents or grandparents. § 210.153.2 RSMo.

Appendix B

In CANRB proceedings, alleged perpetrators have a right to counsel, and to appear personally or to submit written arguments. § 210.153.4(2) RSMo. They may present witnesses § 210.153.4(2). 13 CSR 35-31.025(8)(F). Testimony is not given under oath, nor does the law provide for compulsory attendance or cross-examination of witnesses. *See* § 210.153 and 13 CSR 35-31.025. The rules of evidence do not apply, and hearsay evidence can be considered. *Id.* The CD and the alleged perpetrator may submit written materials and exhibits for consideration. 13 CSR 35-31.025(9)(A)(4). There is no right to formal discovery, but the Circuit Manager will provide a copy of the investigation, including all records provided to the CANRB, with the exception of "confidential information or other information that could jeopardize child safety." 13 CSR 35-31.025(9)(A)(3). At the hearing, the child's representative, the CD, and the alleged perpetrator are given 20 minutes (if requested) to present their case. 13 CSR 35-31.025(10). The CANRB may grant additional time to a party. *Id.* The CANRB will notify CD, the alleged perpetrator and the child's representative of its decision within five business days. 13 CSR 35-31.025(12). The CANRB's decision is the CD's final decision. 13 CSR 35-31.025(11). An alleged perpetrator who is aggrieved by a CANRB decision has a right to file a Petition in State Circuit Court for de novo judicial review. §§ 210.152.4 and 210.153 RSMo.

II. Standard

Federal Rule of Civil Procedure 12(b)(1) provides for a motion to dismiss for lack of subject matter

jurisdiction. The party asserting federal jurisdiction bears the burden to prove federal subject matter jurisdiction exists. *V S Ltd. P'ship v. Dep't of Hous. & Urb. Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

Rule 12(b)(6) provides for a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)). "To survive a motion to dismiss, a claim must be facially plausible, meaning that the 'factual content ... allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Cole v. Homier Dist. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court must "accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Id.* (quoting *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster. *Iqbal*, 556 U.S. at 678.

III. Defendants' Motion to Dismiss

Defendants first move to dismiss Counts I and II for lack of standing. Defendants next argue that Counts I, II, and IV fail to state a claim, because

Missouri law and procedures comply with constitutional due process requirements, and Cook did not violate Plaintiffs' right to substantive due process. They argue that Count II also fails because it does not state a claim for injunctive relief. Defendants contend that Count III fails because it does not identify a protected activity, and because Cook had sufficient facts to raise a reasonable suspicion to support her finding. Defendants argue Counts III and IV are barred by the doctrines of absolute, qualified, and official immunities. Finally, they contend that Count V fails to state a claim for malicious prosecution and is barred by absolute and official immunity.

On the same day Defendants filed their Motion to Dismiss, Plaintiffs moved for a preliminary injunction to enjoin CD during the pendency of this litigation from enforcing the Central Registry statutory and regulatory process without requiring the CD to grant accused parties the following procedural due process rights: (1) right to obtain all evidence, including disclosure of CD's entire file, and to compel production of all evidence if necessary, with some process to compel production; (2) right not to be charged money for disclosure of CD's evidence; and (3) right to cross-examine CD's witnesses where there are conflicting narratives of the truth, in light of an alleged perpetrator's interest in avoiding "stigma plus" placement on the Central Registry. (Doc. 13.)

Appendix B

A. Standing

Defendants first argue that Counts I and II fail because Plaintiffs lack standing in that no actual controversy exists between the parties.

"The irreducible constitutional minimum of standing is that a plaintiff show (1) an injury-in-fact that (2) is fairly ... traceable to the challenged action of the defendant and (3) is likely ... to be redressed by a favorable decision in court." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (cleaned up) (quoting *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011)). "A plaintiff has suffered an injury-in-fact if he has experienced 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Plaintiffs must establish standing for each type of remedy sought, including declaratory and injunctive relief. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 185 (2000); *see Mosby v. Ligon,* 418 F.3d 927, 932-33 (8th Cir. 2005).

"A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack'" on jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* (internal citations

omitted). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* (internal citation omitted).

Here, although Defendants do not specify, it appears they are alleging a facial attack. As such, the Court accords Plaintiffs' complaint Rule 12(b)(6) protection by "accepting as true all facts alleged in the complaint." *See Trooien v. Mansour*, 608 F.3d 1020, 1026 (8th Cir. 2010). The Court will "consider[ ] only the materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint.'" *Cox v. Mortgage Elec. Registration Sys., Inc.*, 685 F.3d 663, 668 (8th Cir. 2012) (quoting *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n. 4 (8th Cir. 2003)).

1. Count I

Count I seeks a declaratory judgment that *Jamison v. State*, 218 S.W.3d 399 (Mo. 2007) is "no longer good law and it deprives the Plaintiffs of adequate procedural due process before a 'stigma plus' deprivation by being placed on the Child Abuse & Neglect Registry." (Doc. 1 at 25.) Plaintiffs request that the Court issue a declaratory judgment enjoining CD from "enforcing unconstitutional procedures as to pre-CANRB hearing discovery and hearing procedure." *Id.*

In *Jamison*, the plaintiffs—nurses at a child care center—were accused of child abuse and neglect. The plaintiffs had been listed in the Central Registry *before* the CANRB hearing. They argued that the

Missouri Child Abuse Act was unconstitutional, facially and as applied, under the due process clauses of the United States and Missouri constitutions. The plaintiffs, like here, argued that due process required a full evidentiary, pre-deprivation hearing on the record, with the right to subpoena witnesses, conduct discovery and cross-examine witnesses under oath before their names were entered in the Central Registry. The Court found that the listing of the plaintiffs' names on the Central Registry implicated a liberty interest for the purposes of a due process challenge, and that these rights were violated when their names were listed prior to the CANRB hearing. The Court, however, held that Missouri's informal, CANRB procedures met procedural due process requirements. *Jamison*, 218 S.W.3d at 412-415.

Defendants argue that no current, actual controversy exists between the parties because the CANRB found in Plaintiffs' favor and Plaintiffs were not listed in the Central Registry. They contend that, as a result, entry of a declaratory judgment cannot put Plaintiffs in a better position and would constitute an impermissible advisory opinion.

Plaintiffs respond that they suffered concrete and particularized injuries when Cook found them to be neglectful of their minor son and continued to prosecute them at the CANRB upon appeal, even though this finding was later overturned. They state that Plaintiff Father's law enforcement license and Plaintiff Mother's desire to return to teaching constitute actual interests that would be impaired by being placed on the Central Registry. Plaintiffs further argue that

they have demonstrated a well-founded fear that findings of neglect by Spring Cook and the CD will continue. They cite to the following allegations in support: they have had a subsequent call out by the FBI on substantially similar allegations; they have faced call outs by the same CD office as to alleged social media content by their thirteen-year-old daughter; and a different sheriff's deputy attempted to "friend" Parents' sixteen-year-old daughter on social media.

The Declaratory Judgment Act provides that, in "a case of actual controversy" within its jurisdiction, a federal court may issue declaratory relief with regard to the rights and/or legal relations of the parties. 28 U.S.C. § 2201. "The Declaratory Judgment Act [does] not extend federal court jurisdiction beyond the recognized boundaries of justiciability, but only 'enlarge[s] the range of remedies available.'" *Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar, Mo.*, 345 F.3d 570, 572 (8th Cir. 2003). In other words, the availability of relief under the Declaratory Judgment Act "presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

The undersigned finds that Plaintiffs have failed to demonstrate an injury in fact. They claim that they were injured when each parent "was found by Spring Cook to be neglectful of their minor son, and she continued to prosecute them at the CANRB upon administrative appeal." (Doc. 36 at p. 5.) In other words, Plaintiffs claim Spring Cook's initial finding constitutes an injury in fact. The decision of the CANRB, not the initial finding of Spring Cook, is the final

finding of the CD. It is undisputed, that, unlike the plaintiffs in *Jamison*, Plaintiffs were never placed on the Central Registry. Under Count I Plaintiffs allege that the state procedures are unconstitutional in that they deprive Plaintiffs of due process "*by being placed on the Child Abuse & Neglect Registry*." (Doc. 1 at p. 25) (emphasis added). As such, Plaintiffs own pleadings reveal that the claimed injury is placement on the Registry, which did not occur in this case.

Further, to the extent Plaintiffs allege Cook's preliminary finding was their injury in fact, the pleadings do not show that this injury could be redressed by a favorable decision of this Court. Plaintiffs seek a judgment that *Jamison* is no longer good law, and that Missouri's procedures for a pre-deprivation hearing at the CANRB violate procedural due process. They also request that the Court enjoin CD from enforcing unconstitutional procedures. Because the CANRB found in Plaintiffs' favor and reversed the preliminary finding of Cook, Plaintiffs will be in no better position if the Court grants the requested relief. Thus, Cook's preliminary finding does not meet the requirements for establishing standing.

Plaintiffs next attempt to establish an injury in fact by arguing they have demonstrated a well-founded fear that findings of neglect will occur in the future. They refer to alleged instances occurring after the CANRB decision, including the FBI investigation and subsequent call outs related to Plaintiffs' other children.

Defendants, relying upon *Mitchell v. Dakota County Social Services*, 959 F.3d 887 (8th Cir. 2020), argue that Plaintiffs' argument that they could face another investigation in the future it too speculative to establish standing. They further argue that Plaintiffs' allegations of subsequent call outs related to their other children are not alleged in the Complaint and are unsubstantiated.

Plaintiffs seeking prospective relief based on past actions must show "a real and immediate threat that [they] would again suffer similar injury in the future." *Mosby*, 418 F.3d at 933 (quoting *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000) (internal quotations and brackets omitted)); *see O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). There are also certain "prudential limitations" on standing and the exercise of federal-court jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As relevant here and in *Mosby*, one such limitation is a rule that parties **"**generally must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties." *Mosby*, 418 F.3d at 933 (quoting *Warth*, 422 U.S. at 499).

In *Mitchell*, the plaintiffs, who were New Jersey residents that briefly resided in Minnesota, brought suit challenging the constitutionality of various Minnesota child protection statutes following the removal of children from their father. When the *Mitchell* plaintiffs filed suit, the children had already been returned by the Minnesota officials and the Plaintiffs had returned to New Jersey. In addition to the children's father, an association of parents affected by

Minnesota's child-protection services—"Stop Child Protection Services from Legal Kidnapping" ("Association")—was a party plaintiff. The Association argued it had standing because its members lived in Minnesota, had had experiences with Minnesota's child-protection services, and could face child abuse investigations in the future. The Court held that "Mitchell's or his children's speculative return to Minnesota is insufficient to show a real and immediate threat of repeat injury. Without an injury in fact, Mitchell and his children lack standing…The speculative future action alleged in the plaintiffs' complaint is not enough to confer standing…to challenge the facial constitutionality of the Minnesota statue." *Id.* (citations omitted). The Court further found that the Association lacked standing, noting that the "speculative future action alleged in the plaintiffs' complaint is not enough to confer standing on any individual member of the association." *Id.*

Plaintiffs argue *Mitchell* is distinguishable because, unlike the *Mitchell* Plaintiffs, they continue to live within Spring Cook's jurisdiction, and they have undergone investigations subsequent to the CANRB decision.

Although it is true that the facts of *Mitchell* are distinguishable in that Plaintiffs in this action remain Missouri residents, the reasoning still applies to preclude standing in this case. The *Mitchell* Plaintiffs' lack of residency in Minnesota was not the only factor considered by the Court. This is demonstrated by the Court's treatment of the Association Plaintiff. The members of the Association *were* Minnesota

residents, alleged they had suffered an injury by Minnesota's child protection system in the past, and argued they could again face child abuse investigations. The Court rejected this argument, finding the allegations of potential future action too speculative to establish standing. Thus, *Mitchell* illustrates that plaintiffs do not have standing to challenge the constitutionality of child protection statutes unless they make a showing of a "*real and immediate* threat of repeat injury." *Id.* at 896 (emphasis added). *See also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (An allegation of "future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur") (internal citations omitted).

The only allegations in the Complaint regarding the possibility of future injury are those related to the subsequent FBI investigation. Plaintiffs allege "on inference," that Spring Cook contacted the FBI in frustration that the CANRB did not substantiate her earlier allegation. (Doc. 1 at 17.) Plaintiffs summarize that the FBI "received a hotline call, made an investigation, and then closed the investigation for lack of probable cause for the allegations." *Id.* By Plaintiffs' own admission, therefore, the FBI did not make a finding of neglect and has closed its investigation. Although Plaintiffs infer that Spring Cook contacted the FBI, Plaintiffs do not allege that Cook or CD opened another investigation. As such, these allegations do not demonstrate a real and immediate threat of an injury caused by Cook or CD.

Appendix B

In an Affidavit attached to Plaintiffs' Motion for Preliminary Injunction (Doc. 13-2), Plaintiff Father alleges that Plaintiffs have also faced recent subsequent call outs by the same CD office in Sikeston as to alleged social media content of their thirteen-year-old daughter; and a different sheriff's deputy attempted to "friend" their sixteen-year-old daughter on social media. Defendants argue that these allegations raise facts outside the scope of the Complaint and should not be considered. In the event the Court considers these new facts, Defendants have filed six Affidavits with supporting materials in opposition.

Even assuming that this evidence can be considered, it does not aid Plaintiffs in establishing standing. The Court will not, therefore, consider Defendants' Affidavits. First, Plaintiffs do not allege that Spring Cook or CD is currently investigating Plaintiffs for allegations of child abuse or neglect. *See Mosby,* 418 F.3d at 933-34; *cf. O'Shea* 414 U.S. at 497 ("[A]ttempting to anticipate whether and when these respondents will be charged with crime and will be made to [be subject to the challenged conduct] takes us into the area of speculation and conjecture.").

Second, even if Plaintiffs could show a CD investigation were pending, Plaintiffs would still lack standing. As previously discussed, Plaintiffs' alleged injury of reputational damage could not be redressed by a favorable decision of this Court, because the requested relief would put Plaintiffs in no better position in light of the fact the CANRB found in Plaintiffs' favor. For the same reason, the requested relief—a declaration that Missouri's CANRB procedures

violate due process—would not redress any future injury. That is, preventing Defendants from enforcing procedures as to "pre-CANRB hearing discovery and hearing procedure" would not preclude Cook from making a preliminary finding of neglect and thereby causing the same injury to Plaintiffs' reputation. To the extent Plaintiffs allege a future investigation could result in not only a preliminary finding of neglect by Cook but also an affirmance of this finding by the CANRB, this argument requires even more speculation and necessarily fails.

Plaintiffs argue in the alternative that they have standing under the mootness exception doctrine because the controversy is "capable of repetition, yet evading review." *Roberts v. Norris*, 415 F.3d 816, 819 (8th Cir. 2005.) Plaintiffs' argument is unavailing. Defendants do not argue, and this Court does not find that Counts I or II are moot. The exception to mootness for disputes capable of repetition yet evading review does not operate to confer standing in this case where Plaintiffs lacked standing at the onset. *See Friends of the Earth, Inc.*, 528 U.S. at 191 ("if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum").

Thus, the Court finds that Plaintiffs lack standing to bring Count I.

2. Count II

In Count II of their Complaint, Plaintiffs seek a preliminary and permanent injunction against CD "on the same grounds as stated in Count I." (Doc. 1 at 25.) Plaintiffs seek to enjoin CD "from enforcing unconstitutional procedures as to pre-CANRB hearing discovery and hearing procedure." *Id.* at 26.

As previously noted, Plaintiffs have also moved for a preliminary injunction to enjoin CD during the pendency of this litigation from enforcing the Central Registry statutory and regulatory process without requiring the CD to grant accused parties the following procedural due process rights: (1) right to obtain all evidence, including disclosure of CD's entire file, and to compel production of all evidence if necessary, with some process to compel production; (2) right not to be charged money for disclosure of CD's evidence; and (3) right to cross-examine CD's witnesses where there are conflicting narratives of the truth, in light of an alleged perpetrator's interest in avoiding "stigma plus" placement on the Central Registry. (Doc. 13.)

To establish standing for their claim for injunctive relief asserted in Count II, Plaintiffs must show the same elements required for their declaratory relief claim, including redressability. *See Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956 (8th Cir. 2015) (citing *Lujan*, 504 U.S. at 560.) The Court has found that Plaintiffs have not sufficiently alleged that they suffered an injury in fact or will suffer an injury in fact in the immediate future that is redressable by a favorable decision. Thus, Plaintiffs

lack standing to bring a claim for a preliminary or permanent injunction. *Id.* at 560-61.

Accordingly, Count II is dismissed. Additionally, Plaintiffs' Motion for a Preliminary Injunction will be denied as moot.

B. Merits of Counts I, II, and IV

Alternatively, had Plaintiffs established standing, Plaintiffs fail to state causes of action for violations of procedural and substantive due process.

To state a claim under 42 U.S.C. § 1983, plaintiff must show a deprivation of a right, privilege, or immunity protected by the Constitution. *Meyer v. City of Joplin,* 281 F.3d 759, 761 (8th Cir. 2002).

A claim for violation of due process may be procedural or substantive. *Creason v. City of Wash.*, 435 F.3d 820, 824 (8th Cir. 2006). A procedural due process violation requires the following elements: (1) a protected life, liberty, or property interest; (2) the deprivation of the same; and (3) the state's failure to provide adequate procedural rights before impinging upon the protected interest. *Mulvenon v. Greenwood*, 643 F.3d 653, 657 (8th Cir. 2011). A substantive due process violation requires the following elements: (1) violation of a constitutional right; and (2) that the state officials' conduct in violating the right "was shocking to the contemporary conscience." *Flowers v. City of Minneapolis, Minn.*, 478 F.3d 869, 873 (8th Cir. 2007).

Whether the due process violation alleged is procedural or substantive in nature, the threshold question is whether the right at issue is protected by the due process clause. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); U.S. Const. amend. XIV ("[n]o [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any [s]tate deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

Plaintiffs first argue that Spring Cook's finding of child neglect was sufficiently stigmatic as to entitle them to the minimum requirements of procedural due process. They assert that they have a liberty interest in being free from State interference in their parenting of their children absent a reasonable suspicion for abuse or imminent danger of abuse. Plaintiffs claim that once a CD official such as Spring Cook "makes an official finding of child neglect against them," then they are entitled to additional procedural due process. (Doc. 36 at 10.) They contend that the constitutional gravamen of a procedural due process claim is not the deprivation itself, but the lack of due process.

"In *Paul v. Davis,* the Supreme Court made clear that injury to reputation alone is not sufficient to state a § 1983 claim." *Jones v. McNeese*, 746 F.3d 887, 898 (8th Cir. 2014) (citing *Paul v. Davis*, 424 U.S. 693, 712 (1976)). However, "reputational harm coupled with 'some more tangible interest such as employment,' can together be 'sufficient to invoke the procedural protection of the Due Process Clause,'" this is

known as the "stigma-plus" test. *Id.* (quoting *Paul*, 424 U.S. at 701). According to the Court, the "plus" element of the stigma plus test is where:

> As a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

Paul, 424 U.S. at 711. The Court held that Paul's action in branding Davis as a known shoplifter in a flyer, despite the harm to Davis' reputation, did not alter or extinguish any right or status Davis enjoyed under state law. *Id.* at 711-12. Thus, Davis was not deprived of a liberty or property interest protected by the Due Process Clause. *Id.* at 712.

The *Jamison* Court applied *Paul* in holding a Central Registry listing met the "stigma plus" test to implicate an individual's constitutionally protected liberty interest insofar as it essentially barred plaintiffs from working in their childcare profession. 218 S.W.3d at 406-08. The Court, however, found additional procedural protections were not required at the pre- deprivation hearing before the CANRB. *Id.* at 412. Citing the State's interest in protecting children and the fact that plaintiffs may seek de novo judicial review, the Court found the "protections given at the CANRB hearing are sufficient." *Id.* at 415.

Here, Plaintiffs have not alleged that a right or status was altered by Spring Cook's preliminary finding of neglect. Cook's finding was confidential under Missouri law, and Plaintiffs do not claim Cook published the finding. Although Plaintiffs' fear of losing their abilities to work in their fields of law enforcement and teaching due to placement on the Central Registry was reasonable, they were not placed on the Central Registry. Because the CANRB found the allegations of neglect were unsubstantiated, Plaintiffs were never placed on the Central Registry, and no other adverse consequences occurred.

It is undisputed that Plaintiffs have a constitutionally protected liberty interest in being free from State interference in their parenting of their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"). That interest, however, "is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Thomason v. SCAN Vol. Services, Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996). As such, parents do not have a constitutional right to be free from child abuse investigations. *Id.*

The Court finds Plaintiffs have failed to allege a sufficient basis to establish Defendants violated a liberty interest. The Complaint reveals that Plaintiffs' minor child was sexually abused by an adult, and that prior to the abuse, he had been groomed through the

use of a smartphone app. Spring Cook received a child neglect hotline call regarding Plaintiffs' minor son, which required Defendants to conduct an investigation. While the investigation was being conducted, Plaintiffs learned that their minor son had had sex with another adult and that this adult had also been contacting the minor son on social media. Plaintiff Father admits he confronted the adult with his daughter and her friend present, which resulted in a physical altercation. Spring Cook found that Plaintiffs were neglectful in failing to supervise their child. (Doc. 13-2.) When Cook notified Plaintiffs of her finding, she informed them of their rights for administrative and judicial review. *Id.* Plaintiffs successfully exercised these rights by seeking review before the CANRB, resulting in a reversal of Spring's preliminary finding after a hearing.

Assuming the allegations in the Complaint are true, they do not support a violation of Plaintiffs' liberty interest. Plaintiffs do not dispute the facts cited by Cook as a basis for her finding of neglect. Instead, they disagree with her conclusion that their actions were neglectful. In light of the admitted facts that Plaintiffs' minor son had been a victim of sexual abuse on multiple occasions, Defendants had a compelling governmental interest in the protection of Plaintiffs' minor son. Plaintiffs successfully challenged Cook's preliminary finding. Contrary to their argument, the fact that other agencies did not press charges or find Plaintiffs were neglectful has no bearing on Cook's *preliminary* finding. Notably, Plaintiffs do not allege Defendants ever removed any of their children from

their home for any length of time during or after the investigation.

Thus, they have not shown that Defendants violated a protected liberty interest by interfering with the custody or care of the children. Because Defendants did not violate a constitutionally protected liberty interest, the Court need not address what process was due. Thus, the procedural due process claims alleged in Counts I, II, and IV will be dismissed.

Similarly, Plaintiffs' substantive due process claim against Defendant Cook asserted in IV necessarily fails due to Plaintiffs' failure to show a deprivation of a protected liberty interest. Thus, Count IV will also be dismissed.

C. Count III

In Count III, Plaintiffs assert a First Amendment retaliation claim against Spring Cook pursuant to § 1983. Specifically, Plaintiffs allege the following: (1) Cook investigated and made findings of parental neglect against Plaintiffs; (2) Plaintiff Father engaged in a protected First Amendment activity in making allegations against Scott County and its Sheriff, and Plaintiff Father's allegations played a part in Cook's decision to investigate and make findings of parental neglect against Plaintiffs; (3) Cook was acting under color of law; (4) Cook took adverse action against Plaintiffs that would chill a person of ordinary firmness from continuing in the activity; (5) the adverse action was motivated at least in part by the exercise

of the protected activity; and (6) Plaintiffs were damaged.

Defendants argue that Count III should be dismissed because Plaintiffs fail to meet any of the elements of a First Amendment retaliation claim.

Retaliation by a government actor in response to an exercise of free speech does qualify as a basis for § 1983 liability. *See Nieves v. Bartlett*, —— U.S. ——, 139 S. Ct. 1715, 1722, 204 L.Ed.2d 1 (2019); *Pendleton v. St. Louis Cnty.,* 178 F.3d 1007, 1011 (8th Cir. 1999). To successfully plead a First Amendment retaliation claim, a plaintiff "must show (1) that he engaged in a constitutionally protected activity; (2) that the defendant took adverse action against him that would chill a person of ordinary firmness from continuing in the activity; and (3) that the adverse action was motivated in part by [the plaintiff's] exercise of his constitutional rights." *Scheffler v. Molin,* 743 F.3d 619, 621 (8th Cir. 2014); *see also Zutz v. Nelson,* 601 F.3d 842, 848-49 (8th Cir. 2010); *Okruhlik v. Univ. of Arkansas,* 395 F.3d 872, 878 (8th Cir. 2005).

First, Plaintiffs must plausibly plead that they engaged in a protected activity. Plaintiffs allege that, "making a civil claim against a government entity related to a matter of public concern—that is, the sexual abuse of a minor son by an on-duty, uniformed police officer—is surely a First Amendment-protected activity." (Doc. 36 at 22.) Defendants argue that Plaintiffs' allegations are insufficient because they fail to indicate the specific claims made that would provide a motive for Cook to retaliate.

Appendix B

It is established law that prison officials may not retaliate against an inmate for filing legal actions in the exercise of his constitutional right of access to the courts. *Goff v. Burton*, 7 F.3d 734, 736 (8th Cir. 1993); *Sanders v. St. Louis Cnty.*, 724 F.2d 665, 666 (8th Cir. 1983). This concept is not exclusive to the formal filing of lawsuits by prisoners, as "criticism of public officials lies at the very core of speech protected by the First Amendment." *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002). *See United States v. Catlett*, 584 F.2d 864, 867 (8th Cir. 1978) (referring to "first amendment right to protest government ... tax-policies"); *Evenstad v. Herberg*, 994 F. Supp. 2d 995, 1000 (D. Minn. 2014) ("The First Amendment protects 'a significant amount of verbal criticism and challenge' directed at the government and its officials.") (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)); *see also Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (case involving retaliatory parking tickets issued to plaintiff who complained to city and state officials about failure to enforce ordinance was sufficient to go to jury).

The Complaint alleges that Plaintiff Father made allegations against Scott County and its Sheriff related to the sexual abuse of his son by a Scott County Sheriff's Deputy. Specifically, on September 7 and 17, 2018, Plaintiff Father, through counsel and as a next friend of his minor son, "asserted but did not file claims against the County related to the underlying occurrence." (Doc. 1 at 4.) Plaintiffs state that these claims were resolved. *Id.* Plaintiffs allege that Scott

County Sheriff's deputies routinely work "hand-in-glove" with Spring Cook.

The Court finds that Plaintiffs have sufficiently alleged that they engaged in a constitutionally protected activity. Defendants raise questions about the specific claims and statements made by Plaintiffs against Scott County that would support Spring Cook's motive to retaliate against Plaintiffs. These are issues better addressed after discovery has been conducted. At this stage, the "plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a sheer possibility," it is not a "probability requirement." *Braden v. Wal–Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009) (citing *Iqbal,* 129 S.Ct. at 1949).

Plaintiffs must next allege that the defendant took adverse action against them that would chill a person of ordinary firmness from continuing in the activity. Defendants argue that "how or why the plaintiffs would be chilled by Ms. Cook's alleged actions is not supported by any allegations of fact." (Doc. 12 at 51.) The Complaint alleges that Cook's finding of parental neglect constitutes an adverse action. The "ordinary firmness test" requires only a small effect on the freedom of speech, as "there is no justification for harassing people for exercising their constitutional rights, it need not be great in order to be actionable." *Garcia*, 348 F.3d at 728-29 (plaintiff's receipt of $35.00 in parking tickets after she complained about city's failure to enforce sidewalk ordinance was sufficient to establish retaliation that would chill the speech of a person of ordinary firmness.) The undersigned finds that

Cook's preliminary finding of parental neglect was sufficiently adverse to chill a person of ordinary firmness.

Third, Plaintiffs must allege that the adverse action was motivated in part by Plaintiffs' exercise of their constitutional rights. Defendants, relying upon *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014), argue that Plaintiffs failed to allege specific facts to establish a plausible claim that their protected activities were a "substantial 'but for' cause of Ms. Cook's decision." (Doc. 12 at 52.) Defendants acknowledge that *Peterson* involved a retaliatory arrest and held that, "[i]n retaliatory arrest cases, we have identified a fourth prong: lack of probable cause or arguable probable cause." *Id.* Defendants argue that this Court should nonetheless apply this principle and require Plaintiffs to show that Cook lacked "reasonable suspicion of child abuse/neglect." (Doc. 12 at 52.) Plaintiffs respond that *Peterson* does not apply. In the alternative, Plaintiffs argue that they sufficiently alleged lack of probable cause.

The Complaint alleges the following facts supporting the adverse action was motivated by Plaintiffs' exercise of their constitutional rights: Defendant Cook arrived at Plaintiffs' home with a Scott County Deputy JO to investigate an alleged child neglect hotline call regarding Plaintiffs' minor son approximately seven weeks after Plaintiff Father asserted claims against Scott County but before the claims were resolved; Defendant Cook and the minor son's abuser share a last name; Plaintiffs, by letter from their counsel, requested that Cook recuse herself from

investigating Plaintiffs but Cook did not recuse herself; during a call out to the family home, Spring Cook made a comment to Plaintiff Father about "getting" his "POST"[1] license; Spring Cook reviewed her own investigatory work as part of the administrative review triggered by Plaintiffs' appeal of her initial finding, despite Plaintiffs' request that she recuse herself; the JO conducted his own investigation and found no evidence to support an allegation of parental neglect; the MSHP never charged Plaintiffs with a crime; the CANRB held that the findings of neglect were unsubstantiated; Spring Cook contacted the FBI after the CANRB did not substantiate her finding as retaliation against Plaintiffs; and the FBI closed its investigation for lack of probable cause for the allegations.

Plaintiffs have plausibly alleged the required causal connection between their protected activity and Cook's decision to investigate and make a preliminary finding of child neglect. At the pleading stage, Plaintiffs need only allege that Defendant's "adverse action was motivated *at least in part* by" Plaintiff Father's protected activity. *Id.* at 808 (emphasis added). Plaintiffs' Complaint contains ample allegations of retaliatory motive.

The Court is not persuaded that Plaintiffs must plead and ultimately prove that Defendant lacked probable cause for her finding of neglect.

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[1] "POST" is an acronym for Peace Officers Standards and Training, and is a program created by state law. *See, e.g.*, Mo. Rev. Stat. §§ 590.010(4), 590.020–.050.)

Nonetheless, the Court finds that Plaintiffs have sufficiently alleged lack of probable cause. Cook's investigation was initiated as a result of Plaintiffs' minor being the victim of sexual abuse by an adult. The Plaintiff Parents, however, were not the abusers. Spring's finding of neglect were based on the facts that Plaintiffs allowed their sixteen-year-old son to have a smartphone with access to the internet and drive a vehicle; the minor son was permitted to go on an age-appropriate date with another minor across state lines; and Plaintiff Father confronted an alleged abuser and was assaulted but did not report the incident to law enforcement. Plaintiffs allege that the CANRB found Cook's findings of neglect were unsubstantiated, the JO found no evidence to support an allegation of parental neglect, the FBI closed its investigation of Plaintiffs for lack of probable cause, and the MSHP never charged Plaintiff with a crime. When the allegations in the Complaint are accepted as true and all reasonable inferences are drawn in favor of Plaintiffs, Plaintiffs have sufficiently pled the absence of probable cause.

In sum, Plaintiffs have plausibly alleged a First Amendment retaliation claim. Defendant's arguments to the contrary target the causal connection between Plaintiffs' protected activity and Defendant's allegedly retaliatory action. Causation, however, is a fact-intensive issue, and Defendant's arguments rely principally on materials which cannot be considered, at this stage, to dispute the well-pled allegations of Plaintiffs' Complaint. Thus, the Court denies Defendant's Motion to Dismiss as to Count III.

Appendix B

D. Absolute and Qualified Immunity

Defendants next argue that Spring Cook is entitled to absolute and qualified immunity from liability on Counts III and IV. Because the Court has already found that Count IV fails to state a claim, the Court will only discuss Count III.

1. Absolute Immunity

"Absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Sample v. City of Woodbury*, 836 F.3d 913, 916 (8th Cir. 2016) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976)). It "protects prosecutors against claims arising from their initiation of a prosecution and presenting a criminal case 'insofar as that conduct is intimately associated with the judicial phase of the criminal process.'" *Sample*, 836 F.3d at 916 (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)). Thus, "[p]rosecutors enjoy absolute immunity in their review of and decisions to charge a violation of the law," *Sample*, 836 F.3d at 916 (citing *Imbler*, 424 U.S. at 420-27), and they are entitled to immunity for the decision to bring charges "whether [they have] probable cause or not[,]" *Saterdalen v. Spencer*, 725 F.3d 838, 843 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n.5 (1993)).

"However, purely administrative or investigative actions that do not relate to the initiation of a prosecution do not qualify for absolute immunity." *Winslow v. Smith*, 696 F.3d 716, 739 (8th Cir. 2012) (quoting *Schenk v. Chavis*, 461 F.3d 1043, 1046 (8th Cir.

2006)). In *Buckley v. Fitzsimmons*, the Supreme Court explained that "[t]here is a difference between the advocate's role in evaluating evidence ... as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." 509 U.S. 259, 273 (1993). It is "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer" that he is not entitled to absolute immunity. *Id.* Therefore, there is a distinction between a police officer's initial collection of evidence and a prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial..." *Id.* The latter function is entitled to absolute immunity. *See Forrester v. White*, 484 U.S. 219, 229 (1987) (The court must look to "the nature of the function performed...."). Absolute immunity has been applied to individuals other than prosecutors if those individuals are participating in court proceedings. *See, e.g. Thomason*, 85 F.3d at 1373 (Social workers "absolutely immune from liability for their participation in the ex parte proceedings in state court that led to the award of temporary protective custody of [the child] to the state").

Here, Plaintiffs challenge Spring Cook's actions in initiating an investigation and making a preliminary administrative finding of child neglect. Defendants have cited no authority for extending absolute immunity to such administrative investigations. Thus, Cook is not entitled to absolute immunity on Count III.

2. Qualified Immunity

Defendants next argue that Spring Cook is entitled to qualified immunity on Count III.

Qualified immunity from personal damage liability "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al- Kidd*, 563 U.S. 731, 743 (2011). "Qualified immunity attaches when an official's conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (quotation omitted). It "protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quotation omitted).

As previously discussed, construed in the light most favorable to Plaintiffs, Count III states a plausible claim of retaliation in violation of the First Amendment against Defendant Cook. Thus, the Court next determines whether the law was clearly established.

The Supreme Court has repeatedly warned that "clearly established law should not be defined at a high level of generality ... [but] must be particularized to the facts of the case." *White*, 137 S.Ct. at 552 (citing prior cases). Although the Supreme Court "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the ... constitutional question beyond debate" at the time the defendant acted. *White*, 137 S.Ct. at 551

(quotation omitted); *see Mullenix*, 136 S.Ct. at 308; *Reichle v. Howards*, 566 U.S. 658 (2012) ("[T]he right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause," *id*. at 665; qualified immunity applied to protective service officers as the right was not clearly established, *id*. at 670).

Defendants argue that *Jamison* is the clearly established law in Missouri on the constitutionality of Missouri's CANRB procedures. Because Cook followed these procedures, Defendants contend that she must be accorded qualified immunity from liability for damages. They further argue that Cook's decision to issue the preliminary finding was objectively reasonable given the facts and in light of the CD's role in conducting child abuse and neglect investigations.

Count III does not challenge the procedures Cook followed, nor does it allege Cook made a mistaken judgment. Instead, the crux of Plaintiffs' claim is Cook's retaliatory intent in making her determination. "Conduct that retaliates against the exercise of a constitutionally protected right is actionable, even if the conduct would have been proper if motivated by a different reason." *Cody v. Weber*, 256 F.3d 764, 771 (8th Cir. 2001). The retaliatory conduct here—the preliminary finding of neglect—is not the constitutional violation; the violation "lies in the intent to impede access to the courts." *Id.* (citing *Madewell v. Roberts,* 909 F.2d 1203, 1206-07 (8th Cir. 1990)).

The question, therefore, is whether a reasonable official might have believed that it was permissible to make findings of child neglect in retaliation for parents making claims against county officials related to the sexual abuse of their child. Under clear Eighth Circuit precedent, the answer is no. *See Goff*, 7 F.3d at 736; *Naucke*, 284 F.3d at 927-28; *Catlett*, 584 F.2d at 867; *Garcia*, 348 F.3d at 729.

Because Plaintiffs successfully allege a violation of a constitutional right, and the right at issue was "clearly established" at the time of the alleged misconduct, Defendant Spring Cook cannot establish qualified immunity "on the face of the complaint." *Bradford v. Huckabee,* 330 F.3d 1038, 1041 (8th Cir. 2003). Thus, the Court will not dismiss Count III.

E. Count V

In Count V, Plaintiffs assert a state law malicious prosecution claim against Spring Cook for investigating and making findings against Plaintiffs for child neglect.

Defendants argue Count V should be dismissed for the following reasons: Defendant Cook is entitled to official immunity; Cook is absolutely immune from liability for malicious prosecution; Count V fails to plead the elements of a claim for malicious prosecution; or, in the alternative, the Court should decline to exercise its supplemental jurisdiction.

To prevail on a malicious prosecution claim in Missouri, a party must prove six elements: (1)

commencement of an earlier suit against the party; (2) instigation of that suit by the adverse party; (3) termination of the suit in the party's favor; (4) lack of probable cause for filing the suit; (5) malice by the adverse party in initiating the suit; and (6) damage sustained by the party as a result of the suit. *State ex rel. O'Basuyi v. Vincent,* 434 S.W.3d 517, 519 (Mo. banc 2014). Malicious prosecution actions are not favored in the law as public policy supports uncovering and prosecuting crime. *Sanders v. Daniel Int'l Corp.,* 682 S.W.2d 803, 806 (Mo. en banc 1984). As such, courts require strict compliance with the requisite elements. *Edwards v. Gerstein,* 237 S.W.3d 580, 583 (Mo. banc 2007).

Missouri courts have not recognized a cause of action for malicious prosecution arising outside of judicial proceedings. *See, e.g., Holland v. Healthcare Servs. of the Ozarks*, 347 S.W.3d 166, 168 n.2 (Mo. Ct. App. 2011) ("No Missouri court has recognized a claim for malicious prosecution arising from an administrative proceeding. The underlying proceeding has always been either a civil or criminal lawsuit."); *Teefey v. Cleaves*, 73 S.W.3d 813, 816 (Mo. Ct. App. 2002) ("Were we to pass favorably on [plaintiffs'] cause of action, we would be the first Missouri court to apply a malicious prosecution claim to an administrative proceeding. No Missouri court has recognized the claim in this context.").

This Court,[2] in *Abernathy v. White*, 4:19-CV-00009-NAB, 2019 WL 4750247, at *3 (E.D. Mo. Sept.

[2] The Honorable Nannette A. Baker, United States Magistrate

30, 2019), recently considered whether a city alderman stated a claim for malicious prosecution arising from impeachment proceedings initiated by the city. Judge Baker held that the plaintiff failed to state a claim, noting that the "Court is not included to supplant the judgment of the Missouri courts and extend the law in the manner required to sustain Plaintiff's claim." *Id.*

The undersigned declines to extend Missouri malicious prosecution actions to administrative proceedings in the absence of any authority to do so. Thus, Count V fails to state a claim for which relief can be granted, and will be dismissed.

F. Plaintiffs' Motion for Leave to File a Sur-Response

Plaintiffs have requested the opportunity to file a Sur-Response in opposition to the Defendants' Motion to Dismiss. The Defendants oppose the Motion.

Eastern District of Missouri Local Rule 4.01(C) states that additional memoranda following a reply may be filed only with leave of Court. Insofar as the above analysis has resulted in a favorable outcome for the Plaintiffs as to Count III, Plaintiffs' request to file a Sur- Response is moot. As to their substantive due process claim, Plaintiffs wish this Court to consider an out-of-district decision that is not binding authority on this Court. The undersigned has found that

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Judge.

Plaintiffs' substantive due process claim against Defendant Cook necessarily fails because the undisputed facts do not support a violation of Plaintiffs' liberty interest. As such, the Court declines to entertain Plaintiffs' Sur-Response.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (Doc. 11) is **granted in part and denied in part**.

IT IS FURTHER ORDERED that Counts I, II, IV, and V are **dismissed**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction (Doc. 13) is **denied as moot**.

IT IS FURTHER ORDERED that Motion for Leave to File a Sur-Response in Opposition to Defendants' Motion to Dismiss (Doc. 44) is **denied as moot**.

/s/ Abbie Crites-Leoni
ABBIE CRITES-LEONI
UNITED STATES MAGISTRATE JUDGE

Dated this 4th day of June, 2021.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

J.T.H.,

and

H.D.H.,

Plaintiffs,

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES CHILDREN'S DIVISION,

Serve: 205 Jefferson Street, 10th Floor
Jefferson City, MO 65103

and

SPRING COOK, *in her individual capacity,*

Serve: 106 Arthur, Suite A
Sikeston, MO 63801

Defendants.

No. 1:20-cv-222

PLAINTIFFS DEMAND JURY TRIAL

Appendix C

COMPLAINT

for Declaratory & Injunctive Relief, and Damages, Civil Rights, 42 U.S.C. § 1983

Plaintiffs J.T.H. and H.D.H., by counsel Hugh A. Eastwood and W. Bevis Schock, state as follows for their Complaint, 42 U.S.C. § 1983, for declaratory & injunctive relief against Defendant Missouri Department of Social Services; and for damages against Defendant Scott County Children's Division director/circuit manager Spring Cook in her individual capacity only.

Introduction

1. Scott County sheriff's deputy Brandon Cook sexually abused Plaintiffs' 15-year-old son. Defendant Spring Cook manages Scott County Children's Division and works closely with Scott County deputies. Plaintiff Father asserted claims against the County. Weeks later Spring Cook initiated a retaliatory Children's Division investigation into Plaintiffs, absurdly claiming that since they allowed their son to drive and have a cell phone, then Plaintiffs were responsible for the abuse. Upon administrative appeal, a state board found no preponderance of evidence. Cook later went to the FBI. Plaintiffs claim denial of procedural due process, and retaliation. Plaintiffs seek damages and equitable relief.

Appendix C

Parties

2. Plaintiff J.T.H. is married to H.D.H. and a resident of Scott County. J.T.H. is a POST- certified law enforcement officer, and a former Scott County sheriff's deputy. (J.T.H. proceeds in this public document by his initials because he is a well-known person in the community, and the open use of his name would effectively reveal the identity of his minor son. J.T.H. is also referred to as "Plaintiff Father".)

3. Plaintiff H.D.H. is married to J.T.H. and a resident of Scott County. H.D.H. has worked in the past as a public school teacher, and once her children grow older she intends to do so again. (H.D.H. proceeds in this public document by her initials because the open use of her name would effectively reveal the identity of her minor son. H.D.H. is also referred to as "Plaintiff Mother".)

4. Defendant Missouri Department of Social Services (MO DSS) enforces and administers the state Child Abuse & Neglect Registry, pursuant to RSMo. 210.152 and 210.153, and 13 CSR 35-31, through its Children's Division investigators, its County Directors/Circuit Managers, and the Child Abuse & Neglect Review Board (CANRB). Plaintiffs seek only prospective declaratory and injunctive relief against MO DSS.

5. At all relevant times Defendant Spring Cook was the Scott County director/circuit manager for the Children's Division of MO DSS for Scott County,

Missouri. Plaintiffs claim damages from Cook in her individual capacity only.

Jurisdiction and Venue

6. Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 and § 1988; and the First and Fourteenth Amendments to the United States Constitution.

7. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 2201.

8. Declaratory relief is authorized by F. R. Civ. P. 57 and 28 U.S.C. § 2201.

9. Injunctive relief is authorized by F. R. Civ. P. 61 and 28 U.S.C. §§ 381 and 382.

10. Venue is proper in this Court under 28 U.S.C. § 1391 because Plaintiffs reside in Scott County, Missouri, which is within the Southeastern Division of the Eastern District of Missouri; the relevant events occurred within Scott County, Missouri, other than events that occurred at the CANRB hearing at Jefferson City, Cole County, Missouri; and Defendant Cook performed most of her relevant acts within Scott County, Missouri.

Color of State Law

11. At all relevant times, all defendants acted under color of state law. Particularly, at all relevant times, all defendants acted under color of the laws,

statutes, ordinances, regulations, policies, customs and usages of the State of Missouri.

Jury Demand

12. Plaintiffs demand a jury trial on their claims for damages.

Facts

13. Scott County sheriff's deputy Brandon Cook sexually abused Plaintiffs' minor son in May 2018.

14. The abuse occurred in Brandon Cook's marked patrol car, while he was on duty and in uniform ("the abuse incident").

15. At that time Plaintiff Father and Brandon Cook were colleagues with the Scott County Sheriff's Department.

16. Before the occurrence of the sexual abuse, Brandon Cook groomed Plaintiffs' minor son through the Scott County Sheriff's Explorer program for young people; at a crawfish boil at the Scott County rodeo ground; and through a smartphone app called Grindr.

17. Shortly after the occurrence of the sexual abuse, Brandon Cook was arrested by, and on information and belief confessed to, troopers from the Missouri State Highway Patrol.

18. The State of Missouri charged Brandon Cook with Statutory Sodomy - 2nd Degree {Felony D RSMo.

566.064}. *State v. Brandon L. Cook,* 18CG-CR01279 (Cape Girardeau Circuit Court, Missouri).

19. Brandon Cook has plead not guilty and is out on bond. His criminal trial date has been in limbo and re-set multiple times because of the COVID-19 virus; as of the date of this filing, it has been re-set for June 10, 2021.

20. On September 7 and 17, 2018, Plaintiff Father, through counsel and as a next friend of his minor son, asserted but did not file claims against the County related to the underlying occurrence.

21. The claims were resolved.

22. Certain County Sheriff's deputies, on information and belief, and based on investigation by counsel and knowledge of Plaintiff Father, routinely work hand-in-glove with Scott County Children's Division director/circuit manager Spring Cook.

23. On November 7, 2018, roughly seven weeks after Plaintiff Father asserted the claims but before their resolution, Defendant Spring Cook arrived at Plaintiffs' family home together with a Scott County deputy juvenile officer and two Missouri State Highway Patrol troopers.

24. Spring Cook asserted that there had been a child neglect hotline call re: their minor son.

25. The timing between Plaintiff Father's allegations and the home visit creates an inference of retaliation.

26. At the time of this home visit, Plaintiff Mother was home, but Plaintiff Father was not.

27. During that home visit, Spring Cook and the troopers asked Plaintiff Mother to leave the room so they could interview the minor son without a parent present. One trooper seized the minor son's cell phone without parental consent, but under threat of a search warrant if consent was not given.

28. That evening the minor son was subjected to a further lengthy interview at SEMO-NASV in Cape Girardeau, again without either parent present in the room.

29. Plaintiff Mother was told by one of the investigators that parents could not be present for the interview.

30. After the interview, Plaintiff Mother and her minor son drove home.

31. Spring Cook and one of the troopers returned to the family home on November 9, 2018.

32. Spring Cook visited the home at least another two times, on November 10, 2018 and November 13, 2018, and during those visits conducted lengthy interviews of the minor son and one of his sisters.

33. Plaintiffs then refused further home visits by Spring Cook.

34. By letter from their counsel dated November 23, 2018, and by telephone call from counsel, Plaintiffs requested that Spring Cook recuse herself from investigating the parents and refer the investigation to a CD office in another county.

35. Such recusal is customary for matters involving local law enforcement families because of the reality that local law enforcement routinely works hand-in-glove with the local county Children's Division office.

36. Counsel copied this request to the statewide director of MO DSS; to the Highway Patrol; and to the Circuit Court deputy juvenile officer. Counsel also wrote separately to the Captain of Highway Patrol Troop E to revoke consent for search and possession of the son's cell phone, and to demand the cell phone's return.

37. Nevertheless, Spring Cook and the troopers continued to suggest that:

a. The minor son himself may somehow have been criminally liable for his own sexual abuse by an adult; and

b. Plaintiffs may somehow have been responsible by failing to supervise their son insofar as they allowed their son, then 16 years

old at that time, to drive a car, possess a cell phone, and access the internet.

38. Trooper Hamlett stated that the minor son was addicted to social media and should not leave the home unsupervised.

39. A Scott County deputy juvenile officer, Philip Warren, although he later found no evidence of neglect, told the son that he could be charged as an adult with a sex crime and perjury if he was not forthcoming in his answers to his questions.

40. There were threats to the son to arrest him in order to "get him some help" for his sexuality based on an allegation that the son was "sexting" using his cell phone.

41. There was also a request to refer the son to SEMO-NASV to inspect the son's genitals and rectum for evidence.

42. The minor son and his family refused that request because there had been no recent assault, and any such inspection would traumatize the boy.

43. Spring Cook also proposed that the parents submit a parenting plan.

44. On January 7, 2019 Spring Cook made findings of neglect under a preponderance of the evidence standard against the parents based on three incidents.

a. The first was the Brandon Cook incident.

b. The second was where the instructor of a local Tae Kwan Do school, T.W., who had previously taught the minor son Tae Kwan Do and then allegedly had sex with the minor son, and gave him gifts. This second incident was initially unbeknownst to the Plaintiffs. When Plaintiff Father found out that the instructor was Facebook messaging about sex with his son (but not knowing of the actual sex itself), he confronted T.W. in person, stated that his son was a minor, and asked him to stop all contact. T.W. then assaulted Plaintiff Father by trying, unsuccessfully, to "karate kick" him in the head and chest. Plaintiffs' daughter, and her friend, who were nearby in Plaintiff Father's car, witnessed that assault and attempted battery. Using his law enforcement training, Plaintiff Father de- escalated the situation by not responding with physical force, but instead by laughing at T.W. and retreating. Plaintiff Father did not report the assault.

c. The third incident, by contrast, was benign and age-appropriate: with his mother's approval, the son went on a date in neighboring Arkansas with another teenage boy, which involved going to a mall, seeing a movie, shopping, and having a meal.

45. Spring Cook focused her findings of neglect on Plaintiffs permitting their minor son, by then 16 years-of-age, to have an iPhone, to access the internet with his cell phone, and to drive a car.

46. Such conduct is commonplace and age-appropriate for 16-year-old teenagers, subject to parental oversight.

47. Spring Cook has never articulated or referred to any objective standards or law holding that a 16-year-old teenage boy having an iPhone, accessing the internet, or driving a car is evidence of parental neglect.

48. Plaintiffs suggest most if not all Missouri parents of 16-year-old teenagers would be found to be neglectful if such facts, and nothing more, constituted *prima facie* objective evidence of parental neglect.

49. Spring Cook performed the field investigation herself.

50. On January 7, 2019, Spring Cook issued CD findings of parental neglect against each Plaintiff, under a preponderance of the evidence standard.

51. Plaintiffs timely filed an administrative appeal under 13 CSR 35.31.025(2) (Exhibit 1, Missouri Code of State Regulations, 13 CSR 35-31), which states:

> The alleged perpetrator will receive written notification of the preponderance of

> the evidence finding by the local division office and of his or her right to an administrative review of the finding.
>
> (A) The alleged perpetrator will have sixty (60) days from the receipt of the notification of the child abuse/neglect finding to request an administrative review in writing to the circuit manager.
>
> (B) The circuit manager, or his or her designee, will review, within ten (10) working days of receipt of the request, the investigative report and all appropriate material presented by the alleged perpetrator and determine whether to uphold or reverse the finding.
>
> (C) The circuit manager, or his or her designee, will notify the alleged perpetrator in writing of the decision to uphold or reverse the original finding. If the finding is upheld, the circuit manager, or his or her designee, will forward the request to the Child Abuse and Neglect Review Board (CANRB) for further administrative review.

52. As part of the administrative review triggered by Plaintiffs' appeal, Spring Cook reviewed her own investigatory work.

53. Spring Cook thus did not follow the regulatory intent or spirit of 13 CSR 35-31.025(2), which

suggests that the local CD manager act as a "second set of eyes" to review the investigator's original finding. By performing an administrative review of her own work, Spring Cook essentially acted as a rubber stamp, and deprived Plaintiffs of any meaningful procedural benefit from a manager review of the investigative report and all appropriate material.

54. Plaintiffs had no procedural ability to request that another supervisor independently review Spring Cook's findings.[1]

55. The deputy juvenile officer represents the family division of the local Circuit Court (that is, the judicial branch of state government), and thus functions independently of CD and its staff who worked under the auspices of the Missouri Department of Social and Senior Services (that is, the executive branch of state government).

56. Spring Cook referred the matter to the deputy juvenile officer from the local Circuit Court.

57. The deputy juvenile officer conducted his own investigation of Plaintiffs and their family.

58. The deputy juvenile officer's investigation was limited to the one call-out to the family home

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[1] Plaintiffs do not allege that Spring Cook's failure to follow to the intent of the regulation itself forms a constitution violation. *Cf. Forrester v. Bass,* 397 F.3d 1047 (8th Cir. 2005).

when he was there at the same time as Spring Cook and the MSHP troopers.

59. The deputy juvenile officer's investigation was separate from Spring Cook's investigation, and thus the deputy juvenile officer formed his own conclusions as to the allegation of parental neglect.

60. Based on that independent investigation, the deputy juvenile officer made an independent determination in writing that he found "no evidence" to support an allegation of parental neglect.

61. Although the deputy juvenile officer found no evidence of parental neglect, his independent determination had no effect on Spring Cook's investigation or Plaintiffs' procedural rights as to the CD finding.

62. Similarly, the troopers from the Missouri State Highway Patrol never charged either Plaintiffs or their minor son with any crime, and particularly not criminal child abuse or neglect.

63. Thus, at this stage, neither the deputy juvenile officer nor the troopers had found probable cause of parental neglect, but Spring Cook still asserted that there was probable cause by making her own findings to the contrary under the preponderance standard.

64. Spring Cook's findings, if substantiated, would mean that the parents would be placed on the permanent Missouri Child Abuse and Neglect Registry.

65. Being placed on the Registry would have been a civil death sentence for Plaintiff Father's ability to continue to work as a law enforcement office with a POST license, and for Plaintiff Mother's ability to return to teaching in the local public school system.

66. During the third call out to the family house, Plaintiff Father was home. Spring Cook made a comment to Plaintiff Father about "getting" his POST license. This comment indicates, by reasonable inference, an improper retaliatory purpose for her findings.

67. The next stage for administrative appeal, before Plaintiffs would be placed on the Registry, was an appearance before a hearing of the Child Abuse and Neglect Review Board in Jefferson City, Cole County, Missouri.

68. Although styled a "hearing," the CANRB appeal process affords almost non-existent procedural due process, and is essentially more like an informal meeting. *See generally* 13 CSR 35-31.025(9) and (10) (Exhibit 1).

69. At the CANRB hearing, testimony and other evidence are not received under oath, cross- examination is not permitted, and there is no record or transcript. Rather, each party makes a brief presentation (up to 20 minutes) and responds to questions from Review Board members. The CANRB process is the final stage before an individual is placed on the registry.

70. Pre-hearing discovery is not permitted, and disclosure of the CD file is not required as of right. The State Document Management Unit will produce the CD file upon request, but that comes at considerable expense.

71. For representation in the CANRB process, Plaintiff Father retained attorney Kathleen Dubois of Legal Services of Eastern Missouri and Plaintiff Mother retained undersigned counsel Hugh Eastwood.

72. After negotiation, the DMU agreed to produce the CD "incident" file without charge since the attorneys were representing low-income persons. On information, DMU and CD did not produce other documents used and referenced by CD in investigating the parents, and so on inference the production was under-inclusive of the documents and things relied upon by Spring Cook and CD[2].

73. Given the procedural irregularities in the investigative process, counsel for Plaintiffs sought to obtain limited discovery before the parents' CANRB hearing on August 27. For example, they issued a subpoena and a notice to take the deposition of Spring Cook. That led to a conference call between undersigned counsel Hugh Eastwood and the General

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[2] The CANRB provides no procedure to take discovery or resolve discovery disputes, other than the production of the limited records prescribed by 13 CSR 35-31.025(9)(A)(3), which excludes "confidential information or other information that could jeopardize child safety."

Counsel for the Missouri Department of Social Services to attempt to resolve. Although DSS would not agree to produce Spring Cook, and the parents' attorneys lacked a judicial process to compel her attendance, DSS did agree verbally to produce certain requested documents referenced in the findings but not by then produced. DSS did not, however, follow through on that agreement, and did not produce any additional documents.

74. Only after placement on the Registry (that is, post-deprivation), can an individual appeal to state Circuit Court in either his home county or in Cole County, and proceed under the regular Missouri rules of procedure and evidence with *de novo* judicial review.

75. Even in circuit court, however, Missouri statutes bar an accused parent from issuing a witness subpoena to either the alleged victim or the reporter.[3] And, while such subpoenas would not be necessary if CD sought the testimony of either individual in its case-in-chief, nevertheless such a rule ignores that evidence from either individual (1) may have already been used pre-deprivation in the underlying CANRB process, thereby creating unfair and perverse incentives for CD to obtain a registration, and/or (2) may otherwise be introduced through affidavits or other potential hearsay exceptions that deprive the accused

[3] RSMo. 210.152.5.

parent of the ability to confront and cross-examine such witnesses against them.

76. The parents timely filed their respective written statements with the CANRB, including a writing from the deputy juvenile officer for the 33rd Judicial Circuit stating his above referenced finding of no evidence of neglect.

77. The parents and their counsel then attended the CANRB hearing in Jefferson City in person on August 27, 2019.

78. Under the relevant statute, RSMo. 210.153, the CANRB has nine members, who shall be appointed by the governor with the advice and consent of the senate, and shall include: (1) a physician, nurse or other medical professional; (2) a licensed child or family psychologist, counselor or social worker; (3) an attorney who has acted as a guardian ad litem or other attorney who has represented a subject of a child abuse and neglect report; (4) a representative from law enforcement or a juvenile office. Other members of the board may be selected from: (1) a person from another profession or field who has an interest in child abuse or neglect; (2) a college or university professor or elementary or secondary teacher; (3) a child advocate; (4) a parent, foster parent or grandparent.

79. Under the same statute, the following persons may participate in a CANRB hearing: (1) appropriate children's division staff and legal counsel for the department; (2) the alleged perpetrator, who may

be represented pro se or be represented by legal counsel[4]; and (3) witnesses providing information on behalf of the child, the alleged perpetrator or the department. Witnesses shall only be allowed to attend that portion of the review in which they are presenting information.

80. No transcript is made of the hearing, and any records and information compiled, obtained, prepared or maintained by the CANRB in the course of any review "shall" be confidential.

81. Since August 28, 2004 the standard of review is preponderance of the evidence, a higher standard than probable cause, but far less than that of beyond a reasonable doubt for criminal cases.

82. At the August 27, 2019 CANRB hearing, there were five members of the board present: Cindy Versell, Donna Neely (a child advocate), Julie Robinson (a nurse), Brenda Maly (a child advocate), and Rhonda Haight (a juvenile officer).

83. Unlike Plaintiffs, who attended in person with their respective counsel, Spring Cook on behalf of CD attended by telephone and without counsel.

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[4] The alleged perpetrator's presence is not required for the review to be conducted. The alleged perpetrator may submit a written statement for the board's consideration in lieu of personal appearance.

84. Spring Cook was given 20 minutes for her presentation, and she went first.

85. Spring Cook stated that that Plaintiffs were neglectful of their son because they allowed him access to the internet, which she alleged that he had used to access the Grindr app to meet up with older men for sexual encounters. Spring Cook further stated that Plaintiff's son presented himself as 18 or 19 years of age on the Grindr app. Spring Cook further stated that one such paramour had gifted Plaintiff's son with a MacBook laptop computer and an Apple watch.

86. During the hearing, Spring Cook alleged that the sexual abuse of the minor son, and the parental neglect, were "ongoing."

87. Spring Cook only received one question from a member of the CANRB board, which was whether a lack of parental supervision falls under the category of neglect.

88. Cook answered in the affirmative.

89. Spring Cook's presentation with herself as witness was the only evidence offered by CD to the CANRB. That is, no other witnesses or exhibits were offered.

90. Plaintiffs through counsel were not permitted to cross-examine Spring Cook. This deprived Plaintiffs of the right to test Spring Cook's narrative of events, as well as her credibility itself.

91. For example, Plaintiffs wished to cross-examine Spring Cook as to the following, non-exhaustive list of issues:

a. What evidence Spring Cook had of parental neglect,

b. Her contact and relationships with other persons connected with the underlying criminal case against Brandon Cook,

c. Her contact and relationships with other persons connected with the underlying civil claims,

d. Her potential conflicts of interest as to investigating a Scott County sheriff's deputy, and also whether or not Spring Cook was related to Brandon Cook (the police officer who sexually assaulted Plaintiff's son, with whom she shares a last name) and/or a third Sheriff's deputy who also has the same last name,

e. Her social media postings and "Friendships" on Facebook with the above-named persons,

f. What other witnesses she had interviewed and/or relied upon as to her findings about Plaintiffs' family,

g. What CD or other policies she referred to in her decision-making,

h. What other similar cases, if any, in which she had made similar findings and/or taken similar action, and

i. Conversations with other CD and DSS officials about the case, including the General Counsel's office related to Plaintiffs' concerns as to discovery production and cost.

92. Two days after the hearing, the CANRB issued letters holding that the findings of neglect were unsubstantiated as to each parent under a preponderance of the evidence standard.

93. In March 2020, Plaintiffs were subject to a new investigation, on substantially similar charges, but this investigation was by the Federal Bureau of Investigation.

94. The FBI's investigation began when it received a complaint about the son. That complaint had similar to near-identical language as to the earlier findings of neglect and other written and verbal assertions made by Spring Cook about Plaintiffs' minor son throughout the CANRB process.

95. On information and belief, two FBI agents visited Spring Cook's office.

96. One of the two FBI agents then asked Plaintiff's daughter to come to the Sikeston Department of Public Safety for an interview.

97. Plaintiffs' daughter complied with the FBI agent's request.

98. At the interview, Plaintiffs' daughter was told that she was the only member of the family who known by "the authorities" to be cooperative.

99. On inference, the reference to "the authorities" meant Spring Cook.

100. The FBI agents questioned Plaintiffs' daughter at length about the minor son's sexuality and his sexual conduct.

101. The FBI did not follow up with any other family members on that interview, did not request access to documents or things, did not serve any subpoenas or warrants, and did not further contact Plaintiffs' daughter or any other members of Plaintiffs' family.

102. The FBI as a matter of agency policy set by the U.S. Attorney General now has an enhanced investigative role after receiving hotline calls that allege the abuse or exploitation of children. That is, an investigation is essentially mandatory after the FBI receives such an allegation.

103. On inference, as to Plaintiffs and their minor son, the FBI received a hotline call, made an investigation, and then closed the investigation for lack of probable cause for the allegations.

104. The allegations reviewed by the FBI were substantially similar to the allegations made by

Spring Cook for which the CANRB found no probable cause.

105. On inference, Spring Cook contacted the FBI in frustration that the CANRB did not substantiate her earlier allegation, and/or as retaliation against Plaintiffs.

Reasons for Declaratory Relief

106. Plaintiffs seek prospective declaratory relief that the CANRB process (pursuant to RSMo. 210.152 and 210.153; Missouri 13 CSR 35-31; and CANRB custom) violates their procedural due process rights under the Fourteenth Amendment to the U.S. Constitution, in that it denies each accused perpetrator the:

a. Right to independent review of the investigator's work by an impartial superior within CD before any administrative finding of abuse or neglect, as required by 13 CSR 35-31.025(2)(B) and as required by constitutional notions of an impartial and neutral decisionmaker (which includes a reversal by CD upon independent review by an impartial and neutral decisionmaker before any findings are made against the accused parent);

b. Right to demand more definite statement or notice (known by way of analogy in a criminal proceeding as a Bill of Particulars) as to the CD findings before the CANRB hearing;

c. Right to obtain, as of right, disclosure of all such evidence upon which the CD finding is made, and to compel production of all such evidence;

d. Right to obtain such disclosure without incurring cost or pre-payment;

e. Right at the CANRB hearing to:

i. be accused only with evidence submitted under oath or otherwise properly authenticated;

ii. object to the use of hearsay evidence;

iii. cross-examine witnesses where there are conflicting narratives of the truth, and/or impeach a witness's credibility, including, where appropriate, challenging the credibility of the alleged victim and/or reporter, by a third party (subject to reasonable restrictions) such as a lawyer[5] or another

[5] Under the statute, there is an absolute right to counsel at the hearing. This contrasts with those administrative proceedings where there is no right to counsel. *Compare Doe v. Univ. of Ark.,* No. 19-1842 at *14 (8th Cir. Sep. 4, 2020), citing *Haidak v. Univ. of Mass.-Amherst,* 933 F.3d 56, 69 (1st Cir. 2019) (no right for accused student to question opposing witnesses himself in school disciplinary proceeding for sexual assault).

individual advocate[6] (at the very least since there is a statutory right to counsel);

iv. make a record (such as a transcript by a court reporter, and exhibits received into evidence);

v. receive notice of objective standards or case law for determining abuse or neglect, particularly here as to parental supervision of the use of the internet and social media by teenagers in today's society; and

vi. have qualified experts under the *Daubert* standard[7] to the extent that Children's Division makes expert findings, or asserts that its findings are based on "expertise" founded in experience. (As of August 28, 2017, Missouri has explicitly adopted the

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[6] Plaintiffs concede that reasonable restrictions may be imposed on the ability of an accused parent himself or herself to *personally* cross-examine an alleged victim or reporter in order to prevent direct harm or harassment. *Doe v. Baum,* 903 F.3d 575, 582 (6th Cir. 2018) ("an individual aligned with the accused … can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker." *Cf. Maryland v. Craig,* 497 U.S. 836, 857 (1990)).

[7] *See Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 589 (1993), which held that F. R. Evid. 702 incorporated a flexible reliability standard instead; *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

> *Daubert* standard for all civil proceedings, RSMo. 490.065, including contested case administrative proceedings[8]).

107. The Missouri Legislature has shown the seriousness of the due process rights implicated by guaranteeing a right to counsel at the CANRB hearing.[9] Cross-examination is thus particularity important where there are disputed issues of fact, disputed narratives, and credibility issues, given the stigma associated with placement on the CAN Registry and the "stigma plus" effect on Plaintiffs' respective professions.[10]

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[8] *State Board of Registration for the Healing Arts v. McDonagh,* 123 S.W.3d 146, 154 (Mo.banc 2003) ("While contested administrative proceedings are not required to follow the 'technical rules of evidence,' the 'fundamental rules of evidence' applicable to civil cases also are applicable in such administrative hearings."). Admittedly, CANRB hearings, although contested administrative cases, are governed by RSMo. 210.153, and not by the Missouri Administrative Procedure Act, RSMo. 536.063 *et seq*. But *McDonagh's* holding is that the Missouri principles of evidence are not based on "any set of rules, but rather have been developed by common law and by statute." 123 S.W.3d at 154.

[9] RSMo. 210.153.2(4). This contrasts with those inquisitorial approach to witness questioning where the lack of a right to counsel pre-empted the right to cross-examine. *Cf. Haidak v. Univ. of Mass.-Amherst,* 933 F.3d 56, 69-70 (1st Cir. 2019) ("If we were to insist on a right to party- conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination.").

[10] *See Dillon v. Pulaski County Special School District,* 594 F.2d 699, 700 (8th Cir. 1979) (Benson, J., concurring) (to resolve

108. The statutory right to counsel is procedurally devalued and made less meaningful when counsel cannot cross-examine witnesses under such circumstances. Further, the right to counsel protects alleged victims from direct and personal cross-examination by an alleged perpetrator, while permitting the unparalleled truth-seeking function of such cross-examination.

109. While any accused perpetrator has a right to *de novo* judicial review in the Circuit Court[11], that is only post-deprivation, after CANRB makes a finding of abuse and neglect, and thus each accused perpetrator would face immediate and lasting "stigma plus" as a result of being on the Registry, with the potential loss of current and future educational and employment opportunities, housing, and reputation in the community.

110. Even with *de novo* judicial review, there is still no right for the accused parent to subpoena or otherwise require the testimony of the alleged victim or reporter—thus depriving the accused perpetrator of the truth-seeking tools of confrontation and cross-

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disputed issue of fact, high school student should have been allowed to cross-examine his accuser, who did not testify at the expulsion hearing); *Winnick v. Manning,* 460 F.2d 545, 549-50 (2d Cir. 1972) (cross-examination of witnesses might be essential to a fair hearing if credibility is at issue in the suspension of a university student).

[11] RSMo. 210.152.5; *Jamison v. State,* 218 S.W.3d 399, 415 (Mo. 2007).

examination, which aid fact-finder determination of witness credibility, demeanor, and trustworthiness, even where the finding of abuse or neglect is based on evidence from the victim or reporter[12]. Further, CD can still attempt to introduce evidence from an accuser or reporter through affidavits or other hearsay-exception evidence that is near impossible to challenge if admitted.

111. Further, the statutory scheme requires an appeal of the CANRB decision to the correct-venue circuit court within sixty days. Outside this narrow procedural window, it has no other provision as of right for removing persons from the abuse and neglect registry once they are placed on the Registry, and thus the statute does not contemplate the possibility of an erroneous registration, and the need for removal for good cause shown if the deadline has run.

Causation of Damages

112. Defendant Spring Cook caused Plaintiffs' damages in that:

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[12] *Doe v. Baum,* 903 F.3d 575, 581 (6th Cir. 2018) ("Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invented for uncovering the truth. Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process." (internal citations omitted)).

a. Plaintiff Father engaged in a protected activity in making his claims for damages against the Sheriff and the County;

b. Spring Cook took adverse action against Plaintiffs in finding them neglectful of their minor son, and seeking to add them to the Child Abuse & Neglect Registry, which would chill a person of ordinary firmness from continuing in the activity of alleging official misconduct;

c. On information and belief, given the substantial similarity between Spring Cook's allegations in the CD process and those found in the FBI complaint, Spring Cook notified the FBI and maliciously and/or recklessly caused a second investigation into Plaintiffs; and

d. Spring Cook's adverse action was motivated by Plaintiffs' allegations against the Sheriff and the County.

113. Defendant Spring Cook caused Plaintiffs' damages in that:

a. She instigated and continued an administrative proceeding against Plaintiffs that terminated in favor of Plaintiffs;

b. Spring Cook acted maliciously[13] and without reasonable grounds[14], and

c. Plaintiffs were thereby damaged.

No Probable Cause for Allegations of Parental Neglect

114. The lack of findings of probable cause by either of (1) the deputy juvenile officer, (2) the Highway Patrol troopers, (3) the CANRB at the hearing, and/or (4) the FBI as to Spring Cook's allegations of parental neglect objectively are strong evidence that Spring Cook's findings of child neglect were without probable cause.

115. Spring Cook did not have even arguable probable cause for her findings (although this doctrine is likely inapposite since there was no seizure under the Fourth Amendment[15]).

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[13] Spring Cook acted with malice in that she acted "without the honest belief that her action was lawful when done." *King v. Young,* 304 S.W.3d 224, 227 (Mo. Ct. App. 2010) (internal citations omitted); *see also Sanders v. Daniel International Corp.,* 682 S.W.2d 803, 807-08 (Mo. banc 1984) (comparing three types of malice).

[14] "Reasonable grounds" is defined to mean "under the circumstances an ordinarily careful person after having made a reasonable inquiry would have believed the facts alleged and that the judicial proceeding was valid." MAI 16.06.

[15] *Borgman v. Kedley,* 646 F.3d 518, 522-23 (8th Cir. 2011).

Appendix C

No Qualified Immunity

116. Defendant Spring Cook has no qualified immunity from claims under 42 U.S.C. § 1983 because she had actual notice and personal knowledge of Plaintiffs' allegations. She then retaliated against the parents with unreasonable-grounds findings of neglect in violation of their clearly-established First Amendment right to speech on a matter of public concern, and their clearly-established Fourteenth Amendment right to procedural due process under the United States Constitution.

No Official Immunity

117. Defendant Spring Cook has no official immunity from claims at Missouri law because she had actual notice and personal knowledge of the parents' allegations, and her conduct was malicious and/or reckless.

No Sovereign Immunity

118. Since Plaintiffs assert their claims against Defendant Spring Cook only in her individual capacity, then she has no sovereign immunity.[16]

[16] *Hafer v. Melo,* 502 U.S. 21 (1991).

119. Defendant MO DSS has no sovereign immunity from claims for prospective declaratory relief under 42 U.S.C. § 1983.[17]

Damages

120. Plaintiff Father is a POST-licensed law enforcement officer, and permanent lifetime registration on the Child Abuse & Neglect Registry would have been a civil death sentence for his chosen vocation.

121. Plaintiff Mother is a former public schoolteacher who seeks to return to teaching when her older children leave the home, and who has recently applied for such a job. Permanent lifetime registration on the Child Abuse & Neglect Registry would have been a civil death sentence for her chosen vocation.

122. The damage caused to the parents of a child from an unsubstantiated allegation by a State official of neglect for their minor child, who was sexually abused by a trusted, third-party law enforcement colleague, is enormous and unmeasurable except by a jury.

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[17] *See Milliken v. Bradley,* 433 U.S. 267 (1977); *Clark v. Cohen,* 794 F.2d 79 (3d Cir. 1986); *Ex parte Young,* 209 U.S. 123 (1908). Attempts to narrow *Ex parte Young* have failed. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 288 (1997).

123. Plaintiffs suffered fear while they were under investigation and all the way through until the CANRB found the charges to be unsubstantiated.

124. Plaintiffs have suffered garden variety distress including anxiety, indignity, fear, weight gain, mental anguish, loss of sleep, and confusion over the trustworthiness and proper role of MO DSS officials in their community.

125. Plaintiffs claim only garden variety emotional distress.

126. Plaintiff have no physical injuries.

127. Plaintiffs claim no special damages such as medical bills.

Punitive Damages

128. The conduct of Spring Cook in investigating and making findings against Plaintiffs was malicious and/or reckless to Plaintiffs' First Amendment right to speak up about misconduct by Sheriff Drury and his deputies at the County, and their state law right to be free from malicious prosecution without reasonable grounds.

Attorney's Fees and Costs

129. In pursuit of their § 1983 (federal civil rights) claims Plaintiffs are incurring reasonable attorney's fees, taxable costs, and non-taxable costs. 42 U.S.C. § 1988.

Appendix C

Count I – Prospective Declaratory Judgment against MO DSS

130. Plaintiffs incorporate all prior paragraphs.

131. Plaintiffs allege that *Jamison v. State,* 218 S.W.3d 399 (Mo. 2007) is no longer good law insofar as it deprives Plaintiffs of adequate procedural due process before a "stigma plus" deprivation by being placed on the Child Abuse & Neglect Registry.

132. Plaintiffs seek a prospective declaratory judgment that the State of Missouri's procedures for a pre-deprivation hearing at the Child Abuse & Neglect Review Board, RSMo. 210.152 and 210.153 and 13 CSR 35-31, violate the procedural due process guarantees of the Fourteenth Amendment to the U.S. Constitution.

WHEREFORE Plaintiffs J.T.H. and H.D.H. pray the Court to enter a declaratory judgment enjoining the Missouri Department of Social Services, Children's Division, from enforcing unconstitutional procedures as to pre-CANRB hearing discovery and hearing procedure, and award Plaintiffs their taxable costs, non-taxable costs, and reasonable statutory attorney's fees under 42 U.S.C. § 1988, and grant such other relief as may be just, meet and reasonable.

Count II – Preliminary and Permanent Injunction against MO DSS

133. Plaintiffs incorporate all prior paragraphs.

134. Plaintiffs seek a preliminary and permanent injunction on the same grounds as stated in Count I.

Prayer

WHEREFORE Plaintiffs J.T.H. and H.D.H. pray the Court enter a preliminary and permanent injunction enjoining the Missouri Department of Social Services, Children's Division, from enforcing unconstitutional procedures as to pre-CANRB hearing discovery and hearing procedure, and award Plaintiffs their taxable costs, non-taxable costs, and reasonable statutory attorney's fees under 42 U.S.C. § 1988, and grant such other relief as may be just, meet and reasonable.

Count III – First Amendment Retaliation against Cook

135. Plaintiffs incorporate all prior paragraphs.

136. *First,* Defendant Spring Cook investigated and made findings of parental neglect against Plaintiffs, and

137. *Second,* Plaintiff Father engaged in a protected First Amendment activity in making allegations against Scott County and its Sheriff, and Plaintiff Father's allegations played a part in Defendant Spring Cooks' decision to investigate and make findings of parental neglect against Plaintiffs, and

138. *Third,* Defendant Spring Cook was acting under color of law, and[18]

139. *Fourth,* Defendant Spring Cook took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and

140. *Fifth,* the adverse action was motivated at least in part by the exercise of the protected activity

141. *Sixth*, as a direct result, Plaintiffs were damaged.[19]

Punitive Damages

142. Spring Cook's investigation and findings were malicious or recklessly indifferent to the First Amendment rights of J.T.H. and H.D.H. to speak up and make allegations about misconduct by deputies.

Prayer

WHEREFORE Plaintiffs J.T.H. and H.D.H. pray the Court enter a judgment for First Amendment retaliation against Defendant Spring Cook in her individual capacity; award Plaintiffs actual and punitive

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[18] Eighth Circuit Model Civil Jury Instructions Section 13.04.

[19] *See, e.g., Bennie v. Munn,* 58 F. Supp. 3d 936, 937 (D. Neb. 2014), *aff'd,* 822 F.3d 392 (8th Cir. 2016), *cert. denied,* 137 S. Ct. 814 (2017); *see also Malik v. Arapahoe County,* 191 F.3d 1306, 1315-16 (10th Cir. 1999) (denying qualified immunity and finding that seizure of child was First Amendment retaliation against mother for retaining an attorney).

damages; award Plaintiffs their taxable costs, non-taxable costs, and reasonable statutory attorney's fees under 42 U.S.C. § 1988; and grant such other relief as may be just, meet and reasonable.

Count IV – Due Process Violation against Cook

143. Plaintiffs incorporate all prior paragraphs.

144. *First,* Defendant Spring Cook investigated and made findings of parental neglect against Plaintiffs based on what she claimed was an anonymous hotline tip.

145. *Second,* even if what Defendant Spring Cook said is true, an anonymous hearsay report alone does not create probable cause for findings of parental neglect.

146. *Third,* the objective facts that Plaintiffs' 16-year-old son drove a family car, accessed the internet with his iPhone, and had been sexually abused by trusted, on-duty law enforcement officer, do not change the probable cause analysis, whether considered independently or in totality, as to parental neglect.

147. *Fourth,* Defendant Spring Cook's investigation and findings were an unreasonable and arbitrary intrusion upon Plaintiffs' familial relationship that

violated the procedural and substantive due process guarantees of the Fourteenth Amendment.[20]

148. *Fifth,* as a direct result, Plaintiffs were damaged.

Punitive Damages

149. Spring Cook's investigation and findings were malicious or recklessly indifferent to the Fourteenth Amendment rights of J.T.H. and H.D.H. to the integrity of their family relationships.

Prayer

WHEREFORE Plaintiffs J.T.H. and H.D.H. pray the Court enter a judgment for Fourteenth Amendment procedural and substantive due process violation against Defendant Spring Cook in her individual capacity; award Plaintiffs actual and punitive damages; award Plaintiffs their taxable costs, non-taxable costs, and reasonable statutory attorney's fees under 42 U.S.C. § 1988; and grant such other relief as may be just, meet and reasonable.

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[20] *See, e.g., Croft v. Westmoreland County Children Youth,* 103 F.3d 1123, 1126 (3d Cir. 1997) ("[The] state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.").

Appendix C

Count V – Missouri state law malicious prosecution against Cook

150. Plaintiffs incorporate all prior paragraphs.

151. *First,* Spring Cook works hand-in-glove on a regular basis with Scott Count Sheriff's Deputies.

152. Spring Cook had notice of Plaintiffs' allegation against those Deputies.

153. Spring Cook then investigated and made findings against Plaintiffs for child neglect.

154. Spring Cook continued a legal action against plaintiffs pursuant to that investigation and those findings.

155. Spring Cook's investigation and findings, and continuation of the proceedings, were motivated by an intention to retaliate against Plaintiffs for making their allegations.

156. Particularly, Spring Cook instigated and continued an administrative proceeding against Plaintiffs that terminated in favor of Plaintiffs.

157. The temporal connection between Plaintiffs' allegation and Spring Cook's investigation is close and obvious that it shows retaliation.

158. *Second,* in so doing Spring Cook acted maliciously[21] and without reasonable grounds[22].

159. *Third,* Plaintiffs were thereby damaged.[23]

Punitive Damages

160. Spring Cook's investigation and findings were malicious or recklessly indifferent to the rights of J.T.H. and H.D.H.

Prayer

WHEREFORE Plaintiffs J.T.H. and H.D.H. pray the Court enter a judgment for malicious prosecution under Missouri state law against Defendant Spring Cook in her individual capacity; award Plaintiffs actual and punitive damages; award Plaintiffs their taxable costs; and grant such other relief as may be just, meet and reasonable.

Respectfully Submitted,

Co-Counsel for Plaintiffs

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[21] Maliciously means intentionally doing a wrongful act without just cause or excuse. It does not necessarily mean hatred, spite or ill will. *See* MAI 16.01(1).

[22] Reasonable grounds is defined to mean "under the circumstances an ordinarily careful person after having made a reasonable inquiry would have believed the facts alleged and that the judicial proceeding was valid." *See* MAI 16.06.

[23] *See* MAI 23.07.

Appendix C

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