24-485-cv
Thayer v. Vermont Dep't for Children and Families

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of January, two thousand twenty-five.

PRESENT:

JOSÉ A. CABRANES,
REENA RAGGI,
MARIA ARAÚJO KAHN,
Circuit Judges.

KEZIAH THAYER, ELAM THAYER, AND MARTHA THAYER,

Plaintiffs-Appellants,

v. 24-485-cv

VERMONT DEPARTMENT OF CHILDREN AND FAMILIES, DCF, IN THEIR OFFICIAL CAPACITY, KENNETH SCHATZ, COMMISSIONER, DCF, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, LAURA KNOWLES, SUPERVISOR VERMONT DEPARTMENT OF CHILDREN AND

FAMILIES (DCF) IN HER INDIVIDUAL CAPACITY, MONICA BROWN, DCF CASE WORKER, IN HER INDIVIDUAL CAPACITY, CHRISTOPHER CONWAY, DCF CASE WORKER, IN HIS INDIVIDUAL CAPACITY, JENNIFER BURKEY, DCF DISTRICT DIRECTOR, IN HER INDIVIDUAL CAPACITY, CHRISTINE JOHNSON, DEPUTY COMMISSIONER OF DCF, FOR THE FSD, IN HER OFFICIAL CAPACITY, KAREN SHEA, FORMER DEPUTY COMMISSIONER FOR THE DCF FAMILY SERVICES DIVISION, IN HER INDIVIDUAL CAPACITY, JACQUELINE PELL, DCF FAMILY SERVICES SUPERVISOR, IN HER INDIVIDUAL CAPACITY, SARAH KAMINSKI, DCF CASE WORKER, IN HER INDIVIDUAL CAPACITY, JOHN W. DONNELLY, PH.D., PLLC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

JUSTICES OF THE VERMONT SUPREME COURT, IN THEIR OFFICIAL CAPACITY, VERMONT CHIEF SUPERIOR JUDGE, IN THEIR OFFICIAL CAPACITY, LUND FAMILY CENTER, INC., IN THEIR OFFICIAL CAPACITY.

Defendants.[*]

FOR PLAINTIFFS-APPELLANTS: DAVID J. SHLANSKY, (Colin R. Hagan, *on the brief*), Shlansky Law Group, LLP, Chelsea, MA.

FOR DEFENDANTS-APPELLEES DAVID MCLEAN, *for* Attorney General Charity Clark, Montpellier, VT, *for Vermont Department for Children and Families*.

[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

EVAN J. O'BRIEN (Monica H. Allard, *on the brief*), Downs Rachlin Martin PLLC, Burlington, VT, *for John W. Donnelly, Ph.D.*

Appeal from a judgment of the United States District Court for the District of Vermont (Geoffrey W. Crawford, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered January 23, 2024 is **AFFIRMED**.

On appeal, Plaintiffs-Appellants Keziah Thayer ("Thayer") and grandparents Martha and Elam Thayer ("Grandparents") challenge multiple district court orders leading to a final judgment in favor of Defendant-Appellees. First, they argue that the district court wrongly dismissed their claims against the Vermont Department for Children and Families and some of their employees in the First Amended Complaint ("FAC") as barred by the *Rooker-Feldman* doctrine. *See Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). Second, Appellants contend that the district court erred by dismissing Thayer's claim for wrongful interference with custody as to Defendants John W. Donnelly and John W. Donnelly, Ph.D., PLLC ("Donnelly Defendants"). Third, Appellants state that the district court erred by abstaining from evaluating its Indian Child Welfare Act ("ICWA") claim pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Finally, Appellants argue that the district court incorrectly granted summary judgment as to the Grandparents' claims for intentional

infliction of emotional distress ("IIED") and violations of civil rights under 42 U.S.C. § 1983.[1] We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

DISCUSSION

I. *Rooker-Feldman* Arguments

The *Rooker-Feldman* doctrine deprives a federal court of subject matter jurisdiction if "(1) the federal-court plaintiff lost in state court; (2) the plaintiff complains of injuries caused by a state court judgment; (3) the plaintiff invites review and rejection of that judgment; and (4) the state judgment was rendered before the district court proceedings commenced." *Hunter v. McMahon*, 75 F.4th 62, 68 (2d Cir. 2023) (internal quotation marks omitted). Appellants contest only the second and third factors. We review the application of the *Rooker-Feldman* doctrine *de novo*. *See Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 83 (2d Cir. 2005).

An injury is caused by a state court judgment when "a federal suit complains of injury from a state-court judgment, even if it appears to complain only of a third party's actions, when the third party's actions are produced by a state-court judgment and not

[1] In their brief, Appellants also argue that the district court erred by denying leave to file a second amended complaint to add an intentional infliction of emotional distress, loss of consortium, and civil conspiracy count. Despite listing this as an issue on appeal, Appellants do not otherwise address this argument. As such, Appellants have abandoned this argument. *See Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997).

simply ratified, acquiesced in, or left unpunished by it." *Id.* at 88. But the doctrine "does not bar claims based on an opponent's misconduct that precedes the state court proceeding." *Dorce v. City of New York*, 2 F.4th 82, 104 (2d Cir. 2021).

In this Circuit, we generally analyze the applicability of the *Rooker-Feldman* doctrine on a claim-by-claim basis. *See id.* at 103 (analyzing each of the plaintiff's alleged injuries and determining that the *Rooker-Feldman* doctrine bars "only some of [the plaintiff's] claims"). For each claim, there must be "a 'causal relationship between the state-court judgment and the injury of which the party complains in federal court.'" *Hunter*, 75 F.4th at 72 (quoting *Milchtein v. Chisholm*, 880 F.3d 895, 898 (7th Cir. 2018)). That is this case.

As the district court explained, "the injuries that Ms. Thayer complains of can all be traced to state court orders." App'x 30–31.[2] In urging otherwise, Appellants contend that the district court erred by failing to conduct an individual analysis of Thayer's claims. The record, however, shows that the district court reached the quoted conclusion based

[2] Counts I, II, IV, and V each allege "loss of custody of her children for almost four years and the indefinite future; the physical, emotional, and psychological damage resulting from the loss of custody of, and separation from, Plaintiff's children; litigation expenses, including attorneys' fees and costs; loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish and distress; and other compensatory damages, in an amount to be determined at trial." FAC ¶¶ 195, 213, 245, 257. Counts III, VI, and VII repeat these injury allegations with minor and non-substantive alterations to the phrasing. FAC ¶¶ 237, 268, 272. Moreover, Count VIII seeks declaratory and injunctive relief to "stop[] any further acts to destroy Ms. Thayer's family, terminate her parental rights, or otherwise advance an unlawful family separation." FAC ¶ 274.

on a claim-by-claim analysis of the FAC and explained its rationale further in a subsequent order denying reconsideration. Thus, on *de novo* review, we conclude that Appellants' claims are barred by *Rooker-Feldman*. *Hunter*, 75 F.4th at 68.

II. Wrongful Interference Claims

Insofar as Appellants sue for wrongful interference with custody, that state law tort is not broad enough to reach the Donnelly Defendants. Courts interpreting Vermont law analyze that tort by reference to § 700 of the Restatement (Second) of Torts. *See, e.g.*, *Schuppin v. Unification Church*, 435 F. Supp. 603, 608 (D. Vt. 1977) (analyzing "causes of action for alienation of affections between parent and child" based on § 700), *aff'd*, 573 F.2d 1295 (2d Cir. 1977). Appellants identify no authority from Vermont or elsewhere in which § 700 (or any other formulation of a wrongful interference tort) has been construed so expansively as to reach expert witnesses and mental health professionals based on their participation in child custody proceedings. Rather, the few state supreme courts that have considered the question have declined to extend tort liability to ancillary professionals involved in custody proceedings. *See, e.g.*, *Padula-Wilson v. Landry*, 841 S.E.2d 864, 871 (Va. 2020) ("[N]o cause of action for tortious interference with a parental or custodial relationship may be maintained against . . . an adverse expert witness based upon his/her expert testimony and/or participation in a child custody and visitation proceeding."); *Wilson v. Bernet*, 625 S.E.2d 706, 714 (W. Va. 2005) ("[N]o cause of action for tortious interference with parental or custodial relationship may be maintained

against an adverse expert witness based upon his/her expert testimony and/or participation in a child custody and visitation proceeding."). Absent any countervailing authority, we agree with the district court that Appellants failed to state a wrongful interference claim.

III. *Younger* Abstention

The district court properly abstained from deciding Appellants' ICWA claim under *Younger*. *See Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (stating that *Younger* mandates abstention "when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims."). Insofar as Appellants dispute whether there is an "ongoing state proceeding," the district court correctly identified Thayer's post-judgment proceedings challenging the termination of her parental rights as an "ongoing proceeding" for which *Younger* abstention is required. *See, e.g.*, *Zahl v. Kosovsky*, 471 F. App'x 34, 36 (2d Cir. 2012) (summary order) (holding that "district court also properly abstained from deciding [ ] issues relating to [ ] post-judgment matrimonial action that remained pending.").

IV. Intentional Infliction of Emotional Distress and § 1983

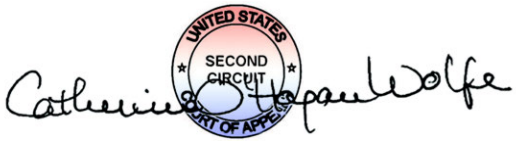
As for Appellants' IIED and § 1983 claims, the former requires allegations of conduct "so outrageous and extreme as to go beyond all possible bounds of decency,"

Jobin v. McQuillen, 609 A.2d 990, 993 (Vt. 1992) (internal quotation marks omitted), which are not pleaded here. As to § 1983, Appellants failed to show the deprivation of any protected property or liberty interest. An allegation that Appellees failed to follow state laws and policies cannot, by itself, support this claim. *See Holcomb v. Lykens*, 337 F.3d 217, 224 (2d Cir. 2003) ("[S]tate statutes do not create federally protected due process entitlements to specific state-mandated procedures."). And, because Appellants fail to assert with any specificity what federal laws would support this claim, they have forfeited the argument. *See In re Demetriades*, 58 F.4th 37, 54 (2d Cir. 2023) (stating that when an "issue is 'adverted to [only] in a perfunctory manner, unaccompanied by [any] effort at developed argumentation,' it must be 'deemed waived,' – or, more precisely, forfeited.") (alterations in original) (internal citations and quotation marks omitted).

* * *

We have considered Appellants' remaining arguments and conclude that they are without merit. For the reasons set forth above, the judgment entered January 23, 2024 is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KEZIAH THAYER,

Plaintiff,

v.

LAURA KNOWLES, Supervisor Vermont Department for Children and Families ("DCF"); KAREN SHEA, Former Deputy Commissioner for the DCF Family Service Division ("FSD"); MONICA BROWN, DCF Case Worker; CHRISTOPHER CONWAY, DCF Case Worker; JENNIFER BURKEY, DCF District Director, each in their individual capacities; and DOES 1–10, individually; KENNETH SCHATZ, Commissioner, DCF, in his individual and official capacities; JOHN W. DONNELLY, individually; JOHN W. DONNELLY, Ph.D., PLLC; LUND FAMILY CENER, INC.; CHRISTINE JOHNSON, Deputy Commissioner of DCF, for the FSD; the VERMONT DEPARTMENT OF CHILDREN AND FAMILIES; JUSTICES OF THE VERMONT SUPREME COURT; and VERMONT CHIEF SUPERIOR JUDGE, in their official capacities,

Defendants.

Case No. 5:19-cv-223

OPINION AND ORDER
(Docs. 43, 48, 53, 82)

In her First Amended Complaint, Plaintiff Keziah Thayer—a pseudonym used to protect her privacy—sues the 23 above-captioned defendants, including the Vermont Department of Children and Families ("DCF"), asserting eight causes of action, including claims under 42 U.S.C. § 1983. (*See* Doc. 25.) Plaintiff's claims arise from her assertion that she "has had her children taken from her unlawfully and removed from her life by a series of unfair and unjust

steps, that in totality comprise an unlawful, unconstitutional, and profoundly wrongful outcome." (*Id.* ¶ 1.) She alleges that "[a]fter an initial, improper taking of her children, she has been withered step by step by a series of patterned practices to the destruction of her family." (*Id.*) Multiple motions are currently pending and ripe for decision.

First, Plaintiff seeks to file a Second Amended Complaint that would add her parents Martha and Elam Thayer[1] (her children's "Grandparents") as "Additional Plaintiffs," and would also add former DCF employees Jacqueline Pell and Sarah Kaminski as "Additional Defendants." (Doc. 43.) Grandparents would join Ms. Thayer in the ADA and Rehabilitation Act claims (Counts IV and V). The proposed Second Amended Complaint would also add four more counts to the eight counts in the First Amended Complaint. Two of the new proposed counts would be brought by Grandparents: a § 1983 claim and a loss-of-consortium claim. The other two new proposed counts are an intentional-infliction-of-emotional-distress ("IIED") claim and a civil conspiracy claim, both brought by all plaintiffs. (*See* Doc. 43-2.)

Second, the Justices of the Vermont Supreme Court and the Vermont Chief Superior Judge (the "Judicial Defendants") have filed a motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the sole count against them, which is a claim for declaratory and injunctive relief. (Doc. 48.)

[1] Also pseudonyms. The Donnelly Defendants argue that Grandparents should be required to proceed using their legal names. (Doc. 46 at 7; Doc. 47 at 8.) The court need not decide that issue now and will instead await a motion to proceed using pseudonyms. (*See* Doc. 51 at 8.)

Third, DCF, DCF Commissioner Kenneth Schatz, DCF Deputy Commissioner Christine Johnson,[2] and DCF officials Laura Knowles, Karen Shea, Monica Brown, Christopher Conway, and Jennifer Burkey (collectively, the "DCF Defendants")[3] have filed a combined opposition to Plaintiff's motion to amend and a motion to dismiss the First Amended Complaint under the doctrines of *Rooker Feldman* and issue preclusion, and also on grounds of waiver, untimeliness, and qualified immunity. (Doc. 53.) In support of their motion to dismiss, the DCF Defendants have submitted 39 exhibits, totaling more than 500 pages and consisting largely of what appear to be DCF and state court records. (*See* Doc. 53-1 (index of exhibits); Docs. 53-2 through 53-41.)

Fourth, Plaintiff seeks leave to file a Third Amended Complaint that would add more factual allegations and a related additional count (Count XIII) by Ms. Thayer seeking declaratory judgment against DCF for failure to comply with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq. (*See* Doc. 82-2.)

The court held a hearing on the motions to dismiss and to amend on December 9, 2020. At the hearing, the court noted that the DCF Defendants attached numerous documents to their motion, and further noted Plaintiff's concern that she does not have the same access to the documents. The court granted Plaintiff 60 days to confer with counsel for the DCF Defendants—who has access to substantially all of the DCF and state court records—and

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[2] Although the DCF Defendants do not mention Christine Johnson in the opening sentence of their motion to dismiss (*see* Doc. 56-41 at 1), she is listed among the "Defendants" seeking that relief in the signature line of the brief (*id.* at 40).

[3] Although the DCF Defendants do not discuss the "John and Jane Does 1–10" listed in the caption, the First Amended Complaint describes those individuals as "DCF personnel" (Doc. 25 ¶ 164) and the court's conclusions are the same for those un-named individuals as for the other DCF Defendants. In any case, Ms. Thayer seeks to eliminate the Doe defendants in her proposed Second Amended Complaint. (*See* Doc. 43-2 at 2.)

supplement the record with any further records relevant to the DCF Defendants' motion. The court subsequently granted an unopposed motion to extend the original 60-day period to February 22, 2021. (Doc. 94.)

On February 22, 2021 Plaintiff filed a "Motion for Discovery to Supplement the Record." (Doc. 96.) The court heard argument on that motion on May 20, 2021. In an Order dated May 21, 2021, the court granted the motion in part and granted the parties an opportunity to supplement their memoranda. (Doc. 121.) Ms. Thayer submitted supplemental documents on September 9, 2021. (Doc. 131.) The DCF Defendants filed a response on October 6, 2021 (Doc. 135) and Ms. Thayer filed a reply on October 20, 2021 (Doc. 136).

Background

The court begins with the allegations in the currently operative pleading, which is Plaintiff's First Amended Complaint (Doc. 25). It is unnecessary here to recite all of the allegations in that 294-paragraph pleading. Instead, the court reviews the overall structure of the First Amended Complaint, and then summarizes the factual allegations as necessary to address the motions that are pending.

The First Amended Complaint is organized as follows. The first 27 paragraphs comprise an "introduction," including a claim that DCF runs what is "effectively an organized, intentional eugenic child reassignment program hidden behind the shroud of confidentiality." (*Id.* ¶ 21.) Paragraphs 28–41 describe the parties, and paragraphs 42–43 are allegations relating to jurisdiction and venue. Paragraph 44–172 appear under the heading "Case-Specific Facts." Those alleged facts appear under 11 sub-headings labeled: "The Real (and Unreal) Abuse"; "The Origins of the Plan to Destroy Ms. Thayer's Family"; "The Vermont Child Welfare System, and Its Context"; "Knowledge of Wrongfulness and Clear Rights"; "The Actual Efforts Expended";

"The Best Interests"; "The End of the Game"; "The 'Voluntary Relinquishment'"; "The Actual Standards"; "The Help"; and "The Federal Law Response." (*Id.* ¶¶ 44–172.)

Paragraphs 173–294 comprise the First Amended Complaint's eight causes of action. They are: (1) a claim under 42 U.S.C. § 1983 alleging substantive due process violations; (2) a claim under 42 U.S.C. § 1983 alleging procedural due process violations; (3) a claim under the Fourteenth Amendment entitled "Violation of Liberty and Autonomy in the Right to Refuse Unwanted Medical Treatment"; (4) a claim under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq.; (5) a claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, et seq.; (6) a claim for "Wrongful Interference with Custody"; (7) a claim under 42 U.S.C. § 1983 (against a different set of defendants than those in Counts I and II) alleging substantive and procedural due process violations; and (8) a claim for declaratory and injunctive relief.

Ms. Thayer seeks multiple forms of relief. She seeks "compensatory, exemplary, and punitive damages," and also "loss of consortium damages." (Doc. 25 at 86.) She also seeks a declaration that DCF and DCF officials violated the ADA and the Rehabilitation Act "by failing to make reasonable modifications to services, programs, and supports for Plaintiff and her children, who are each entitled to such accommodations under such laws, and a remedy, including restoration of their family, for such past violations." (*Id.*) Ms. Thayer further seeks a declaration that "[t]he decisions of the Vermont state court system in regard to [her] family purporting to terminate parental rights are unlawful under federal law" and "an injunction, if still necessary, sufficient to stop administrative or enforcement actions implementing the destruction of Ms. Thayer's family, including further acts to complete the adoption of her three children." (*Id.* ¶ 275.)

I. DCF "Unwritten, Tacit Policies"; Meetings with Judiciary Personnel

"In 2014, DCF was involved with two cases where there were extensive warnings of severe child abuse for two very young children." (Doc. 25 ¶ 76.) DCF "ignored" the warnings and the children were murdered. (*Id.*) DCF subsequently worked with the legislature, the judiciary, and other agencies "to put child protection as a paramount concern of the State systems." (*Id.*)

"In recent years, there have been regular meetings between sitting judges, senior managers of the DCF like Defendants Schatz and Shea, and others, to discuss how matters wherein children are removed from their families are handled." (*Id.* ¶ 77.) "These meetings and contacts involve PowerPoint presentations, meetings, letters, and email contacts urging that the judiciary handle things certain ways at the requests of the DCF, including Defendants Schatz and Shea." (*Id.*) Plaintiff alleges that this collaboration resulted "in unwritten, tacit policies" to obtain safety at the expense of civil rights (*id.* ¶ 76) and a "hair-trigger program of removing children" and severing families (*id.* ¶ 83).

II. Ms. Thayer, Her Children, and Her Relationship with the Children's Father

Keziah Thayer is the mother of three children: Sheera Winthrop, age 13, Joel Winthrop, Jr., age 8, and Jesse Winthrop, age 6. (Doc. 25 ¶ 44.)[4] Sheera and Joel, Jr. have significant behavioral issues and learning disabilities. (*Id.* ¶ 51.) Jesse has exhibited some signs of similar issues. (*Id.* ¶ 52.)

Ms. Thayer lived with the father of the three children, Joel Winthrop, Sr., for years until 2015. (*Id.* ¶ 45.) Ms. Thayer was the victim of serial domestic violence, for which criminal

[4] The names of the three children are, like Ms. Thayer's name, all pseudonyms. (*See* Docs. 2, 7.) The children's ages are as of the date of the April 6, 2020 First Amended Complaint.

charges were brought at various times against the father. (*Id.*) Ms. Thayer has various clinical diagnoses, including post-traumatic stress disorder (PTSD) and bi-polar disorder. (*Id.* ¶ 48.)

Prior to 2015, Sheera made allegations of physical and sexual violence committed by Joel Winthrop, Sr. (*Id.* ¶ 54.) Ms. Thayer considered some of those allegations credible and some not credible. (*Id.*) Also prior to 2015, Sheera told "fantastical stories" in school. (*Id.* ¶ 55.) There were also "behavioral concerns about Sheera's connection to reality and engagement with the learning environment, resulting in specialized educational plans and supports." (*Id.*)

During 2015, Ms. Thayer sought to end her relationship with Joel Winthrop, Sr. (*Id.* ¶ 56.) During that time, Sheera made false accusations of harm against Ms. Thayer. The Rutland police thoroughly investigated those accusations and found them not credible. Similarly, Joel Winthrop, Sr. thoroughly denied Sheera's accusations and confirmed that Ms. Thayer never harmed any of her children. (*Id.*)

III. CHINS Petition; Children Placed in Foster Care

DCF nevertheless filed a CHINS petition[5] based on supposed physical child abuse committed by Ms. Thayer. (*See id.* ¶ 57.) Ms. Thayer alleges that DCF—including Defendants

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[5] Under Vermont law, a "[c]hild in need of care or supervision (CHINS)" is a child who:

> (A) has been abandoned or abused by the child's parent, guardian, or custodian. A person is considered to have abandoned a child if the person is: unwilling to have physical custody of the child; unable, unwilling, or has failed to make appropriate arrangements for the child's care; unable to have physical custody of the child and has not arranged or cannot arrange for the safe and appropriate care of the child; or has left the child with a care provider and the care provider is unwilling or unable to provide care or support for the child, the whereabouts of the person are unknown, and reasonable efforts to locate the person have been unsuccessful.
>
> (B) is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being;
>
> (C) is without or beyond the control of his or her parent, guardian, or custodian; or

Burkey, Knowles, Conway, and Brown—did not "meaningfully or lawfully" investigate the basis for those supposed concerns. (*Id.*) All three children were removed from Ms. Thayer's custody on October 29, 2015, on an *ex parte* basis. (*Id.*)

All three children were placed with foster parents that fall. (*See id.* ¶ 59.) The foster parents are not disabled and are wealthier than Ms. Thayer. (*Id.* ¶ 19.) Plaintiff alleges that several of the DCF Defendants had by that time already concluded that the children should be adopted by the foster parents and discussed adoption with the foster parents. (*Id.* ¶¶ 59, 62.) The foster parents decided that they wanted to adopt Ms. Thayer's children before they had ever met them. (*Id.* ¶ 50.)

Ms. Thayer and Joel Winthrop, Sr. were both represented by counsel at a January 26, 2016 contested hearing. (*Id.* ¶ 58.) At that hearing, the Rutland prosecutor and DCF "openly acknowledged that they did not believe that the children had at any time actually been physically abused." (*Id.*; *see also id.* ¶¶ 74, 86.) "Instead of withdrawing the petition, the Rutland prosecutor and DCF pursued the theory that the two elder children's clear behavioral challenges were somehow a proper basis for them to be taken from their mother." (*Id.* ¶ 58.) The State "settled on the theory that the children were 'unmanageable,' pursuant to subpart 'C' of the Vermont CHINS statute." (*Id.* ¶ 62; *see also id.* ¶ 74 ("unmanageable" theory was the State's "backup plan").) There was, however, "never any suggestion that Ms. Thayer's youngest child, Jesse, was unmanageable . . . ." (*Id.* ¶ 64.)

> (D) is habitually and without justification truant from compulsory school attendance.

33 V.S.A. § 5102(3). The CHINS petition would have been filed in the Family Division of the Vermont Superior Court. *See id.* § 5102(6); *see also id.* §§ 5309, 5310.

IV. Conditional Custody Order; Period of Homelessness; Children Removed to DCF Custody

Under a "conditional custody order," the two younger children were returned to Ms. Thayer under a series of conditions in February 2016. (*Id.* ¶ 65.) One of the conditions was that the children could not be with their father, based on concerns that he might physically abuse them. (*Id.*) The eldest child, Sheera, remained with foster parents. (*Id.* ¶ 66.)

In March 2016 Ms. Thayer was experiencing homelessness. She applied for and received assistance for housing. DCF placed her temporarily in a motel in Rutland, Vermont. (*Id.* ¶ 67.) Police officers visited her at the motel and removed the two youngest children twice. (*Id.* ¶ 68.) They did so without any evident court order and without leaving any paperwork for the removed children. (*Id.*) Ms. Thayer recalls that the police told her that the motel was unsuitable for children. (*Id.*)

Then—also in March 2016—DCF stopped funding Ms. Thayer's temporary housing at the motel. (*Id.* ¶ 69.) Not wanting to sleep in a vehicle, Ms. Thayer went to stay with Joel Winthrop, Sr. for a few nights. (*Id.*) "No harm resulted, and by all accounts the father was working to be supportive of his children . . . ." (*Id.*) But the interaction with the father violated the conditional custody order. DCF officials "saw to it that Joel Winthrop, Sr., was criminally prosecuted for this lapse, and used it as a basis to remove the two youngest children again. (*Id.*) DCF has since retained custody of the two youngest children, as well as the eldest child, Sheera, who was already in foster care. (*Id.*)

V. "Case Plans" (2016 and 2017)

During 2016 and 2017, DCF officials "made it exceedingly difficult for Ms. Thayer to be with her children." (*Id.* ¶ 70.) They developed "Case Plans," which are "documents that specify the abuse or neglect that is the root cause of a family separation, and the plan for remedy." (*Id.*)

But the Case Plans for Ms. Thayer had "no meaningful, defined goals" and included "no meaningful supports to achieve them." (*Id.*) The Case Plans referred only to Ms. Thayer's "issues" in "loose generalities"; none of the Case Plans stated any diagnosis or concerning behavior. (*Id.* ¶ 88.)

The "rationale" in the Case Plans was that one of Ms. Thayer's children was "out of control." (*Id.* ¶ 97.) But this rationale devolved into a focus on Ms. Thayer's own "deficiencies." (*Id.*) The Case Plans never clarified what any of the "deficiencies" were. (*Id.*) During this time, DCF officials frequently told Ms. Thayer that she was failing to "improve" on her "issues." (*Id.* ¶ 87.) But according to Plaintiff, DCF did not share with her what those "issues" were, what the standard for "improvement" was, or what DCF was doing to provide her with federally required supports. (*Id.*)

Ms. Thayer consistently attended her therapy sessions, "though there was never any clear point to her what her therapy was for." (*Id.* ¶ 98.) Although she had been battered and had PTSD, she asserts that "that was not related to any child abuse or neglect or valid reason to take her children." (*Id.*) According to Plaintiff, the Case Plans "became filled with manufactured records of how superior the foster parents were, and how deficient Ms. Thayer's parenting was." (*Id.* ¶ 99.)

While with their foster parents, DCF ensured that the children received "expensive therapeutic supports, including inpatient care." (*Id.* ¶ 98.) Plaintiff alleges that some of those services harmed her relationship with her children. She alleges that DCF workers "orchestrated" help for the children to receive new names, help "forgetting their loving mother," and help "remembering the trauma and abuse that brought them to their rescuing, new families." (*Id.* ¶ 96.) The Lund Family Center, Inc. ("Lund") also provided "extensive services and assistance"

to the foster parents and supported preparing them for adoption. (*Id.* ¶ 161.) DCF did not provide Ms. Thayer with the extensive supports that it provided to her children. (*Id.* ¶ 98.) The only service that Lund provided to Ms. Thayer was to collect her personal information so that someday as adults her children might find out who she is and where she lives. (*Id.* ¶ 161.)

Ms. Thayer moved to a new marital home where she found stability and security. (*Id.* ¶ 100.) She now lives in Washington County, New York with her husband, Joshua Winthrop. (*Id.* ¶ 46.) Joshua Winthrop is the half-brother of Joel Winthrop, Sr. (*Id.* ¶ 47.) Ms. Thayer and her husband receive limited income from disability payments. (*Id.*) Despite these changes, DCF officials "took every opportunity to say that Ms. Thayer had missed appointments, and claim that she was uninterested in her children." (*Id.* ¶ 100.) Ms. Thayer states that she missed appointments because DCF failed to provide the transportation that it had promised and because the vehicle that she bought was unreliable. (*Id.*; *see also id.* ¶ 108.) And Ms. Thayer maintains her "undying love of her children," as evidenced by "[t]housands of pictures and videos." (*Id.* ¶ 100; *see also id.* ¶ 86 (describing "thousands of photos and videos of smiles, love, and safe contact"); *id.* ¶ 108 (describing correspondence and photos).)

Ms. Thayer's wish was to have her children placed with her at her new home in New York state and with her mother (the children's grandmother). (*Id.* ¶ 112.) The New York Department of Social Services undertook its own review of Ms. Thayer's parenting. (*Id.*) That agency "saw no need to separate her from her children." (*Id.*) At the end of 2016, a senior New York caseworker wrote: "I think that this is [a] workable situation and would recommend placement. [Ms. Thayer] has some real good supports right now that can help her turn her life around." (*Id.* (second alteration in original).)

VI. DCF Moves to Terminate Parental Rights (2018)

In spring 2018, DCF and the State announced that they were moving to terminate Ms. Thayer's parental rights. (*Id.* ¶ 113.) According to Plaintiff, DCF and the State relied on two primary sources for its position: (1) the "issues" stated in the Case Plans, and (2) a "forensic report" prepared by John W. Donnelly and his firm, John W. Donnelly, Ph.D., PLLC. (*See id.* ¶¶ 113, 118.)

A. The Case Plans

As recounted above, Plaintiff alleges that the Case Plans faulted her for missing appointments, but that transportation issues beyond her control caused those missed appointments. (*Id.* ¶ 115.) The Case Plans also faulted her for failing to make "progress" with her clinicians, but Plaintiff maintains that this was because "there was never anything established that she needed to make progress on." (*Id.*) Other "problems" noted in the case plans were: (1) a notation that when Ms. Thayer was playing with one of her children, sometimes the other children felt left out; (2) at one point, Ms. Thayer "spoke[] harshly" when her children were acting up; and (3) "Ms. Thayer did not bring as many crafts and games as the report-writer would have liked, and merely wanted to be with her children, and hold them quietly." (*Id.* ¶ 119.)

According to Plaintiff, the extent of DCF's guidance in the Case Plans was as follows:

- Ms. Thayer needs to "engage in services and demonstrate behavioral changes";
- She needs to "address[] how a person interacts with others across environments and in different relationships";
- She has "made some gains, however not enough";
- She has not "been able to demonstrate enough of a change in circumstances to safely transition the children home";

- She "continues to lack follow through";
- She "isn't in a place right now to be able to see what needs to be done."

(*Id.* ¶ 116.) Ms. Thayer was "also faulted for having negative things to say about the serious physical and emotional domestic abuse that she had suffered, and expressing that she was hurt by it to her children." (*Id.* ¶ 117.) DCF deemed those expressions to be "dysregulated" and "inappropriate." (*Id.*)

B. Dr. Donnelly's Report

DCF also sought to support its position with a 34-page "family forensic report" from John W. Donnelly and his firm, John W. Donnelly, Ph.D., PLLC. (*See id.* ¶¶ 25, 118.) Dr. Donnelly's report "confirmed that Ms. Thayer's children have cognitive, behavioral, and educational special needs." (*Id.* ¶ 118.) It also confirmed that "Ms. Thayer has some slight cognitive issues and disability diagnoses." (*Id.*)

But Plaintiff alleges that, instead of recognizing these as factors requiring support and accommodation, the report "counted them as factors weighing against Ms. Thayer's ability to parent her own children, when compared to others." (*Id.*) The report concluded that Ms. Thayer was unsuitable to parent her own children. (*Id.* ¶ 122.) According to Plaintiff, that conclusion was not based on any observed "relevant measurable facts" or any "empirical method," and instead "simply parroted the damning conclusions" of DCF workers who had concluded that Ms. Thayer "was not meeting the Case Plan and was an unfit parent." (*Id.*; *see also id.* ¶¶ 25, 163.)

VII. The "Voluntary Relinquishment"

In 2017 and 2018, the State provided Ms. Thayer with a lawyer under a program for indigent parents who are involved in CHINS proceedings. (*Id.* ¶ 124.) The lawyer had "no meaningful experience in defending a termination of parental rights [TPR]." (*Id.*) She advised

Ms. Thayer that there was "no hope of overcoming the termination of her parental rights." (*Id.* ¶ 125.) The lawyer advised Ms. Thayer to "give up, that nothing could be done to fight the case, and that [the lawyer] would not fight the case." (*Id.*) Ms. Thayer was incredulous, but the lawyer told her "there was nothing that can be done." (*Id.*)

Ms. Thayer sought a new attorney in a letter dated July 20, 2018. (*Id.* ¶ 127.) She wrote that she needed "proper legal representation," that she was "not being fairly represented," and that she was being "non-represented." (*Id.*) The judge set a hearing to consider the lawyer's withdrawal from the case. (*Id.* ¶ 128.) The lawyer told Ms. Thayer not to show up at the hearing. (*Id.*) At the hearing, the judge required the lawyer to stay in the case and Ms. Thayer to keep working with the lawyer. (*Id.*)

The lawyer advised Ms. Thayer that her "only hope" of having any contact with her children was to "voluntarily" agree to relinquish her parental rights, confirm that she wanted that outcome, and "show no emotion." (*Id.* ¶ 129.) The lawyer printed out a "voluntary relinquishment" and told Ms. Thayer to sign it. (*Id.*) Ms. Thayer signed the document. (*Id.*)

Plaintiff alleges that her relinquishment of parental rights was not voluntary, knowing, or intelligent. (*Id.* ¶ 131.) She maintains that she was "coerced" into signing. (*Id.* ¶¶ 19, 276.) In particular, she alleges that DCF officials told her that if she did not relinquish her parental rights, "she would never see her children again." (*Id.* ¶ 19.) Although the "voluntary" relinquishment included a provision for child visitation and contact, Plaintiff alleges that the provision was illusory, unenforceable, and has been "disregarded by the prospective adoptive parents." (*Id.* ¶ 131.) At a hearing, the Vermont judge asked "legalistic questions" but "never asked Ms. Thayer whether there was any truth to the claim that she was unsuitable as a parent." (*Id.* ¶ 132.)

Plaintiff filed her original complaint in this case on December 2, 2019. (Doc. 3.) As of April 6, 2020, the date of Ms. Thayer's First Amended Complaint, DCF officials continued to "withhold[] Ms. Thayer's access to her children, even for visitation." (Doc. 25 ¶ 134.) They have suggested that she will never see her children until she assists them to finalize the adoption of her children, accepts her children's new names and new life stories, and "otherwise gives up on her family." (*Id.*)

Analysis

The court addresses each of the pending motions in the analysis below.

I. Judicial Defendants' Motion to Dismiss (Doc. 48)

The First Amended Complaint's sole count against the Judicial Defendants appears in Count VIII, which seeks declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and, alternatively, under 42 U.S.C. § 1983. (Doc. 25 ¶¶ 273–294.) Plaintiff names the Justices of the Vermont Supreme Court and the Chief Superior Judge in their official capacities. (*Id.* ¶¶ 37–38.) As against the Judicial Defendants, Count VIII is brought "with regard to administrative and enforcement activities, and does not purport to address adjudicative functions." (*Id.* ¶ 274.)

For relief, Plaintiff seeks a declaration that the decisions of the Vermont state court system terminating her parental rights are unlawful, and, "if still necessary," an injunction "sufficient to stop administrative or enforcement actions implementing the destruction of Ms. Thayer's family, including further acts to complete the adoption of her three children." (*Id.* ¶ 275.) Plaintiff has clarified that she does not seek any monetary relief from the Judicial Defendants. (Doc. 52 at 6 n.2.) The Judicial Defendants seek dismissal of Count VIII against them under Fed. R. Civ. P. 12(b)(1) and, alternatively, under Fed. R. Civ. P. 12(b)(6). (Doc. 48.)

A. Rule 12(b)(1) Standard

The court begins with the applicable standard for the jurisdictional issues that the Judicial Defendants raise. "A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it . . . .'" *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). Where a Rule 12(b)(1) motion is "facial"—i.e., "based solely on the allegations of the complaint or the complaint and exhibits attached to it"—the plaintiff has no evidentiary burden in opposing the motion. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). The court's task is to determine whether the pleadings allege "facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." *Id.* (alteration in original) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) (per curiam)). In ruling on a facial Rule 12(b)(1) motion, the court must accept as true all material allegations of the complaint and must construe the complaint in favor of the plaintiff. *See id.*

B. Article III Standing

"Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to the resolution of 'cases' and 'controversies.'" *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 92 (2d Cir. 2018) (quoting *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012)). "To ensure that this bedrock case-or-controversy requirement is met, courts require that plaintiffs establish their standing as the proper parties to bring suit." *Id.* (quoting *Mahon*, 683 F.3d at 62). "To have standing to sue, 'a plaintiff must demonstrate (1) a personal injury in fact (2) that the challenged conduct of the defendant caused and (3) which a favorable decision will likely redress.'" *Id.* (quoting *Mahon*, 683 F.3d at 62). "The party

invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court begins with the "causation" element.

The "causation" requirement for standing means that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). This causation element does not require the plaintiff to prove proximate causation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 n.6 (2014). But the causation requirement cannot be satisfied by a mere "attenuated chain of conjecture." *Vt. Pub. Interest Rsch. Grp. v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 512 (D. Vt. 2002) (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001)).

The Judicial Defendants maintain that the First Amended Complaint does not allege that any of the named Judicial Defendants "participated directly in Plaintiff's termination proceeding" or that "any of their administrative actions taken as individual justices or judge [are] linked to the termination of Plaintiff's parental rights, or the adoption of her children." (Doc. 48-1 at 11.) Plaintiff argues that she has met her burden of establishing the "causation" element because, in her view, "[t]he unlawful family separation and impending adoption is a direct result of the decisions of the Vermont state court system, and therefore, the Judicial Defendants." (Doc. 52 at 11.) More specifically, Plaintiff asserts that the "causation" element is satisfied for two main reasons: (1) the Judicial Defendants exercise "administrative enforcement and implementation" of the allegedly unconstitutional CHINS adjudication (*id.*), and (2) "the judges in Vermont and DCF have had 'back door' meetings which have resulted in favoring a policy of giving credence to unsupported allegations of abuse and neglect" (*id.* at 12).

The First Amended Complaint describes the Chief Superior Judge as having "direct reports" who include the "probate, juvenile, family and superior judges that operate within the Vermont Superior Court system." (Doc. 25 ¶ 37.) The First Amended Complaint similarly describes the Justices of the Vermont Supreme Court as having the following "direct and indirect reports": the Chief Superior Judge and "all clerks, administrators, agents, judicial officers, and employees of the Vermont Judiciary." (*Id.* ¶ 38.) But at the December 9, 2020 hearing, Plaintiff's counsel conceded that the Judicial Defendants are not like managers or CEOs in the business world. The phrase "direct report" may not accurately describe the hierarchies or structures of the Vermont judiciary.

It is true that the Vermont Supreme Court and the Chief Superior Judge have administrative authority within the Vermont judiciary. *See, e.g.*, Vt. Const. ch. II, § 30 ("The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the State."); 4 V.S.A. § 3 ("The Supreme Court shall have administrative and disciplinary control of all judicial officers of the State, in addition to and not inconsistent with the constitutional powers of the General Assembly in those matters."); *Vt. R. S. Ct. Admin. Order No. 18*, § 1 (creating a Chief Superior Judge to "supervise and oversee the administrative responsibilities of the judicial officers who serve in the Superior Court of the State and the Judicial Bureau (trial courts)."). The Vermont Supreme Court also has rule-making power. *See* Vt. Const. ch. II, § 37 ("The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly.").

But the First Amended Complaint contains no allegations that the Judicial Defendants played any adjudicative role in the CHINS proceeding or the adoption proceeding; there is no allegation that any of those judicial officers presided over any of the proceedings in Ms. Thayer's case. To evaluate traceability, there must be some "challenged action" to trace. *Lujan*, 504 U.S. at 560. The Judicial Defendants' leadership within the Vermont judiciary is not, by itself, a sufficient basis for the Article III "causation" inquiry.

The court accordingly focuses on Plaintiff's allegation that, "[i]n recent years, there have been regular meetings between sitting judges, senior managers of the DCF like Defendants Schatz and Shea, and others, to discuss how matters wherein children are removed from their families are handled." (*Id.* ¶ 77.) "These meetings and contacts involve PowerPoint presentations, meetings, letters, and email contacts urging that the judiciary handle things certain ways at the requests of the DCF, including Defendants Schatz and Shea." (*Id.*) In short, Plaintiff alleges that the "judiciary, acting administratively," collaborates with DCF "on setting judicial policy for how to treat general classes of family and juvenile cases." (*Id.* ¶ 80.)

The court concludes that these allegations support no more than an "attenuated chain of conjecture" as to causation on the part of the Judicial Defendants. Plaintiff's allegations do not state that the Judicial Defendants are among the "sitting judges" referenced in the First Amended Complaint. But even assuming they are, the allegations are insufficient to support Plaintiff's conjecture that the Vermont judiciary has entered into a "tacit deal" (Doc. 25 ¶ 83) to violate parents' civil rights in an effort to minimize child deaths. There are no allegations that the meetings referred to in the First Amended Complaint involved discussion or approval of any policy to claim that federal law does not apply to child removals in Vermont courts, or to tolerate false representations to courts or coerced relinquishments of children. (*See id.*)

In light of this conclusion, it is unnecessary to reach the "injury" or "redressability" elements of the Article III standing inquiry. It is also unnecessary to reach the Judicial Defendants' remaining arguments for dismissal on the basis of sovereign immunity or for failure to state a plausible § 1983, ADA, or Rehabilitation Act claim under Rule 12(b)(6). For the reasons discussed below, however, even if Ms. Thayer had Article III standing to pursue her claims against the Judicial Defendants, this court lacks jurisdiction to adjudicate those claims under the *Rooker-Feldman* doctrine.

II. DCF Defendants' Motion to Dismiss (Doc. 53)

As noted above, Plaintiff seeks to file a Second Amended Complaint that would add her parents (her children's grandparents) as "Additional Plaintiffs," and would also add former DCF employees Jacqueline Pell and Sarah Kaminski as "Additional Defendants." (Doc. 43.) The DCF Defendants have filed a combined opposition to that motion and their own motion to dismiss the First Amended Complaint. (Doc. 53.) The court treats both motions in this decision, beginning with the motion to dismiss. *See Albert v. Embassy of Music GMBH*, No. 5:19-cv-06652-EJD, 2020 WL 4284830, at *4 (N.D. Cal. July 27, 2020) (combined motion to dismiss and opposition to prior-filed motion to amend was proper; court proceeded to analyze whether leave should be denied and the remainder of the complaint be dismissed).

The DCF Defendants seek dismissal of all claims against them for multiple reasons. First, the DCF Defendants assert that Plaintiff's claims are attempts to relitigate proceedings in state court and are therefore barred by the *Rooker-Feldman* doctrine. (Doc. 53 at 5.) Second, the DCF Defendants contend that Plaintiff's claims are barred by issue preclusion and Ms. Thayer's voluntary relinquishment of her parental rights. (*Id.* at 8.) Third, the DCF Defendants argue that many of Plaintiff's claims are time-barred. (*Id.* at 17.) And finally, the DCF Defendants argue

that qualified immunity bars all of Plaintiff's claims. (*Id.* at 18.) The court begins with the *Rooker-Feldman* doctrine.

"Under the *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction over 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Grundstein v. Lamoille Superior Docket Entries/Orders*, 821 F. App'x 46, 47 (2d Cir. 2020) (summary order) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)), *cert. denied*, 141 S. Ct. 2517 (2021); *see also Marshall v. Hanson*, No. 2:13-cv-224-wks, 2015 WL 1429797, at *9 (D. Vt. Mar. 27, 2015).[6] "The doctrine applies where the federal court plaintiff: (1) lost in state court, (2) complains of injuries caused by a state-court judgment, (3) invites the district court to review and reject the state-court judgment, and (4) commenced the district court proceedings after the state-court judgment was rendered." *Grundstein*, 821 F. App'x at 47 (citing *Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 426 (2d Cir. 2014) (per curiam)). The first and fourth requirements are "procedural," while the second and third requirements are "substantive." *Green v. Mattingly*, 585 F.3d 97, 101 (2d Cir. 2009) (quoting *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005)).

Because the *Rooker-Feldman* doctrine concerns the district court's subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1) applies. *See Sowell v. Tinley Renehan & Dost, LLP*, 807 F. App'x 115, 118 (2d Cir. 2020) (summary order); *see also Grundstein v. Lamoille Superior Docket Entries/Orders*, No. 5:17-cv-151 (D. Vt. Sept. 7, 2018), ECF No. 37 (deciding

[6] The *Rooker-Feldman* doctrine is named for two cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Rooker-Feldman issue in Rule 12(b)(1) context), *aff'd*, *Grundstein*, 821 F. App'x at 49. The court has already recited the Rule 12(b)(1) standard as it applies to a "facial" motion addressed to the plaintiff's standing. *See supra* Section I.A. In the context of the DCF Defendants' *Rooker-Feldman* argument, the court "may refer to evidence outside the pleadings." *Makarova*, 201 F.3d at 113; *see also Burfeindt v. Postupack*, 509 F. App'x 65, 67 (2d Cir. 2013) (summary order) (trial court properly considered matters outside the pleading to dismiss claims under *Rooker-Feldman* doctrine where the court considered such matters not for the truth of matters asserted in the other litigation, "but rather to establish the fact of such litigation and related filings" (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998))). In opposition to such a fact-based Rule 12(b)(1) motion, the plaintiff's burden is to "come forward with evidence of [her] own to controvert that presented by the defendant 'if the affidavits submitted on a 12(b)(1) motion . . . reveal the existence of factual problems' in the assertion of jurisdiction." *Makarova*, 201 F.3d at 113 (ellipsis in original; quoting *Exch. Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976)).

As noted above, the DCF Defendants have submitted 39 exhibits (totaling more than 500 pages) in support of their motion to dismiss. (*See* Doc. 53-1 (index of exhibits); Docs. 53-2 through 53-41.) The exhibits appear to be copies of DCF case plans and court records from multiple juvenile cases docketed in the Family Division of the Vermont Superior Court (hereinafter, the "Family Division" or "Family Court") and spanning the period from October 2015 through a March 2019 Final Order terminating Plaintiff's parental rights as to all three children. Plaintiff has submitted a 12-page chart ("Schedule A") compiling her objections

to each of the 39 exhibits, asserting that the exhibits "are improperly used to establish facts or dispute Ms. Thayer's allegations or are otherwise taken out of context." (Doc. 70-1 at 1 n.1.)

With the above standards in mind, the court proceeds to analyze the elements of the *Rooker-Feldman* doctrine. The court reviews the elements somewhat out-of-order, beginning with the two "procedural" elements. Although the DCF Defendants have submitted voluminous documentation in support of their motion, only a few of those documents are necessary for the *Rooker-Feldman* analysis. The court includes explanations in the limited instances that it cites materials outside the pleadings.

A. Plaintiff Lost in State Court

The DCF Defendants argue that Plaintiff "lost" in state court because the Family Division temporarily and permanently terminated her parental rights. (Doc. 53 at 5.) Plaintiff maintains that she did not lose in the Family Division action because, according to the DCF Defendants themselves, she *voluntarily* relinquished her rights. (Doc. 70 at 20.)[7] In support of that contention, Plaintiff cites *Schweitzer v. Crofton*, 935 F. Supp. 2d 527, 541 (E.D.N.Y. 2013), *aff'd*, 560 F. App'x 6 (2d Cir. 2014) (summary order). The DCF Defendants contend that *Schweitzer* is distinguishable. (*See* Doc. 74 at 12 n.5.)

Generally, "[a] party has 'lost' in state court if the court orders removal of the child on a non-temporary basis." *Yi Sun v. N.Y.C. Police Dep't*, No. 18 CV 11002-LTS-SN, 2020 WL 4530354, at *10 (S.D.N.Y. Aug. 6, 2020); *see also Canning v. Admin. for Children's Servs.*, 588 F. App'x 48, 49 (2d Cir. 2014) (summary order) (parents were state-court losers for *Rooker-*

[7] Plaintiff's argument on this point is somewhat confusing because it depends on a position contrary to her allegation that her relinquishment was *not* voluntary. (*See* Doc. 25 ¶ 131 ("None of Ms. Thayer's relinquishment of her parental rights was voluntary, knowing, or intelligent.").) For the reasons discussed below, even if the relinquishment was voluntary, Plaintiff was still a state-court "loser" for *Rooker-Feldman* purposes.

Feldman purposes because they lost custody of their children under a July 2012 state court order); *Voltaire v. Westchester Cnty. Dep't of Soc. Servs.*, No. 11-CV-8876 (CS), 2016 WL 4540837, at *9 (S.D.N.Y. Aug. 29, 2016) ("Plaintiff lost in state court when her parental rights were terminated . . . ."); *Davis v. Abrams*, No. 13-CV-1405 (ARR), 2014 WL 279807, at *4 (E.D.N.Y. Jan. 23, 2014) ("[P]laintiffs 'lost' in state court when the Family Court issued orders removing the children from plaintiffs' custody . . . ."); *cf. Green*, 585 F.3d at 102 (no "loss" for *Rooker-Feldman* purposes where family court temporarily removed parent's child for four days before issuing a superseding order returning the child to her and ultimately dismissing petition; but suggesting that a family court's final "order of disposition" removing a child would make the parent a state-court loser).

Schweitzer is the only case that Ms. Thayer cites for her contention that the rule is different when the parent *voluntarily* relinquishes her rights. In that case, New York State Department of Social Services (DSS) officials authorized an ex parte emergency removal of a newborn baby, placing her in a foster home immediately after she was discharged from the neonatal intensive care unit in the hospital where she was born. *Schweitzer*, 935 F. Supp. 2d at 538–39. The DSS officials took that action based on their determination that the mother, Victoria, who took medication for bipolar disorder and lived in an independent-living facility, would not be able to care for the infant by herself—a concern that the DSS officials concluded was expressed by all of Victoria's service providers. *Id.* at 538. After the emergency removal, Victoria appeared in family court to respond to a removal petition that DSS filed. *Id.* at 541 n.9. At the preliminary hearing, the parties agreed that Victoria would consent to a finding of neglect and temporary custody would be awarded to her parents, but with Victoria retaining visitation rights. *Id.* At the final hearing, Victoria was granted joint, non-residential custody of the child.

Id. The family court then adjourned the proceedings "in contemplation of dismissal," and the petition was automatically dismissed. *Id.*

Victoria brought suit in federal court asserting claims arising out of the infant's emergency removal and temporary placement in foster care. *Id.* at 534.[8] The DSS defendants sought summary judgment on a variety of grounds, including the *Rooker-Feldman* doctrine. The district court held that *Rooker-Feldman* did not bar the plaintiffs' claims because the claims did not "invite district court review and rejection" of a state-court judgment. *Id.* at 541 (quoting *Green*, 585 F.3d at 101). The district court noted that the plaintiffs challenged only the ex parte emergency removal of the infant from the hospital—an action that was permissible by New York statute, but that did not involve any court action. *See id.* at 542. Since the district court concluded that the *Rooker-Feldman* doctrine was inapplicable because the doctrine's third element (invitation to review and reject the state-court judgment) was lacking, the court expressly declined to decide whether the first element (that plaintiff lost in state court) was satisfied under the circumstances. *Id.* at 541 n.9.

It is true that, although the *Schweitzer* court did not decide the issue, the court stated that it was "not clear" that Victoria was a "state-court loser" for purposes of the *Rooker-Feldman* doctrine. *Id.* The *Schweitzer* court noted that "[a]lthough there was no final adjudication in Plaintiff's favor . . . and Plaintiff did not secure the reversal of the removal order entered against her, there was also no final 'order of disposition' removing her child . . . and Victoria was satisfied with the joint custodial arrangement." *Id.* (citing *Green*, 585 F.3d at 102). But any lack of clarity on that issue in the *Schweitzer* case does not support Ms. Thayer's contention that she

[8] Victoria died while the lawsuit was pending and her parents litigated the action as representatives of her estate and on behalf of their granddaughter. *Id.* at 534 & n.1.

did not "lose" in state court. The state court in Ms. Thayer's CHINS cases transferred custody to DCF and, after returning custody of two children to Ms. Thayer in the conditional custody order, returned those children to DCF's custody after a violation of conditions. The state court also permanently terminated Ms. Thayer's parental rights and she was not granted a joint custodial arrangement.[9]

Thus, as numerous court decisions indicate, a non-temporary termination of parental rights renders the parent a "loser" for *Rooker-Feldman* purposes even if the termination was the result of a voluntary relinquishment of those rights. *See Hussell v. Jackson Cnty. Prosecuting Attorney*, No. 2:19-cv-00101, 2020 WL 4210487, at *5 (S.D. W.Va. Feb. 14, 2020) (*Rooker-Feldman* doctrine barred petitioner's claim seeking rescission of voluntary termination of parental rights), *proposed findings and recommendation adopted*, 2020 WL 4208942 (S.D. W.Va. July 22, 2020); *Johnson v. St. Louis Cnty. Pub. Health & Human Servs.*, No. 19-cv-111 (SRN/LIB), 2019 WL 7580104, at *2, 5 (D. Minn. Aug. 28, 2019) (state court accepted parents' voluntary termination of parental rights; federal court concluded that *Rooker-Feldman* barred all claims), *report and recommendation adopted*, 2019 WL 5677871 (D. Minn. Nov. 1, 2019), *aff'd*, 817 F. App'x 294 (8th Cir. 2020) (per curiam); *Huot v. Mont. State Dep't of Child & Family Servs.*, No. 17-45-BU-BMM-JCL, 2017 WL 4401639, at *1–2 (D. Mont. Sept. 5, 2017) (same), *findings and recommendation adopted*, 2017 WL 4341851 (D. Mont. Sept. 29, 2017), *aff'd*,

[9] On this point, the permanent termination of parental rights distinguishes this case from *Mortimer v. Wilson*, No. 15 Civ. 7186 (KPF), 2020 WL 3791892 (S.D.N.Y. July 7, 2020). The court in that case observed that it was unclear whether the plaintiff was a "state court loser" for *Rooker-Feldman* purposes because the plaintiff was challenging a temporary order of removal. *See id.* at *18 & n.17. Notably, however, the *Mortimer* court assumed that the entry of a temporary removal order constituted a "loss." *Id.* at *18. This case involves both temporary removals and a permanent termination of parental rights—the sum total of which can only be a "loss" for Ms. Thayer.

727 F. App'x 397 (9th Cir. 2018); *Alleyne v. City of New York*, 244 F. Supp. 2d 214, 215–16 (S.D.N.Y. 2003) (*Rooker-Feldman* doctrine barred review of challenges to state proceeding in which plaintiff surrendered his children for adoption).

For the reasons discussed above, the court concludes that Ms. Thayer "lost" in state court for *Rooker-Feldman* purposes.

B. Plaintiff Commenced This Action After State-Court Judgment

Ms. Thayer filed her original complaint in this federal case on December 2, 2019. (Doc. 3.) She therefore filed this case after the temporary and conditional transfers of custody in the CHINS cases (2015–2017), and after the March 2019 Final Order terminating her parental rights, which was issued on the basis of the "voluntary relinquishment" that she now disputes (*see* Doc. 53-35).[10] But according to the First Amended Complaint, the proceedings in which the foster parents seek to adopt Ms. Thayer's children are ongoing. (*See* Doc. 25 ¶ 134.) Ms. Thayer argues that the ongoing adoption proceedings preclude the operation of the *Rooker-Feldman* doctrine. (Doc. 70 at 20.)

It is true that "*Rooker-Feldman* has no application to federal-court suits proceeding in parallel with ongoing state-court litigation." *Hoblock*, 422 F.3d at 85. But Plaintiff's reliance on the adoption proceedings is misplaced. Critically, the First Amended Complaint seeks a declaration requiring "restoration" of Plaintiff's family (Doc. 25 at 86); a declaration that "[t]he decisions of the Vermont state court system in regard to [her] family purporting to terminate parental rights are unlawful under federal law"; and "an injunction, if still necessary, sufficient to

[10] The First Amended Complaint does not explicitly reference or incorporate the March 2019 Final Order. The court rejects Ms. Thayer's objections to consideration of the Final Order (Doc. 70-1 at 11). The court cites that order here only to establish the date and fact of the Family Division's action.

stop administrative or enforcement actions implementing the destruction of Ms. Thayer's family, including further acts to complete the adoption of her three children." (*Id.* ¶ 275.) These requests for relief show why the ongoing adoption proceedings do not preclude application of the *Rooker-Feldman* doctrine.

The "judgments" that resulted in Plaintiff's loss in state court are the judgments that she complains of in this case. Her request to halt the pending adoption proceedings is derivative of her fundamental request for reinstatement of her parental rights—rights which were terminated by order of the state court. *See Shallenberger v. Allegheny Cnty.*, No. 2:20-cv-00073-NR, 2020 WL 1465853, at *5 (W.D. Pa. Mar. 26, 2020) ("[U]ltimately what Plaintiffs really seek is a final injunction overturning the parental-rights termination order and returning the children to Ms. Metzger's custody, with the requested temporary relief [including a stay of an adoption hearing] serving as only a stop-gap in the meantime. This is prohibited by *Rooker-Feldman*.").

The court accordingly concludes that both of the "procedural" *Rooker-Feldman* requirements are present in this case. It remains to consider the two "substantive" elements of the doctrine.

C. Plaintiff Complains of Injuries Caused by State-Court Judgment

Ms. Thayer argues that she has pleaded "independent claims that were not 'caused' by orders of the Family Court." (Doc. 70 at 18; *see also id.* at 22.)[11] In particular, she notes that she is alleging constitutional violations arising out of: "(i) Defendants' initial investigation based on improper procedures; (ii) Defendants' removal of Ms. Thayer's children from her custody without complying with due process, prior to any proper investigation; and (iii) Defendants'

[11] Anticipating the *Rooker-Feldman* issue, Plaintiff asserts this argument in the First Amended Complaint itself. (*See* Doc. 25 ¶ 293.)

coercing Ms. Thayer to enter into an unenforceable 'voluntary relinquishment.'" (*Id.* at 19; *see also* Doc. 25 ¶¶ 8, 201, 282.) She also highlights multiple counts in the Amended Complaint that she contends do not seek review or rejection of the Family Court's decisions. (Doc. 70 at 22.) The DCF Defendants insist that Ms. Thayer has not asserted any independent claims and that Plaintiff "squarely attack[s]" Family Division decisions in her case. (Doc. 74 at 10–11.)

Notably, Counts I–VII each include requests for damages as a remedy. (*See* Doc. 25 ¶¶ 195, 213, 237, 245, 257, 268, 272.) Count VIII incorporates all of the allegations in the previous sections of the First Amended Complaint, including the claims in Counts I–VII. (*Id.* ¶ 273.) In some jurisdictions, the claims for damages might survive *Rooker-Feldman*. For instance, the Eleventh Circuit has held that, in the wake of *Exxon-Mobil*, the analysis of whether a plaintiff is complaining of and inviting review and rejection of a state-court judgment should be approached "claim-by-claim." *Behr v. Campbell*, No. 18-12842, 2021 WL 3559339, at *5 (11th Cir. Aug. 12, 2021). "The question isn't whether the whole complaint seems to challenge a previous state court judgment, but whether resolution of each individual claim requires review and rejection of a state court judgment." *Id.* Moreover, "[b]ecause *Rooker-Feldman* bars only claims that invite a district court's 'review and rejection' of a state court judgment, claims that seek only damages for constitutional violations of third parties—not relief from the judgment of the state court—are permitted." *Id.* at *6. Some courts within the Second Circuit have held similarly. *See Ho-Shing v. Budd*, No. 17 Civ. 4633 (LGS), 2018 WL 2269245, at *4 (S.D.N.Y. May 17, 2018) ("[T]o the extent that Plaintiff requests an injunction undoing the judgment of the New York Supreme Court, his complaint is dismissed for lack of jurisdiction. However, to the extent that the Complaint seeks monetary damages based on statutory violations, there is

jurisdiction over those claims, because they 'do not require that the Court review and reject' the state court judgment.").

However—even after the 2005 *Exxon Mobil* decision—the weight of authority within the Second Circuit indicates that *Rooker-Feldman* doctrine is not quite that narrow. In 2014 the Second Circuit held that *Rooker-Feldman* applied in a case where the plaintiffs brought a federal court action seeking damages and injunctive relief arising from a New York family court's order removing their children to ACS custody. *Canning v. Admin. for Children's Servs.*, 588 F. App'x 48, 49 (2d Cir. 2014) (summary order). District courts within the Circuit have reached similar conclusions. *See Hunter v. McMahon*, No. 20-CV-0018-LJV-MJR, 2021 WL 1996772, at *2 (W.D.N.Y. May 19, 2021) (alterations in original) (quoting *Lomnicki v. Cardinal McCloskey Servs.*, No. 04-CV-4548 (KMK), 2007 WL 2176059, at *5 (S.D.N.Y. July 26, 2007)) ("[A p]laintiff does not avoid *Rooker-Feldman* by seeking damages instead of injunctive relief. In order to award damages to [the p]laintiff, the Court would have to review the decision of the Family Court."), *appeal docketed*, No. 21-1473 (2d Cir. June 14, 2021); *see also Gifford v. United N. Mortg. Bankers, Ltd.*, No. 18 Civ. 6324 (PAE) (HBP), 2019 WL 3685225, at *8 (S.D.N.Y. July 8, 2019) (cleaned up) ("Although plaintiff requests money damages in her complaint, reading the complaint as a whole it is clear that plaintiff disputes the validity of the underlying state foreclosure judgment and that this dispute forms the sole basis for the complaint.").

Here, at the most general level, Ms. Thayer complains of the "destruction of her family." (Doc. 25 ¶ 1.) The Family Division's March 2019 Final Order terminating Ms. Thayer's parental rights is the single most tangible official action reflecting that alleged destruction. The request for declaratory and injunctive relief in Count VIII of the First Amended Complaint squarely

attacks that state-court judgment. (*See* Doc. 25 ¶ 275 ("The decisions of the Vermont state court system in regard to Ms. Thayer's family purporting to terminate parental rights are unlawful under federal law . . . .").) And Count VIII incorporates all of the allegations and theories in Counts I–VII. (*Id.* ¶ 273.) As in *Gifford*, the court reads the First Amended Complaint as a whole and concludes that Ms. Thayer disputes the validity of the March 2019 Final Order and that dispute is the basis of the First Amended Complaint.

The court recognizes that the First Amended Complaint alleges events prior to that date, including temporary losses of custody (*e.g.*, Doc. 25 ¶¶ 57, 69), DCF officials conditioning reunification upon successful completion of "treatment" consisting of behavioral and mental health "services" that Ms. Thayer did not want (*e.g.*, *id.* ¶¶ 223–224), and DCF officials coercing Ms. Thayer into relinquishing her parental rights by telling her that if she did not do so, "she would never see her children again." (*Id.* ¶ 19.) Ms. Thayer also alleges that DCF's actions to remove her children and to allegedly force her into voluntarily relinquishing her parental rights were motivated by discriminatory animus due to Ms. Thayer's PTSD and bi-polar disorder. (*See id.* ¶¶ 243–244, 255–256.)

All of those alleged acts occurred before the Family Division's March 2019 Final Order and thus could not have been caused by that order. But the injuries that Ms. Thayer complains of can all be traced to state-court orders.[12] The court must "scrutinize the injury of which a plaintiff complains as a necessary step toward determining whether the suit impermissibly seeks review and rejection of a state court judgment." *Charles v. Levitt*, 716 F. App'x 18, 21 (2d Cir. 2017)

[12] The court observes that Ms. Thayer challenges the DCF investigation that led to the earliest CHINS orders issued by the Family Division. The allegedly flawed investigation was not conducted pursuant to any court order. But the investigation itself did not injure Plaintiff. She is complaining of injuries caused by court orders that relied on that allegedly flawed investigation.

(summary order). Here, Ms. Thayer seeks more than just damages for alleged injuries prior to any court involvement. She seeks wholesale rejection of numerous court orders that followed. Each count of the First Amended Complaint against the DCF Defendants catalogues the following alleged injuries:

> [L]oss of custody of her children for almost four years and the indefinite future; the physical, emotional, and psychological damage resulting from the loss of custody of, and separation from, Plaintiff's children; litigation expenses, including attorneys' fees and costs; loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish and distress; and other compensatory damages, in an amount to be determined at trial.

(Doc. 25 ¶¶ 195, 213, 237, 245, 257.) And as described above, Ms. Thayer seeks sweeping relief from this court, including a declaration that "[t]he decisions of the Vermont state court system in regard to [her] family purporting to terminate parental rights are unlawful under federal law" and "an injunction, if still necessary, sufficient to stop administrative or enforcement actions implementing the destruction of Ms. Thayer's family, including further acts to complete the adoption of her three children." (*Id.* ¶ 275.) In light of the alleged injuries and the relief requested, the court concludes that, as against the DCF Defendants, the First Amended Complaint is, as a whole, a complaint directed at alleged injuries caused by state-court judgments.

Ms. Thayer's reliance on *Mortimer v. Wilson*, No. 15 Civ. 7186 (KPF), 2020 WL 3791892 (S.D.N.Y. July 7, 2020), is therefore misplaced. The plaintiff in that case sought only money damages based on her claim that a state child protective specialist failed to provide her with notice of a family court hearing that proceeded without her and resulted in temporary removal of her son. *Id.* at *4. She did not seek to have the temporary removal order "rejected, undone, or otherwise modified"—indeed, the temporary order had expired, and a permanent removal order was denied. *Id.* at *19. The *Mortimer* court accordingly held that *Rooker-*

Feldman did not bar her from seeking compensatory damages, reasoning that the plaintiff did not allege that her injury was caused by a state order and did not seek review or rejection of the temporary removal order. *Id.* at *19 (citing *Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 427–28 (2d Cir. 2014) (per curiam)).

Ms. Thayer's case is different. The Family Division did enter a permanent removal order, and Ms. Thayer requests broad relief that would undo that order. All of Plaintiff's claims against the DCF Defendants are "inseparably" linked, *Harris v. N.Y. State Dep't of Health*, 202 F. Supp. 2d 143, 166 (S.D.N.Y. 2002), and granting the relief that Plaintiff requests in those claims would require modification of the Family Division's judgment. Although Ms. Thayer seeks to challenge "general procedures," she *also* seeks "modification of the specific orders" affecting her. *Mortimer*, 2020 WL 3791892, at *19 (quoting *Schweitzer*, 935 F.3d Supp. 2d at 542).

Returning to the other categories of acts that Ms. Thayer alleges, the court notes that her temporary losses of custody prior to the March 2019 Final Order were also the result of court orders.[13] (*See, e.g.*, Docs. 53-3, 53-5, 53-10, 53-11, 53-17, 53-19.)[14] That distinguishes this case from *Schweitzer*, where the court held that *Rooker-Feldman* did not bar the plaintiffs' challenge

[13] One paragraph of the First Amended Complaint alleges that police officers removed Ms. Thayer's two youngest children twice "without any evident court order." (Doc. 25 ¶ 68.) Assuming that no court order authorized the officers to remove the children, the First Amended Complaint does not name the police officers as defendants.

[14] The First Amended Complaint does not explicitly reference or incorporate any of the Family Division's emergency or temporary care orders. But the court rejects Plaintiff's objections to consideration of those orders (Doc. 70-1); the court cites the Family Division's orders solely to establish the fact that the state court took those actions that Plaintiff claims injured her.

to an emergency removal that was lawful under a state statute but that was not ordered by any court. *Schweitzer*, 935 F. Supp. 2d at 542.

The behavioral and mental health services that Ms. Thayer challenges were part of case plans that the Family Division ordered under 33 V.S.A. § 5318(b). (*See* Doc. 53-24 (Oct. 13, 2016 disposition orders adopting case plans).)[15] Ms. Thayer's claim that she was coerced into relinquishing her parental rights is directly contrary to the Family Division's finding, in its March 2019 Final Order, that she relinquished those rights "voluntarily, without duress or coercion." (Doc. 53-35 ¶ 10.)[16] Thus the alleged injuries that flow from the alleged coercion are traceable to a state court order that found the absence of coercion—an order that Ms. Thayer asks this court to review. Irrespective of Ms. Thayer's allegations that DCF took the challenged actions due to discriminatory animus, the injuries that she complains of flow from court orders granting the relief that DCF requested, rather than from the challenged actions themselves.

D. Plaintiff Invites Review and Rejection of State-Court Judgment

The Second Circuit has observed that the two "substantive" *Rooker-Feldman* elements are arguably not distinct. *See Hoblock*, 422 F.3d at 85 n.4 ("[T]o complain of injuries caused by a state-court judgment is necessarily to invite review and rejection of that judgment."). But the *Hoblock* court also stated that "conceiving these as two separate requirements makes *Rooker-Feldman*'s contours easier to identify." *Id.* For the reasons described above, Ms. Thayer

[15] The First Amended Complaint does not explicitly reference or incorporate any of the Family Division's disposition orders. Plaintiff argues that Defendants impermissibly cite the disposition orders "to establish a factual record." (Doc. 70-1 at 9.) But the court cites the disposition orders only to establish the fact that court orders authorized the challenged case plans.

[16] The court quotes the Family Division's March 2019 Final Order not for the truth of that court's finding in paragraph 10, but for the *fact* that the Family Division so found.

complains of injuries caused by the state-court judgment. For the same reasons, she also invites review and rejection of that judgment.

E. Three Additional Arguments Against Applying *Rooker-Feldman*

The court accordingly concludes that all four *Rooker-Feldman* elements are present in this case. It remains to consider three additional arguments that Plaintiff raises against application of the *Rooker-Feldman* doctrine in this case.

1. Claim of Inadequate Review Process

First, Ms. Thayer asserts that the implication of Defendants' *Rooker-Feldman* argument "is that there could never be a District Court case arising from due process violations during a state court proceeding." (Doc. 70 at 21.) Plaintiff's argument on this point appears to rest on a conception of *Rooker-Feldman* as a much broader doctrine than it is. As the Supreme Court has explained, *Rooker-Feldman* occupies only a "narrow ground." *Exxon Mobil*, 544 U.S. at 284. The doctrine is confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* Thus, for example, prior to entry of a judgment in the state court, *Rooker-Feldman* is not a bar (although an abstention doctrine might be). Likewise, if the plaintiff's requested relief does not seek to undo the state-court judgment, then *Rooker-Feldman* would not prohibit the action in federal district court. *See, e.g.*, *Schweitzer*, 935 F. Supp. 2d at 542 ("Plaintiffs' claims do not seek to [undo] any family court order.").

And insofar as *Rooker-Feldman* removes the federal district courts as an avenue for aggrieved state-court losers, that is by design. Such litigants are not left without recourse to vindicate their federal constitutional rights. Notably, *Rooker-Feldman* concerns actions in

federal district courts; it does not prohibit state-court postjudgment relief or appellate review of state trial court judgments, including review of federal constitutional issues. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) (acknowledging presumption that state courts enjoy concurrent jurisdiction to decide federal issues); *Moore v. Sims*, 442 U.S. 415, 430 (1979) (Supreme Court has "repeatedly and emphatically" rejected contentions that the state courts might be incompetent to adjudicate federal constitutional claims). And if the state process fails to vindicate the federal constitutional interest, the ultimate resort of certiorari is available under 28 U.S.C. § 1257.

That is precisely what occurred in the trio of Supreme Court cases that Plaintiff cites for the proposition that due process violations during state-court proceedings can be brought in federal court: *Santosky v. Kramer*, 455 U.S. 745 (1982), *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Stanley v. Illinois*, 405 U.S. 645 (1972). That proposition is true insofar as the United States Supreme Court is a federal court empowered to review the final judgments or decrees of the highest court of each state. But no federal *district* court took any action in *Santosky*, *Quilloin*, and *Stanley*. Each of those cases involved appeals within the state-court system before the United States Supreme Court granted certiorari.

2. "Exception" for Independent Claims

Second, Ms. Thayer argues that there are "exceptions" to the *Rooker-Feldman* doctrine that apply even if all four elements are met. (Doc. 70 at 21.) She suggests that one such "exception" appears in the Supreme Court's *Exxon Mobil* decision: "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Exxon Mobil*,

544 U.S. at 293 (alterations in original; quoting *GASH Assocs. v. Vill. of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993)). Whether this is an "exception" or a corollary to *Rooker-Feldman*, it does not apply in this case—as discussed above, Ms. Thayer's claims are not independent of her direct attack on the judgment of the Family Division. This remains true even for Ms. Thayer's claim that the Family Court judgment was procured by fraud; the court considers that claim next.

3. Fraud

At the December 9, 2020 hearing, counsel for Ms. Thayer suggested that the Family Court had been misled by certain falsehoods. In her Motion for Discovery to Supplement the Record, Ms. Thayer sought "full discovery" of the state-court record and DCF's "case notes" or, alternatively, authorization to subpoena the Family Court. (Doc. 96 at 6.) She argued that *Rooker-Feldman* "does not block an action where a plaintiff alleges that a state court judgment was procured by fraud." (*Id.* at 12.) She asserted that the requested discovery will show the existence of "fraud in the State court proceeding," thereby—in her view—removing any *Rooker-Feldman* bar. (*Id.* at 14.)[17] The DCF Defendants maintained that *Rooker-Feldman* remains operative even where a plaintiff argues that the relevant judgment was obtained fraudulently. (Doc. 100 at 8.)

In her supplemental filing dated September 9, 2021, Plaintiff cites numerous DCF case notes as showing "the absence of certain key facts that were represented to the state court (which she claims were misrepresentations to the state court)" and as providing "context that suggest[s] that the overall context and presentation of Mother's supposed unsuitability, or any other need for termination of parental rights, was misleading." (Doc. 131 at 2.) The DCF Defendants

[17] Ms. Thayer alleges that the State misrepresented that it conducted a diligent ICWA inquiry. (*See* Doc. 96 at 4; *see also* Doc. 107 at 2–3.) She also alleges several other categories of misrepresentations. (*See* Doc. 107 at 6–7.)

maintain that Plaintiff's supplemental submission "does not identify a single document relevant to whether this case should be dismissed." (Doc. 135 at 2.)

The court begins with Plaintiff's assertion that "federal courts are allowed to address independent actions to redress fraud." (Doc. 96 at 12.) Presumably Plaintiff makes this argument to attempt to fit within the statement in *Exxon Mobil* that there is jurisdiction where a federal plaintiff presents an "independent claim." In support, Plaintiff cites the following passage from *United States v. Sierra Pacific Industries, Inc.*: "A court's power to grant relief from judgment for fraud on the court stems from 'a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.'" 862 F.3d 1157, 1167 (9th Cir. 2017) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

The difficulty with this argument is that *Sierra Pacific* concerns a court's power to grant relief from *its own* judgment. *See id.*; *see also* Fed. R. Civ. P. 60(b)(3). If the Family Court's judgment was obtained by fraud, Ms. Thayer might have a basis to bring a motion in *that* court under V.R.C.P. 60(b)(3). But if *this* court were to attempt to grant relief from the Family Court's judgment, that would plainly be the type of impermissible federal court review of state-court judgments that *Rooker-Feldman* seeks to prevent.

Benavidez v. County of San Diego, 993 F.3d 1134 (9th Cir. 2021), is distinguishable. The court in that case applied the "extrinsic fraud corollary" to the *Rooker-Feldman* doctrine. *Id.* at 1143–44 (citing *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140–41 (9th Cir. 2004)). "Extrinsic fraud is conduct which prevents a party from presenting his claim in court" and "a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud." *Kougasian*, 359 F.3d at 1140–41 (quoting *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir.

1981)). But it is not clear that this corollary is recognized in the Second Circuit. *See Lewis v. Guardian Loan Co.*, No. 3:19-CV-00704 (CSH), 2019 WL 3938150, at *2 (D. Conn. Aug. 20, 2019) (rejecting "extrinsic fraud" argument; *Rooker-Feldman* applies even where a party claims that the underlying judgment was obtained fraudulently). Even if it is, the fraud that Ms. Thayer complains of would be *intrinsic* fraud—the remedy for which must be sought in the underlying lawsuit. *See In re Buckskin Realty Inc.*, No. 1-13-40083-nhl, 2016 WL 5360750, at *6 (Bankr. E.D.N.Y. Sept. 23, 2016) (misrepresentations to the court would be intrinsic fraud).

The other cases that Plaintiff cites are likewise unavailing. The plaintiffs in *Sykes v. Mel Harris & Associates, LLC* brought suit in federal court alleging that "a debt-buying company, a law firm, a process service company, and others engaged in a 'massive scheme' to fraudulently obtain default judgments against them and more than 100,000 other consumers in state court." 757 F. Supp. 2d 413, 418 (S.D.N.Y. 2010). Some of the defendants sought dismissal of all or some of the claims under *Rooker-Feldman*, arguing that the plaintiffs were effectively appealing from a state-court judgment. *Id.* at 429. The Second Circuit rejected that argument, reasoning that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them. In fact, all plaintiffs have had the default judgments against them vacated or discontinued." *Id.* The reason that the *Rooker-Feldman* doctrine was inapplicable was not that the plaintiffs sought relief for an alleged scheme to fraudulently obtain judgments. The doctrine was inapplicable because the plaintiffs did not seek district court review or rejection of those judgments. *See id.* ("Plaintiffs seek, inter alia, declaratory relief that defendants violated the law and injunctive relief via notice to putative class members that is independent of the state-court judgments.").

Similarly, *Rooker-Feldman* was not a bar in *Mascoll v. Strumpf*, No. 05-CV-667 (SLT), 2006 WL 2795175 (E.D.N.Y. Sept. 26, 2006), and *Goddard v. Citibank, NA*, No. 04CV5317 (NGG)(LB), 2006 WL 842925 (E.D.N.Y. Mar. 27, 2006), but not because the plaintiffs complained of fraud or misuse of the judicial process. *Rooker-Feldman* did not apply because the plaintiffs were not challenging a state-court judgment. *See Mascoll*, 2006 WL 2795175, at *8 ("The plaintiff in this case . . . is not challenging a state-court ruling."); *Goddard*, 2006 WL 842925, at *6 (plaintiffs' claims did not "invite [federal district] court to vacate the [state-court] judgment of foreclosure").[18] In contrast, as discussed above, Ms. Thayer *does* seek district court review and rejection of the Family Court's judgment; the fact that she alleges that the judgment was obtained by fraud does not defeat *Rooker-Feldman*'s applicability. *See Gurdon v. Bank*, No. 15-CV-5674 (GBD) (JLC), 2016 WL 721019, at *6 (S.D.N.Y. Feb. 23, 2016) ("[T]o the extent Gurdon argues that the Defendants perpetrated a fraud upon the state court to obtain this judgment, *Rooker-Feldman* nonetheless bars this claim."), *report and recommendation adopted*, 2016 WL 3523737 (S.D.N.Y. June 22, 2016).

Ultimately, only a few of the records are relevant to the *Rooker-Feldman* analysis, and the court has cited those records only for the fact of what the Family Court did, not for the truth of any findings made by that court. Even if Plaintiff's requested discovery proved that the Family Court judgment was obtained by fraud, that would not prevent operation of the *Rooker-Feldman* doctrine.

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[18] Of course, if a plaintiff presents a fraud claim that does not invite review and rejection of a state-court judgment, then *Rooker-Feldman* might not apply. *See Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 427 (2d Cir. 2014) (noting that *Rooker-Feldman* would not bar fraud claims where the adjudication of the claims "does not require the federal court to sit in review of the state court judgment").

Under the analysis above, the court concludes that the *Rooker-Feldman* doctrine bars all of the First Amended Complaint's claims against the DCF Defendants. That conclusion makes it unnecessary to consider the DCF Defendants' alternative arguments based on issue preclusion (Doc. 53 at 8), the statute of limitations (*id.* at 17), and qualified immunity (*id.* at 18) insofar as those arguments relate to the First Amended Complaint. The court turns next to Plaintiff's "Motion for Permissive Joinder." (Doc. 43.)

III. Plaintiff's "Motion for Permissive Joinder" (Doc. 43)

Plaintiff seeks to file a Second Amended Complaint that would add her parents (her children's grandparents) as "Additional Plaintiffs," and would also add former DCF employees Jacqueline Pell and Sarah Kaminski as "Additional Defendants." (Doc. 43.) Grandparents—who live in New York—would join Ms. Thayer in the ADA and Rehabilitation Act claims (Counts IV and V), but not in any of the other original eight counts. Although Grandparents would not join the count seeking declaratory and injunctive relief, the Prayer for Relief is phrased such that (all) "Plaintiffs" seek to "[e]njoin the Declaratory/Injunctive Defendants." (Doc. 43-2 at 115.)

The proposed Second Amended Complaint would also add more factual allegations and four more counts to the eight counts in the First Amended Complaint. Two of the new proposed counts would be brought by Grandparents: a § 1983 claim and a loss-of-consortium claim. The other two new proposed counts are an intentional-infliction-of-emotional-distress ("IIED") claim and a civil conspiracy claim, both brought by all plaintiffs. (*See* Doc. 43-2.)

As part of their motion to dismiss, the DCF Defendants assert that leave to file the proposed Second Amended Complaint should be denied as futile. (Doc. 53 at 2.) Similarly, Dr. Donnelly and his firm John W. Donnelly, Ph.D., PLLC (the "Donnelly Defendants") oppose

Plaintiff's motion as futile. (Docs. 46, 47.) Plaintiff maintains that her motion should be granted. (Doc. 51.)

A. Applicable Standards

Although titled "Motion for Permissive Joinder" under Fed. R. Civ. P. 20, the motion also seeks leave to file a Second Amended Complaint (Doc. 43 at 2) and recognizes that a motion to amend is governed by Fed. R. Civ. P. 15 (*id.* at 3 n.2; *see also id.* at 7). The same standard applies to both types of motions. *See Shulman v. Chaitman LLP*, 392 F. Supp. 3d 340, 358 (S.D.N.Y. 2019) ("In deciding whether to permit joinder, courts apply the same standard of liberality afforded to motions to amend pleadings under Rule 15." (quoting *Bridgeport Music Inc. v. UMG Recordings, Inc.*, No. 05 Civ. 6430 (VM) (JCF), 2008 WL 113672, at *2 (S.D.N.Y. Jan. 10, 2008))); *see also Catamount Radiology, P.C. v. Bailey*, No. 1:14-cv-213, 2015 WL 5089104, at *1 (D. Vt. Aug. 27, 2015).

Under Rule 15(a)(2), a party that has already amended its pleadings once as a matter of course "may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* But such leave may be denied "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Broidy Capital Mgmt. LLC v. Benomar*, 944 F.3d 436, 447 (2d Cir. 2019) (quoting *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018)).

B. Proposed New Claims to be Brought by Ms. Thayer

The proposed Second Amended Complaint includes new claims brought by Ms. Thayer. They are proposed Count IX (IIED) and proposed Count XI (civil conspiracy). Ms. Thayer may also implicitly be seeking to join Grandparents in proposed Count X (loss of consortium), since the proposed Second Amended Complaint seeks an award of "loss of consortium damages" for

all "Plaintiffs." (Doc. 43-2 at 115.) Because these claims seek damages for alleged injuries caused by various state court judgments, the court concludes that *Rooker-Feldman* bars her from bringing those claims for the reasons stated above. Amendment to include those claims by Ms. Thayer would be futile.

C. Proposed Additional Defendants

The *Rooker-Feldman* doctrine likewise would entitle the proposed additional defendants—former DCF employees Jacqueline Pell and Sarah Kaminski—to dismissal of all claims that Ms. Thayer seeks to bring against them for the reasons set forth above with respect to the DCF Defendants. *See Bobrowsky v. Yonkers Courthouse*, 777 F. Supp. 2d 692, 705 n.17 (S.D.N.Y. 2011) (a federal plaintiff may not avoid *Rooker-Feldman* "simply by adding new or different defendants in the federal action"). Joinder of those individuals as defendants as to Ms. Thayer's claims would be futile and the court accordingly concludes that their addition would not be just under Fed. R. Civ. P. 21.

D. Grandparents' Proposed Claims Against the DCF Defendants

The DCF Defendants argue that Grandparents' joinder as additional plaintiffs would be futile because qualified immunity bars all of the Grandparents' proposed claims against them. (Doc. 53 at 34; Doc. 74 at 17.)[19] On the issue of qualified immunity, the DCF Defendants argue,

[19] It is not entirely clear whether the DCF Defendants also argue that the Grandparents' proposed claims might be barred by the *Rooker-Feldman* doctrine. In their motion to dismiss, the DCF Defendants appear to collect Ms. Thayer and Grandparents together, referring to them all as "Plaintiffs," and argue that "*Rooker Feldman* bars *Plaintiffs'* attempt to relitigate the state court proceedings." (Doc. 53 at 2 (latter emphasis added).) But the DCF Defendants' legal analysis focuses on qualified immunity; they offer no explicit analysis regarding the potential impact of *Rooker Feldman* on the Grandparents' proposed claims. The court declines to address here the potential impact of *Rooker Feldman* on Grandparents' proposed claims. The briefing is inadequate to address the complex issues regarding the potential applicability of *Rooker Feldman* to Grandparents' proposed claims, including whether Grandparents should be treated as if they were parties to the suit in Family Court, and whether the doctrine of "virtual representation"

among other things, that they "did not violate any clearly established rights" and that "Grandparents do not have the type of rights they seek to assert here." (Doc. 74 at 17.)

1. Qualified Immunity Doctrine; Preliminary Issues

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)); *see also Hurd v. Fredenburgh*, 984 F.3d 1075, 1089 (2d Cir. 2021) (quoting *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 432–33 (2d Cir. 2009)) ("Government actors are entitled to qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Courts typically consider two questions in a qualified immunity analysis: (1) "whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional [or statutory] right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). On the latter element, the court evaluates (a) whether the defendant's action violated "clearly established law" and (b) whether it was "objectively reasonable" for the defendant to believe that his or her action did not violate such law. *Poe v. Leonard*, 282 F.3d 123, 133 (2d Cir. 2002) (quoting *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998)).

Before proceeding further, the court notes some preliminary points about qualified immunity as it might apply in this case. First, the doctrine of qualified immunity has recently

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might be available. *See UMB Bank, N.A. v. City of Winooski, Vt.*, No. 2:17-cv-00231, 2018 WL 4080384, at *14 (D. Vt. Aug. 27, 2018) (declining to address issue due to inadequate briefing).

been the subject of intense public scrutiny and debate, especially as the doctrine relates to police action. Courts have also weighed in on the issue. *See, e.g.*, *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391–92 (S.D. Miss. 2020) (asserting that qualified immunity "operates like absolute immunity" in real life, and that the doctrine "has served as a shield" for law enforcement officers who have failed to respect "the dignity and worth of black lives"). Ms. Thayer states that she reserves the right to argue that the qualified immunity doctrine is facially unconstitutional. (Doc. 70 at 35 n.17.) But as the *Jamison* court observed, "[t]his Court is required to apply the law as stated by the Supreme Court." *Jamison*, 476 F. Supp. 3d at 392.

Second, when qualified immunity applies, it bars claims for money damages, but it "does not bar actions for declaratory or injunctive relief." *Panzella v. Sposato*, 863 F.3d 210, 216 (2d Cir. 2017) (quoting *Adler v. Pataki*, 185 F.3d 35, 48 (2d Cir. 1999)). Here, Grandparents do not seek to join proposed Count XII, which seeks declaratory and injunctive relief. On the other hand, the Prayer for Relief is phrased such that (all) "Plaintiffs" seek to "[e]njoin the Declaratory/Injunctive Defendants." (Doc. 43-2 at 115.) If qualified immunity applies, it is a shield only against Grandparents' damages claims.

Third, while qualified immunity is a shield against *federal* causes of action, it "is not generally understood to protect officials from claims based on state law." *Jenkins v. City of New York*, 478 F.3d 76, 86 (2d Cir. 2007). Here, Grandparents seek to bring claims for alleged violations of both federal law—i.e., the ADA and the Rehabilitation Act (Counts IV and V) and 42 U.S.C. § 1983 (proposed Count VIII)—and Vermont state law—i.e., IIED (proposed Count IX), loss of consortium (proposed Count X), and civil conspiracy (proposed Count XI). But a similar immunity doctrine exists under Vermont law, *see Sutton v. Vt. Reg'l Ctr.*, 2019 VT

71A, ¶ 49, 238 A.3d 608, and Plaintiffs do not argue that Vermont's version of the doctrine would result in any different outcome.

Fourth, the "DCF Defendants" include multiple DCF officials in their individual capacities but also includes two officials (Mr. Schatz and Ms. Johnson) in their official capacities as well as DCF itself. Although qualified immunity might benefit the individual DCF officials, it is not available to officials sued in their official capacity or to DCF itself. *See Pearson*, 555 U.S. at 242–43 (qualified immunity is unavailable in an action against a municipality); *Soto v. Gaudett*, 862 F.3d 148, 162–63 (2d Cir. 2017) (qualified immunity defense "does not belong to the governmental entity; the entity itself is not allowed to assert that defense"; suit against a government official in his official capacity is equivalent to suit against the government entity); *Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647, 654 (2d Cir. 1998) (qualified immunity was not at issue "because the defendant is the government agency itself"); *Finch v. City of New York*, 591 F. Supp. 2d 349, 364 (S.D.N.Y. 2008) ("[Q]ualified immunity is a defense reserved for individuals.").

But DCF and the official-capacity DCF Defendants do not need to rely on qualified immunity as a shield against Grandparents' damages claims because DCF and the official-capacity DCF Defendants are entitled to Eleventh Amendment immunity, which bars Grandparents' proposed damages claims against them. *See Marshall v. Dep't of Children & Family Servs.*, No. 2:13-cv-00224-wks, at 13 (D. Vt. Feb. 5, 2014), ECF No. 31 ("DCF is a state agency, and therefore the Marshalls claims for damages and injunctive relief against DCF are barred.").

Fifth, since the court is evaluating whether a proposed pleading would be futile as barred by qualified immunity, the court employs the "stringent" standard that applies to immunity

defenses that are advanced on a Rule 12(b)(6) motion. *Chamberlain ex rel. Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 110 (2d Cir. 2020) (quoting *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004)). The court is mindful that, under this stringent standard, "typically 'the defense of qualified immunity cannot support a grant of a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted.'" *Marshall v. Hanson*, No. 2:13-cv-244-wks, 2015 WL 1429797, at *8 (D. Vt. Mar. 27, 2015) (quoting *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004)). "Qualified immunity is appropriately granted on a Rule 12(b)(6) motion only if it is based on facts appearing on the face of the complaint, exhibits to the complaint, documents incorporated by reference, and items of which judicial notice may be taken." *Biswas v. Kwait*, 576 F. App'x 58, 59 (2d Cir. 2014) (summary order).

2. Grandparents' Rights

With the above preliminary points in mind, the court considers the DCF Defendants' argument that Grandparents have failed to allege any violation of Grandparents' clearly established rights. According to the proposed Second Amended Complaint, Grandparents generally allege that Defendants "improperly and wrongfully deprived Grandparents of their right to adopt their granddaughter [Sheera] . . ., which was fully approved by the State of New York (but repeatedly ignored and subverted by numerous Liability Defendants)." (Doc. 43-2 at 4.)[20] More specifically, Grandparents allege violations of their substantive and procedural due process rights and their rights of familial association. (*Id.* at 100.) They claim to have a "fundamental right to freely associate with and participate in the upbringing of their

[20] The proposed Second Amended Complaint describes the "Liability Defendants" as: Laura Knowles, Karen Shea, Monica Brown, Christopher Conway, Jennifer Burkey, Jacqueline Pell, Sarah Kaminski, and Kenneth Schatz, plus the Donnelly Defendants and Lund Family Center, Inc. (Doc. 43-2 at 3.)

grandchildren" and to have a protected liberty interest "in maintaining relationships with their grandchildren." (*Id.* at 101.)

> Grandparents assert that their substantive rights were violated in the following ways:
>
> (1) Liability Defendants failed to notify Grandparents or adequately notify Grandparents and intentionally concealed from Grandparents their options under federal and state law which were available to them to participate in the care and placement of Sheera Winthrop, including failure to notify them of any options that would be lost; (2) Liability Defendants failed to notify or adequately notify or discuss and inform Grandparents of the requirements to become a foster care provider, or permanent legal custodian or adoptive parent as required by federal and state law; (3) Liability Defendants followed a policy, custom, and practice of failing adequately to conduct family finding and notify family members of options under Federal and State law available to them to participate in the care and placement of a related child, including any options that would be lost by failing to respond to the notice; (4) Liability defendants specifically prevented Grandparents becoming the foster care providers or adoptive parents of Sheera Winthrop by taking affirmative action to prevent New York CPS approval from becoming effective.

(*Id.* at 101–102.) Grandparents maintain that their procedural due process rights were violated "by the Liability Defendants' failure to follow their own policies and federal law, including DCF Policy 91," as well as 42 U.S.C. § 671(a)(29) and 33 V.S.A. § 5307(e)(5)(A). (*Id.* at 23, 102.) They allege:

> The Liability Defendants routinely refused to engage in appropriate family finding, failed to provide appropriate notice to family members of their options under federal and state law which are available to them to participate in the care and placement of a child, including failure to notify them of any options that would be lost; and failed to inform family members of the requirements to become a foster care provider, or permanent legal custodian or adoptive parent, including by actively refusing to assist the Grandparents in becoming legal custodians or adoptive parents.

(*Id.* at 102.) The DCF Defendants argue that there are no plausible allegations that Grandparents had a constitutional right to pursue temporary and permanent custody of their grandchildren. (Doc. 56-41 at 35.)

The Due Process Clause of the Fourteenth Amendment of the Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This clause protects rights to both "substantive" and "procedural" due process. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998). "The Fourteenth Amendment guarantees a substantive right under the Due Process Clause to intimate familial association, including between siblings." *Gorman v. Rensselaer Cnty.*, 910 F.3d 40, 47 (2d Cir. 2018). A claim for infringement of that substantive right requires conduct "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." *Id.* (quoting *Anthony v. City of New York*, 339 F.3d 129, 143 (2d Cir. 2003)). Regarding procedural due process claims, the court asks "whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). To prevail on either a substantive or a procedural due process claim, Grandparents must show that they possessed a protected liberty interest. The court begins with that required element.

a. Protected Liberty Interest

The parties dispute whether Grandparents have any relevant protected liberty interest. The DCF Defendants cite *Gause v. Rensselaer Children & Family Services*, No. 10-CV-0482, 2010 WL 4923266 (N.D.N.Y. Nov. 29, 2010). In that case, Sharon Gause—the maternal grandmother of an infant, S.S.—challenged the Rensselaer Children and Family Services' determination to place the infant in the temporary custody of the infant's paternal grandmother after the infant's mother, Audrea Gause, temporarily lost parental rights. *Id.* at *1. Sharon Gause asserted various constitutional violations, but the court stated that it was "questionable

whether Plaintiff has any protected liberty or property interest here." *Id.* at *3. The court observed that the "federal courts of appeals that have considered the contours of the liberty interest recognized in [*Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977)], have expressed a reluctance to extend it beyond grandparents living with their grandchildren." *Id.* (quoting *Johnson v. City of Cincinnati*, 310 F.3d 484, 513 (6th Cir. 2002) (Gilman, J., dissenting)).

The *Gause* court held that "in light of the fact that Audrea Gause had custody of the child up until the subject termination proceedings, there are insufficient plausible allegations that Plaintiff had a sufficient relationship with S.S. to give rise to a protected liberty or property interest." *Id.* "For example," the court observed, "it does not appear that S.S. lived with Plaintiff." *Id.* at *3 n.5. The court cited the following passage from *Mullins v. State of Oregon*: "We have found no other authority supporting the proposition that a grandparent, by virtue of genetic link alone, enjoys a fundamental liberty interest in the adoption of her grandchildren." 57 F.3d 789, 794 (9th Cir. 1995). Other courts have similarly suggested that grandparents' substantive due process rights regarding their grandchildren are significantly more limited than parents' rights. *See McIntosh v. White*, No. 16-CV-6654 (PKC) (LB), 2017 WL 1533539, at *3 (E.D.N.Y. Apr. 27, 2017) ("Although *parents* have a substantive right under the Due Process Clause to remain together with their children without the coercive interference of the awesome power of the state, the same constitutional right might not extend to grandparents at all." (cleaned up, emphasis added) (citing *Troxel v. Granville*, 530 U.S. 57, 75 (2000) and *Mullins*, 57 F.3d at 794)).

But neither *Gause* nor *Mullins* go so far as to hold that grandparents never have any liberty interests regarding their grandchildren. As the court in *Rees v. Office of Children and*

Youth observed after surveying numerous cases including *Moore* and *Mullins*, the inquiry is more nuanced:

> [C]ertain common themes seem to figure prominently in the cases, most notably the courts' emphasis on whether the plaintiff was a custodial figure or otherwise acting in loco parentis to the children at the time of the state's involvement in their lives; whether and for how long the children had been residing with the plaintiff prior to state intervention; whether the plaintiff has a biological link to the children; whether there is a potential conflict between the rights of the plaintiff and the rights or interests of the children's natural parents; and whether the plaintiff has any rights or expectations relative to the children under relevant state law.

744 F. Supp. 2d 434, 451–52 (W.D. Pa. 2010). Decisions from within the Second Circuit are in accord. *See Bellet v. City of Buffalo*, No. 03-CV-27S, 2009 WL 2930464, at *4 (W.D.N.Y. Sept. 11, 2009) (holding that grandfather, who did not enjoy legal custody but was his grandson's "primary caregiver for approximately seven years after his biological mother and father surrendered custody" had established "a triable issue of fact as to whether he possessed a protected liberty interest").

Here, Grandparents maintain that they have expressly alleged "a close bond with their grandchildren, more than just a biological relationship." (Doc. 70 at 41.) They cite their allegation that "[f]rom October 2015, when the children were first taken into custody, until November 2018, Sheera spent every birthday, holiday, and weekend with her Grandparents." (Doc. 43-2 at 57.) They also cite their allegation that, before October 29, 2015, they "active[ly] participat[ed]" in the lives of all three grandchildren. (*Id.* at 101.) They further represent that they "could say much more if it were needed to clarify." (Doc. 70 at 42.)

As to most of the factors that the *Rees* court identified, these allegations are unlikely to sustain a plausible liberty interest arising from the Due Process Clause itself. Even with the benefit of all reasonable inferences, Grandparents' generalized allegation of "active participation" in the lives of all three grandchildren is insufficient. Grandparents' alleged

frequent visits with Sheera between October 2015 and November 2018 do not suggest a custodial arrangement. Nor do Plaintiffs allege that Sheera was residing with Grandparents. The factor regarding potential conflict between Grandparents' rights and Ms. Thayer's rights appears to be neutral.

But that does not end the inquiry; as the *Rees* court noted, it is also vital to consider "whether the plaintiff has any rights or expectations relative to the children under relevant state law." *Rees*, 744 F. Supp. 2d at 452. That is because a protected liberty interest can be created by state laws and policies. *See Francis v. Fiacco*, 942 F.3d 126, 141 (2d Cir. 2019) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)); *see also Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 415 n.20 (D. Vt. 2009) (recognizing that "constitutionally protected liberty interests may be created by state law"; citing *Wilkinson*, 545 U.S. at 222). Here, the proposed Second Amended Complaint alleges violations of 33 V.S.A. § 5307(e)(5)(A)[21] and of "DCF Policy 91," a copy of which is attached to the proposed pleading as an exhibit. (*See* Doc. 43-1 at 113–130.)

Consistent with 42 U.S.C. § 671(a)(19)—which conditions certain funding upon state plans that "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child"—Policy 91 recites the benefits of "kinship care" and sets forth a policy of identification and notification of relatives and engagement of relatives as temporary or permanent placement resources. (*See* Doc. 43-1 at 114–127.) Consistent with

[21] Section 5307(e)(5)(A) requires that at every temporary care hearing DCF must notify the court of all relatives who are "appropriate, capable, willing and available to assume temporary legal custody of the child."

42 U.S.C. § 671(a)(29), Policy 91 recognizes that "[f]ederal law requires a diligent search for a child's extended relatives" and acknowledges that "[w]hen a child enters DCF custody, the division has an obligation to identify all individuals with parental rights and conduct a diligent search for relatives within the parents' families." (*Id.* at 117.) The policy further provides for notification to such relatives: "[o]nce a child is in DCF custody, relatives shall be contacted as soon as they are identified and their contact information is obtained. . . . Efforts to engage relatives should be continuous." (*Id.* at 120.)

Grandparents allege that multiple DCF Defendants failed to comply with these provisions. (Doc. 43-2 at 22–23.) The factual allegations in support of that contention appear to include the following. Grandparents allege that after their grandchildren were taken from Keziah Thayer, Martha Thayer repeatedly tried to call Defendant Brown but, apart from acknowledging receipt of Martha Thayer's messages, Ms. Brown "never attempted to get in contact with Ms. Thayer, Sr. about maintaining family unity." (*Id.* at 22.) Grandparents also allege that "Defendants Brown, Pell, Kaminski, Conway, Burkey, and Knowles never met with Elam Thayer, and only met with Martha Thayer when Martha went with Ms. Thayer to a DCF meeting. No one at DCF ever gave Ms. Thayer or Grandparents a business card or contact information, despite numerous requests." (*Id.*) And Grandparents allege that Defendant Pell did not contact Grandparents after the January 26, 2016 hearing. (*Id.* at 24.)

Grandparents further allege that Keziah Thayer "consistently and frequently requested that Grandparents be considered as adoptive parents for Sheera, and as caregivers for the other children." (*Id.* at 28.) But Grandparents allege "[u]pon information and belief" that Defendants Pell, Kaminski, Conway, Burkey, and Knowles did not want to place the children with Grandparents because those defendants "preferred reassigning the children to others whom they

thought were richer, better, and more likeable to them and their cultural values, and because Defendants Schatz and Shea have set up an unwritten policy to engage in a system of eugenic family reassignments." (*Id.* at 24.) Grandparents allege a series of events that they describe as "avoidance, delay, deflection, and bandying of Ms. Thayer, her family, and New York CPS." (*Id.* at 32.)

Although it appears from the proposed Second Amended Complaint that Grandparents did at some point become aware of DCF's involvement and the proceedings involving their grandchildren and Keziah Thayer's parental rights, the court concludes that it would be improper to determine that Grandparents' due process claim is futile under the stringent standard that applies at this stage of the case. Further factual development is necessary.[22] *See McGreal v. Westmoreland Cnty.*, No. 2:18-cv-1601-NR, 2020 WL 516309, at *2 (W.D. Pa. Jan. 28, 2020) (denying motion to dismiss grandparents' claim that they were not properly notified of their rights to participate in the care and placement of their grandchild; concluding that "[t]o rule in Defendants' favor, the Court would have to determine the precise nature of the notice provided, the degree to which Plaintiffs were afforded a chance to participate in the proceedings, and the extent of Plaintiffs' actual participation, among other things"). The court reaches the same conclusion with respect to Grandparents' claim that the Liability Defendants improperly prevented Grandparents from becoming Sheera's foster care providers or adoptive parents.

[22] The DCF Defendants have presented a number of exhibits in opposition to Grandparents' claims about notice and interaction with them during the custody proceedings. (*See* Doc. 56-41 at 36–40 and exhibits cited.) Even assuming that consideration of those materials is proper, the court concludes that the facts should be developed fully to address Grandparents' due process claims.

Having rejected the DCF Defendants' argument that Grandparents have failed to identify or allege any protected liberty interest, the court considers the aspects of the DCF Defendants' qualified-immunity argument below.

b. "Clearly Established"

The DCF Defendants rely on *Connor v. Deckinga* to argue that, even if Grandparents did have the rights they claim, "a grandparent's right to due-process in seeking to obtain custody of her grandchildren is not clearly established." No. 4:10-CV-885-Y, 2013 WL 991251, at *8 (N.D. Tex. Mar. 14, 2013). Grandparents maintain that their rights are "recognized and clear." (Doc. 70 at 40.)

At the pleading stage, a plaintiff "must plausibly allege that the defendants violated clearly established law." *Vasquez v. Maloney*, No. 20-1070-cv, 2021 WL 826214, at *3 n.5 (2d Cir. Mar. 4, 2021). "To determine whether a right is clearly established, 'we generally look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation.'" *Id.* at *3 (quoting *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015)). "The Supreme Court has repeatedly admonished lower courts 'not to define clearly established law at a high level of generality.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "A case directly on point is not necessarily required, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (cleaned up).

The *Connor* court cited multiple cases holding that particular grandparent-plaintiffs lacked a protected liberty interest in family integrity or association with their grandchildren arising from the Due Process Clause itself. *See Connor*, 2013 WL 991251, at *8 (citing cases). But as discussed above, the cases cited (including *Mullins* and *Rees*) do not hold that grandparents *never* have any liberty interests regarding their grandchildren. To the contrary, the

Supreme Court and courts within this circuit "have extended due process protection (both substantively and procedurally) to quasi-parental custodial relationships beyond the nuclear family" in certain circumstances. *Yunus v. Robinson*, No. 17-CV-5839 (AJN) (BCM), 2018 WL 3455408, at *34 (S.D.N.Y. June 29, 2018) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982), and *Bellet v. City of Buffalo*, No. 03-CV-27S, 2009 WL 2930464 (W.D.N.Y. Sept. 11, 2009)). Moreover, it does not appear that the *Connor* court was presented with any argument that the grandparents there had a liberty interest arising from state law rather than from the Due Process Clause itself. Here, Grandparents have made that argument, and the court concludes that additional factual development is necessary to resolve Grandparents' challenge to the notice they received. *See McGreal*, 2020 WL 516309, at *2.

c. "Objectively Reasonable"

The court accordingly rejects the DCF Defendants' additional argument that qualified immunity should be granted at this stage because DCF proceeded reasonably and because "it was objectively reasonable for DCF officials to believe that their conduct did not violate any constitutional rights." (Doc. 56-41 at 36.) The qualified immunity defense to Grandparents' proposed due process claims should be analyzed on a more complete factual record.

d. Remaining Grandparent Claims

The analysis above focuses on Grandparents' proposed Count VIII—a claim under 42 U.S.C. § 1983 for due process violations. But Grandparents also seek to bring other claims: ADA and Rehabilitation Act claims (Counts IV and V), IIED (proposed Count IX), loss of consortium (proposed Count X), and civil conspiracy (proposed Count XI). The DCF Defendants argue that qualified immunity bars all of those claims because they all seek to

challenge "(1) the initial investigation of reports of abuse by Plaintiff, (2) the initial removal of her children, (3) the alleged nonreturn of Plaintiff's children, and (4) Plaintiff's voluntary relinquishment of her parental rights." (Doc. 56-41 at 34.) As noted above, Ms. Thayer has brought claims arising out of those alleged circumstances, and the DCF Defendants maintain that qualified immunity bars Ms. Thayer's claims because the DCF Defendants did not violate any clearly established constitutional rights and their conduct was objectively reasonable. (*Id.* at 18.) The DCF Defendants argue that qualified immunity bars Grandparents' proposed claims in Counts IV–V and IX–XI for the same reasons. (*Id.* at 34.)

Grandparents join Ms. Thayer in arguing that a factfinder must determine whether Defendants' actions were "objectively reasonable." (Doc. 70 at 33, 40.) Grandparents further argue that they have sufficiently alleged violations of their clearly established rights, and that this also defeats the DCF Defendants' qualified immunity argument as to Grandparents' remaining claims, including proposed Counts IX–XI. (*See id.* at 42 n.25.)

The court's analysis above did not reach the qualified immunity argument as to Ms. Thayer's claims because the *Rooker-Feldman* doctrine bars those claims. With respect to Grandparents' proposed claims in Counts IV–V and IX–XI, the court concludes that it would be inappropriate to dismiss those claims at this stage on qualified immunity grounds. As discussed above, a more complete factual record is necessary to analyze the qualified immunity defense to Grandparents' due process claim under proposed Count VIII. The court accordingly concludes that the same is true as to Grandparents' proposed claims in Counts IV–V and IX–XI. Proposed Counts IX–XI incorporate the allegations in Count VIII. (*See* Doc. 43-2 ¶¶ 362, 370, 375.) Similarly, Counts IV and V are premised on an alleged improper removal of Ms. Thayer's

children (*see id.* ¶¶ 310, 324), which could have been improper if it was done in violation of Grandparents' due process rights as alleged in Count VIII.[23]

E. Grandparents' Proposed Counts X and XI Against the Donnelly Defendants

Qualified immunity is not available to the Donnelly Defendants because they are not government actors. But the Donnelly Defendants have their own arguments against the two claims that Grandparents seek to bring against them. They maintain that since Grandparents are not the parents or legal guardians of the three minor children, Grandparents lack standing to recover damages for loss of consortium (proposed Count X) or civil conspiracy (proposed Count XI). (*See* Doc. 46 at 7.) In particular, the Donnelly Defendants argue that Vermont law does not allow a grandparent to recover for loss of consortium due to alienation from a grandchild, and that there can be no civil conspiracy claim to subvert rights that Grandparents do not have under Vermont law. (*See id.* at 6–7.)

The court begins with Grandparents' proposed "civil conspiracy" claim against the Donnelly Defendants (proposed Count XI). Grandparents claim that the Donnelly Defendants conspired with other defendants to deprive Grandparents of their civil rights, including their right to notice of the grandchildrens' removal under 42 U.S.C. § 671(a)(29), Grandparents' "right to adopt their granddaughter," and "their rights to substantive and procedural due process." (Doc. 43-2 at 4, 23, 105.) The Donnelly Defendants argue that this proposed claim is futile "because the object of this alleged conspiracy was to subvert 'rights' that [Grandparents] plainly lack under Vermont law." (Doc. 46 at 7.)

[23] This conclusion means that the court need not address the question of whether all of the documents outside the pleadings on which the DCF Defendants rely for their qualified-immunity argument may properly be considered in the present procedural posture as integral to the complaint or suitable for judicial notice.

Under Vermont law, "the *crime* of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means." *Jenkins v. Miller*, No. 2:12-cv-184, 2020 WL 5128472, at *3 (D. Vt. Aug. 31, 2020) (emphasis added) (quoting *Jenkins v. Miller*, No. 2:12-cv-184, 2017 WL 4402431, at *10 (D. Vt. Sept. 29, 2017)). "For a *civil action*, the plaintiff must be damaged by something done in furtherance of the agreement, and the thing done must be something unlawful in itself. There can be no recovery unless illegal means were employed." *Id.* (emphasis added). "The unlawful act need not be committed by each conspirator; so long as one conspirator causes the plaintiff damage by committing an unlawful act to further the conspiracy, all conspirators may be held liable for civil conspiracy." *Id.* (citing *F.R. Patch Mfg. Co. v. Prot. Lodge, No. 213, Int'l Ass'n of Machinists*, 60 A. 74, 80 (Vt. 1905)).

Here, Grandparents' proposed civil conspiracy claim is not limited to an alleged conspiracy to subvert Grandparents' alleged right under Vermont tort law to "consortium" with their grandchildren. As discussed above, Grandparents claim that their due process rights were violated. The court accordingly rejects the Donnelly Defendants' suggestion that the civil conspiracy claim is "wholly duplicative" of the loss-of-consortium claim, and also rejects the Donnelly Defendants' argument that Grandparents lack any rights that could have been subverted by the alleged conspiracy. (Doc. 46 at 7.)

Turning to Grandparents' loss-of-consortium claim in proposed Count X, the court observes that, in Vermont, a claim for "loss of consortium" is a "derivative action"; it depends upon the success of an underlying tort. *Derosia v. Book Press, Inc.*, 148 Vt. 217, 220, 531 A.2d 905, 907 (1987) (quoting *Hay v. Med. Ctr. Hosp. of Vt.*, 145 Vt. 533, 539, 496 A.2d 939, 942–43 (1985)). Since the court is not dismissing the civil-conspiracy claim, it appears that an

underlying tort is potentially available to support a loss-of-consortium claim. The more difficult question is whether Vermont law permits a grandparent to recover for loss of consortium due to alienation from a grandchild.

"[R]ecovery of a loss of consortium is an action recognized at common law." *Hay*, 145 Vt. at 536, 496 A.2d at 941. In 1968, the Vermont Supreme Court defined "consortium" as including "plaintiff's right to the affection, conjugal society, assistance, companionship, comfort and services of her husband." *Hedman v. Siegriest*, 127 Vt. 291, 295, 248 A.2d 685, 687 (1968). In 1977, the Vermont legislature clarified that "[a]n action for loss of consortium may be brought by either spouse." 12 V.S.A. § 5431. In 1985, the Vermont Supreme Court recognized "that a minor child has the right to sue for damages for the loss of parental consortium when the parent has been rendered permanently comatose." *Hay*, 145 Vt. at 545, 496 A.2d at 946.

The Donnelly Defendants assert that no Vermont court has held that a grandparent may recover for loss of consortium due to alienation from a grandchild; they argue that any further extension of actions for loss of consortium should come from the Vermont Supreme Court rather than the federal district court. (Doc. 46 at 6–7.) Grandparents do not cite any Vermont case extending loss of consortium to grandparent-grandchild loss. But they assert that "[t]he idea that grandparents have an essential interest in their familial relationships is not a novel concept" and they encourage the court to recognize an expansion of the common law in this case. (Doc. 51 at 7.)

The Vermont Supreme Court has the authority to change the common law in Vermont. *See Hay*, 145 Vt. at 536–37, 496 A.2d at 941 ("[T]his Court has the authority to make changes in the common law, should we deem it appropriate to do so."). Generally, the role of the federal court is more limited. *See Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005) ("In

addressing unsettled areas of state law, we are mindful that our role as a federal court sitting in diversity is not to adopt innovative theories that may distort established state law." (cleaned up)); *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d 448, 452 (D. Vt. 2019) ("The federal courts do not serve as engines for change of state common law."); *see also* 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4507 (3d ed.) ("[I]t is not the function of the federal court to expand the existing scope of state law.").

Instead, the federal court must "carefully predict how the state's highest court would resolve" an uncertainty. *Travelers*, 411 F.3d at 329 (quoting *Santalucia v. Sebright Transp., Inc.*, 232 F.3d 293, 297 (2d Cir. 2000)). "In making this prediction, we give the fullest weight to pronouncements of the state's highest court, here the Vermont Supreme Court, while giving proper regard to relevant rulings of the state's lower courts. We may also consider decisions in other jurisdictions on the same or analogous issues." *Id.* As Grandparents point out, this court has made such predictions in other cases. *See, e.g.*, *Sullivan*, 431 F. Supp. 3d at 466 (predicting that Vermont law would "follow cases permitting proof of the elements of a medical monitoring remedy"); *Jenkins v. Miller*, 983 F. Supp. 2d 423, 451 (D. Vt. 2013) (predicting that the Vermont Supreme Court would recognize a claim for tortious interference with parental rights).

The Vermont Supreme Court in *Hay* changed the common law and recognized a new cause of action for loss of parental consortium. The Court began by examining "analogous areas of existing Vermont law"—namely, the provisions of Vermont's wrongful death statutes, which authorize a minor child's recovery for "pecuniary injuries" resulting from the death of a parent. *Hay*, 145 Vt. at 537, 496 A.2d at 941 (citing 14 V.S.A. §§ 1491–1492). The Court reasoned that it would be "inappropriate that a minor child may recover such a loss if a parent is killed, but not

if the parent is rendered permanently comatose." *Id.* The Court rejected a series of arguments against the expansion of loss of consortium. One such argument was that the expansion would lead to increased litigation. The Court stated that "the recognition of a new cause of action is not a step which we take lightly" and reiterated that its holding was "restricted to allowing minor children to recover for loss of parental consortium." *Id.* at 540, 496 A.2d at 943. Two justices dissented, expressing their view that the action was one for wrongful death, which does not authorize damages for loss of love and companionship unless the decedent is a minor child. *See id.* at 546, 496 A.2d at 946–97 (Larrow, J., dissenting) ("I feel that the type of recovery sought is expressly barred by the Wrongful Death Act, not subject to repeal or amendment by this Court for reasons other than constitutional.").

The 3-2 decision in *Hay* indicates that the extension of the common law in that case was a close question. Even the majority recognized that "the weight of legal precedent favors nonrecognition of such a cause of action." *Id.* at 545, 496 A.2d at 946. The Court explicitly limited the expansion of the loss-of-consortium action to allowing minor children to recover for loss of parental consortium. A further judicial extension of the common law to encompass loss of consortium due to alienation from a grandchild appears to be unlikely.

The parent-child relationship is specially recognized in Vermont law. The Wrongful Death Act provides that when a minor child dies, the parents may recover "pecuniary injuries" that include the loss of love and companionship and the destruction of the parent-child relationship. 14 V.S.A. § 1492(b). As descendants of their parents, children are first in line after any surviving spouse in Vermont's law of descent. 14 V.S.A. § 314(a). Vermont law recognizes parents' unique rights and responsibilities "related to a child's physical living arrangements,

education, medication and dental care, religion, travel, and any other matter involving a child's welfare and upbringing." 15 V.S.A. § 664(1).

The grandparent-grandchild relationship is different. It is true that grandparents and their grandchildren are "close relatives." *Goodby v. Vetpharm, Inc.*, 2009 VT 52, ¶ 10, 186 Vt. 63, 974 A.2d 1269. But grandparents do not enjoy parental rights and responsibilities for their grandchildren. Although grandparents and grandchildren could be next of kin—*see* 14 V.S.A. § 314(b)—their kinship is not as close as that of parents and children under the laws of descent. *See Goodby*, 2009 VT 52, ¶ 10 ("[U]nder the Wrongful Death Act people may recover only for the loss of their next of kin, which can exclude recovery in many cases for the loss of many close relatives, such as grandparents or grandchildren . . . ."); *see also Russo v. Brattleboro Retreat*, No. 5:15-cv-55, 2017 WL 3037556, at *2 (D. Vt. June 28, 2017) ("[R]ecovery for loss of a child differs from that of a spouse or other relative.").

The parties have not cited and this court has not found any Vermont trial court decisions ruling on whether grandparents can recover for loss of consortium due to alienation from a grandchild. The court accordingly considers decisions from other jurisdictions.

The Donnelly Defendants assert that "[t]o the extent a grandparent consortium claim has been recognized nationally, it appears to be a minority view." (Doc. 46 at 6 n.1.) Grandparents have not responded with any authorities suggesting otherwise. Indeed, when the Vermont Supreme Court decided *Hay* in 1985, extending loss of consortium even to minor children for loss of parental consortium was against the "weight of legal precedent." *Hay*, 145 Vt. at 545, 496 A.2d at 946. Although there may have been a "growing trend" toward that modest expansion at the time of the *Hay* decision, the same cannot be said with respect to grandparent consortium claims.

New Mexico has allowed grandparent consortium claims. In *Fernandez v. Walgreen Hastings Co.*, the Supreme Court of New Mexico held that "a plaintiff may recover for loss of consortium due to the death of a minor grandchild where the plaintiff was a family caretaker and provider of parental affection to the deceased." 1998-NMSC-039, ¶ 33, 968 P.2d 774. But the *Fernandez* court recognized that it was in the minority on that issue. *See id.* ¶ 24 ("Defendants point out that no jurisdiction in the United States has yet recognized a claim for grand-parental consortium. Our research supports that proposition.").

Jurisdictions that rejected grandparent consortium claims prior to *Fernandez* do not appear to have reversed course.[24] And jurisdictions that have taken up the question since *Fernandez* have declined to join that court's holding.[25] For all of the above reasons—and in

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[24] *See Villareal v. State of Ariz., Dep't of Transp.*, 774 P.2d 213, 219 (Ariz. 1989) ("Injuries to siblings, grandparents, other relatives, or friends do not qualify as an injury to a parent for purposes of this claim [for child's loss of consortium]."); *Hutchinson v. Broadlawns Med. Ctr.*, 459 N.W.2d 273, 278 (Iowa 1990) ("We have previously recognized loss-of-consortium actions only by spouses, parents, and children. . . . Grandchildren have not been included . . . ."); *Sizemore v. Smock*, 422 N.W.2d 666, 672 (Mich. 1988) ("Grandparents, siblings, and others with close emotional ties to a negligently injured plaintiff undoubtedly would be able to posit an argument just as logical and sympathetic as the parent or child for protection of their consortium interests by recognition of a similar action in their favor. However, for the policy considerations we discuss here, we believe the limit of one's liability should not be extended any further." (footnote omitted)); *Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 188 (Mo. 1992) (en banc) ("Present Missouri law draws the line between spouses who are allowed to recover on a consortium claim and everyone else who is not."); *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1058 (Ohio 1993) (rejecting argument that recognizing claim for loss of filial consortium would lead to recognition of consortium claims for grandparents or others; noting that "[t]he parent-child relationship is unique, and it is particularly deserving of special recognition in the law").

[25] *See Campos v. Coleman*, 123 A.3d 854, 860 (Conn. 2015) ("Although we acknowledge that strong emotional attachments frequently arise in all of these relationships [including relationship of grandparent and grandchild], we do not agree that the relationships 'present equally strong claims of loss of consortium' as those arising from the relationship between a minor child and a parent." (quoting *Mendillo v. Bd. of Educ. of the Town of E. Haddam*, 717 A.2d 1177, 1191 (Conn. 1998))); *Strickland v. Medlen*, 397 S.W.3d 184, 195 (Tex. 2013) ("Our cases reject loss-of-consortium recovery for such losses [including loss of grandparents].")

light of this court's limited role in matters of Vermont state law—the court predicts that the Vermont Supreme Court would not recognize the loss-of-consortium claim that Grandparents seek to bring. The court is mindful that Rule 12(b)(6) dismissals are disfavored "in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Baker v. Cuomo*, 58 F.3d 814, 818–19 (2d Cir. 1995), *vacated in part on other grounds*, *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc). Grandparents' proposed loss-of-consortium claim is novel, but additional factual development would not aid the claim because it is unlikely to be cognizable under Vermont law. This conclusion defeats Count X as to all defendants.

IV. Plaintiff's Motion for Leave to File Third Amended Complaint (Doc. 82)

The final pending motion is Plaintiff's Motion for Leave to file a Third Amended Complaint "to include a Declaratory Judgment count to address the Nonjudicial Defendants' inaccurate representations to the Family Court regarding ICWA [the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.] and the proper legal standard applicable." (Doc. 82 at 3.) The proposed Third Amended Complaint would add 20 paragraphs of additional allegations under the heading "Failure to Comply with the Indian Child Welfare Act." (Doc. 82-2 at 4.) It would also add a count (proposed Count XIII) brought by Ms. Thayer against DCF entitled "Declaratory Judgment: Failure to Comply with ICWA." (*Id.* at 13.)

A. Proposed New Allegations and ICWA Declaratory-Judgment Claim

Ms. Thayer alleges that during the Family Court proceeding, DCF never asked her about any Indian heritage, never investigated the issue, and instead represented to the Family Court that Ms. Thayer's children were not Indian children. (*Id.* at 5–6, ¶¶ 246–247.) She alleges that "there is good reason to believe that Ms. Thayer's three children may be eligible for Tribal membership and may be Indian children. Had Ms. Thayer been asked, she would have said right

away her children are Cherokee." (*Id.* at 6, ¶ 248.) She claims violations of 25 U.S.C. § 1912 and that under 25 U.S.C. § 1913 she is entitled to withdraw her consent to the voluntary relinquishment. (*See id.* at 5, ¶ 244, *id.* at 8, ¶ 256.) She seeks a "remedy of invalidation" under 25 U.S.C. § 1914. (*See id.* at 6, ¶ 250.)

Ms. Thayer also alleges that she has "withdrawn" her "voluntary relinquishment" of parental rights in the Family Division "on the basis that there was and is good reason to believe that her children are Indian children." (Doc. 82-2 at 9, ¶ 258; *see also* Doc. 82-3 (redacted motion dated November 25, 2020 and filed in the Family Division).) She represents that, as of January 22, 2021, she has received no response to that November 25, 2020 filing. (Doc. 92 at 10.)[26] In proposed Count XIII, Ms. Thayer requests that the court declare:

> A. That the State of Vermont acting *qua* state, including through the Official Defendant, DCF, failed to apply ICWA's preemptive, mandatory, and supreme standards and must do so; and
>
> B. That such voluntary terminations of Ms. Thayer's parental rights are reversible by withdrawal, which was noticed to the family court on November 25, 2020, and have now been reversed.

(Doc. 82-2 at 14, ¶ 406.)

B. Statutory and Regulatory Provisions

Ms. Thayer asserts that the alleged ICWA violation gives rise to the remedy of invalidation under 25 U.S.C. § 1914. (Doc. 82 at 8; Doc. 82-2 at 6, ¶ 250.) That statute provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition

[26] More recently, Ms. Thayer acknowledges that the Family Division set a hearing as to ICWA on July 9, 2021. She has therefore partially withdrawn her Motion for Leave to File a Third Amended Complaint to the extent that it requests this court to "compel a hearing with regard to ICWA." (Doc. 117 at 3.)

> any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914. "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). Section 1912 provides in pertinent part as follows:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . .

Id. § 1912(a). Section 1913 includes the following provisions:

> (a) Consent; record; certification matters; invalid consents
>
> Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. . . .
>
> (c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody
>
> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.
>
> (d) Collateral attack; vacation of decree and return of custody; limitations
>
> After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has

> been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

Id. § 1913(a), (c), (d).

Federal regulations describe the "minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101. Ms. Thayer cites multiple regulatory provisions, including 25 C.F.R. § 23.107(a), which states:

> State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

Ms. Thayer also cites the provision describing who can petition to invalidate a termination of parental rights for ICWA violations. *See id.* § 23.137.

C. The Parties' Positions

While not named in proposed Count XIII, the Donnelly Defendants oppose the proposed Third Amended Complaint "because it wholly incorporates Plaintiff's proposed Second Amended Complaint," which the Donnelly Defendants oppose. (Doc. 87 at 2; Doc. 88 at 2.) The court agrees with the Donnelly Defendants on this point. Insofar as the proposed Third Amended Complaint incorporates the proposed Second Amended Complaint, it is futile for the reasons set forth above. That leaves only the proposed ICWA claim that Ms. Thayer seeks to bring against DCF.

DCF opposes the proposed Third Amended Complaint as futile for three reasons. First, DCF argues that the proposed Third Amended Complaint lacks allegations that Ms. Thayer or her children are members of a recognized tribe, and thus she cannot bring a petition under

25 U.S.C. § 1914 to invalidate the prior proceedings. (Doc. 91 at 2.) Second, DCF argues that even if ICWA applied, ICWA does not provide any independent basis for seeking to withdraw a voluntary termination of parental rights after entry of a final decree of termination. (*Id.* at 4.) Finally, DCF maintains that Ms. Thayer's motion to amend should be denied under the abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971). (*Id.* at 6.) Ms. Thayer insists that her motion should be granted as properly before the court and as not barred by the *Younger* abstention doctrine. (Doc. 92 at 2–3.)

D. *Younger* Abstention

The court begins by assuming, without deciding, that it has jurisdiction to adjudicate the proposed ICWA claim. "In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." *Trump v. Vance*, 941 F.3d 631, 637 (2d Cir. 2019) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013)), *aff'd and remanded*, 140 S. Ct. 2412 (2020). But under *Younger* and its progeny, "federal courts must decline to exercise jurisdiction in three . . . exceptional categories of cases." *Id.* "First, *Younger* preclude[s] federal intrusion into ongoing state criminal prosecutions. Second, certain civil enforcement proceedings warrant[ ] abstention. Finally, federal courts [must] refrain[ ] from interfering with pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* (alterations in original; quoting *Sprint Commc'ns*, 571 U.S. at 78).

Only the third category is potentially applicable in this case. As to that category, Ms. Thayer does not argue that a Family Court proceeding regarding custody of children is not "uniquely in furtherance of the state courts' ability to perform their judicial functions." Numerous cases suggest that such a proceeding would come within the third category of cases

subject to *Younger* abstention. *See Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *Ogala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018) ("South Dakota's temporary custody proceedings are civil enforcement proceedings to which *Younger* principles apply."); *Morrow v. Winslow*, 94 F.3d 1386, 1398 (10th Cir. 1996) (holding that "the ongoing state proceeding does 'afford an adequate opportunity' to raise the ICWA and constitutional claims of Morrow" and that *Younger* abstention was required); *see also Chen Xu v. City of New York*, No. 19-CV-3760 (VSB), 2019 WL 5865343, at *4 (S.D.N.Y. Nov. 8, 2019) (*Younger* abstention was warranted because "the relief Plaintiff seeks ultimately amounts to a collateral attack on New York Family Court orders issued in an ongoing custody proceeding"), *appeal dismissed*, No. 19-3275 (L), 2020 WL 2537646 (2d Cir. Feb. 27, 2020), *cert. denied*, 141 S. Ct. 610 (2020).

Instead, Ms. Thayer raises two other arguments. The court considers them in turn.

1. "Ongoing" Proceeding

Ms. Thayer contends that there is no "ongoing" proceeding in the Family Division. (Doc. 92 at 10.) In support of that contention, she refers to DCF's argument that the termination of parental rights became "final" more than a year ago. (Doc. 91 at 2.) She maintains that the TPR proceeding cannot be both "final" and "ongoing." (Doc. 92 at 10.)

The court rejects Ms. Thayer's argument on this point. Just because the Family Division entered a "Final" order on March 1, 2019 does not mean that the proceedings cannot be "ongoing" for *Younger* purposes. Ms. Thayer's own proposed Third Amended Complaint alleges that she has filed a motion in the Family Division seeking relief from that court's TPR Final Order on ICWA grounds. (Doc. 82-2 at 9, ¶ 258; *see also* Doc. 82-3 (redacted motion dated November 25, 2020 and filed in the Family Division).) The court concludes that

proceedings in the Family Division are "ongoing" for the purposes of the first element of *Younger*. *See Kelly v. New York*, No. 19-CV-2063 (JMA) (ARL), 2020 WL 7042764, at *5 (E.D.N.Y. Nov. 30, 2020) (*Younger* abstention precluded interference with on-going post-judgment divorce and custody proceedings); *Sargent v. Emons*, No. 3:13cv863 (JBA), 2013 WL 6407718, at *4 (D. Conn. Dec. 9, 2013) ("This Court thus infers that ongoing post-judgment proceedings constitute a 'pending' state court action for *Younger* purposes.").

2. "Extraordinary Circumstances" Exception

The *Younger* abstention doctrine "is also subject to exceptions of its own in cases of bad faith, harassment, or other 'extraordinary circumstances.'" *Trump v. Vance*, 941 F.3d at 637 (quoting *Kugler v. Helfant*, 421 U.S. 117, 124 (1975)). The "extraordinary circumstances" exception applies when such circumstances "render the state court incapable of fairly and fully adjudicating the federal issues before it." *Kugler*, 421 U.S. at 124. For the exception to apply, there must be "an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Id.* at 125.

Ms. Thayer implicitly argues that the "extraordinary circumstances" exception applies. She asserts that if the court accepts DCF's *Younger* argument, then she would have "no place to seek relief." (Doc. 92 at 11.) The court disagrees. Notwithstanding Plaintiff's generalized assertion that she lacks "visibility" into the activities of the Family Division since the March 1, 2019 Final Order (*see* Doc. 92 at 10), that court will either act on her November 25, 2020 ICWA motion or it will fail to act at all. If the Family Division enters an unfavorable order on that motion, then appeal to the Vermont Supreme Court is available. If the Family Division fails to act at all, then Plaintiff might have cause to seek mandamus in the Vermont Supreme Court.

Either way, Plaintiff has failed to show an "extraordinarily pressing need for immediate federal equitable relief."

Conclusion

The Judicial Defendants' Motion to Dismiss (Doc. 48) is GRANTED. Ms. Thayer lacks Article III standing to pursue her claims against the Judicial Defendants. Even if she had standing, the *Rooker-Feldman* doctrine bars those claims.

The Motion to Dismiss filed by Laura Knowles, Karen Shea, Monica Brown, Christopher Conway, Jennifer Burkey, Kenneth Schatz, and the Vermont Department of Children and Families (Doc. 53) is GRANTED. The *Rooker-Feldman* doctrine bars all of the First Amended Complaint's claims against the DCF Defendants.

Plaintiff's Motion for Leave to File a Second Amended Complaint (Doc. 43) is GRANTED IN PART and DENIED IN PART. The following components of the proposed Second Amended Complaint cannot proceed because they are futile:

- The claims that the court is dismissing as to the Judicial Defendants and the DCF Defendants—e.g., Ms. Thayer's claims in proposed Counts I–V and XII.
- Proposed Counts IX, X, and XI insofar as they are claims that Ms. Thayer seeks to bring. *Rooker-Feldman* bars her from bringing those claims.
- Joinder of former DCF employees Jacqueline Pell and Sarah Kaminski as additional defendants to Ms. Thayer's claims would be futile under the *Rooker-Feldman* doctrine.
- Eleventh Amendment immunity bars all of Grandparents' proposed claims for money damages against DCF and against Defendants Schatz and Johnson in their official capacities.
- Grandparents' claim in Count X (Loss of Consortium).

Plaintiff's Motion for Leave to File a Second Amended Complaint (Doc. 43) is otherwise granted.

Plaintiff's Motion for Leave to File a Third Amended Complaint (Doc. 82)—to the extent it has not already been withdrawn in part—is DENIED. The court abstains from taking up the proposed ICWA claim under *Younger v. Harris*, 401 U.S. 37 (1971).

In summary, and with reference to the counts appearing in the Second Amended Complaint, the causes of action that remain in the case are:

- Ms. Thayer's claims against Lund and the Donnelly Defendants in Counts VI and VII.
- Grandparents' claims in Counts IV–V, VIII–IX, and XI, except that those counts are dismissed insofar as they seek damages against DCF, Schatz, and Johnson in their official capacities.

Within 30 days, the parties shall file a proposed scheduling order to govern the disposition of these remaining claims.

Dated at Burlington, in the District of Vermont, this 14 day of December, 2021.

Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KEZIAH THAYER, Plaintiff, v. LAURA KNOWLES, Supervisor Vermont Department for Children and Families ("DCF"); KAREN SHEA, Former Deputy Commissioner for the DCF Family Services Division ("FSD"); MONICA BROWN, DCF Case Worker; CHRISTOPHER CONWAY, DCF Case Worker; JENNIFER BURKEY, DCF District Director, each in their individual capacities; KENNETH SCHATZ, Commissioner, DCF, in his individual and official capacities; JOHN W. DONNELLY, individually; and JOHN W. DONNELLY, Ph.D., PLLC; LUND FAMILY CENER, INC.; CHRISTINE JOHNSON, Deputy Commissioner of DCF, for the FSD; the VERMONT DEPARTMENT OF CHILDREN AND FAMILIES; JUSTICES OF THE VERMONT SUPREME COURT; and VERMONT CHIEF SUPERIOR JUDGE, in their official capacities, Defendants.	)	Case No. 5:19-cv-223

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND ON DCF DEFENDANTS' PARTIAL CROSS-MOTION FOR RECONSIDERATION (Docs. 138, 163)

In her First Amended Complaint, Plaintiff Keziah Thayer—a pseudonym used to protect her privacy—sued the above-captioned defendants,[1] including the Vermont Department of

[1] The First Amended Complaint also named ten "Doe" defendants, but the Second Amended Complaint eliminated those defendants. (*See* Doc. 137 at 3 n.3.)

Children and Families ("DCF"), asserting eight causes of action, among which are claims under 42 U.S.C. § 1983. (*See* Doc. 25.) Plaintiff asserts that she "has had her children taken from her unlawfully and removed from her life by a series of unfair and unjust steps, that in totality comprise an unlawful, unconstitutional, and profoundly wrongful outcome." (*Id.* ¶ 1.) She alleges that "[a]fter an initial, improper taking of her children, she has been withered step by step by a series of patterned practices to the destruction of her family." (*Id.*)

In its December 14, 2021 Opinion and Order, the court granted separate motions to dismiss filed by the Justices of the Vermont Supreme Court and the Vermont Chief Superior Judge (the "Judicial Defendants") and by DCF, DCF Commissioner Kenneth Schatz, DCF Deputy Commissioner Christine Johnson, and DCF officials Laura Knowles, Karen Shea, Monica Brown, Christopher Conway, and Jennifer Burkey (collectively, the "DCF Defendants"). (*See* Doc. 137.) The court concluded that Ms. Thayer lacks Article III standing to pursue her claims against the Judicial Defendants and that even if she had standing, the *Rooker-Feldman* doctrine bars those claims. (*Id.* at 72.) The court also concluded that the *Rooker-Feldman* doctrine bars all of the First Amended Complaint's claims against the DCF Defendants. (*Id.*)

The court also ruled on two motions to amend the complaint, granting leave to file a Second Amended Complaint in part and denying leave to file a Third Amended Complaint. (*Id.* at 72–73.) The court summarized the remaining causes of action as:

- Ms. Thayer's claims against Lund Family Center, Inc. ("Lund") and against John W. Donnelly and John W. Donnelly, Ph.D., PLLC (the "Donnelly Defendants") in Counts VI and VII of the Second Amended Complaint; and

- Ms. Thayer's parents' claims in Counts IV–V, VIII–IX, and XI of the Second Amended Complaint, "except that those counts are dismissed insofar as they seek damages against DCF, Schatz, and Johnson in their official capacities."

(*Id.* at 73.)

Two motions are currently pending. First, Plaintiff has filed a "Motion for Reconsideration with Request for Leave to Amend." (Doc. 138.) Second, in connection with their opposition to Plaintiff's motion (Doc. 150), the DCF Defendants have filed a Partial Cross-Motion for Reconsideration. (Doc. 163.) Familiarity with the December 14, 2021 Opinion and Order is presumed.

I. Reconsideration Standard; Timeliness of Cross-Motion

Although Plaintiff brings her reconsideration motion under Fed. R. Civ. P. 59(e), that rule is available only for alteration or amendment of a "judgment." The court's December 14, 2021 Opinion and Order did not resolve all aspects of the case and is not yet appealable; it is not a judgment but is instead an interlocutory order. *See* Fed. R. Civ. P. 54(a) (definition of "judgment"). The court therefore construes Plaintiff's motion to be under Rule 54(b), which states that "any order or other decision . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

This procedural distinction makes no difference with respect to Plaintiff's reconsideration motion because the standard is the same. The court considers whether there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." *Lareau v. Nw. Med. Ctr.*, No. 2:17-cv-81, 2019 WL 4963057, at *2 (D. Vt. Oct. 8, 2019) (reconsideration standard under Rule 54(b)) (quoting *Off. Comm. of*

Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003)); *see also Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020) (same standard under Rule 59(e)). This is a "strict" standard; "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

The distinction between Rules 54(b) and 59(e) raises a timeliness issue with the DCF Defendants' partial cross-motion for reconsideration, filed on January 25, 2022. Since the DCF Defendants' motion must also be a Rule 54(b) motion, then the 14-day deadline in Local Rule 7(c) applies. *See* L.R. 7(c) ("A motion to reconsider a court order, other than one governed by Fed. R. Civ. P. 59 or 60, must be filed within 14 days from the date of the order."). Plaintiff contends that the DCF Defendants' motion is untimely. (Doc. 153 at 6.) The DCF Defendants concede that they filed their motion more than 14 days after the court's December 14, 2021 Opinion and Order but they assert that strict compliance with that time limit would be unjust in this case. (Doc. 156 at 3.)

"Although the Court generally requires full compliance with its Local Rules, the Court may also excuse non-compliance where 'strict application of the local rules would lead to an unjust result.'" *Hoehl Fam. Found. v. Roberts*, No. 5:19-cv-229, 2021 WL 3677837, at *2 (D. Vt. May 27, 2021) (quoting *Pietrangelo v. Alvas Corp.*, 664 F. Supp. 2d 420, 431 (D. Vt. 2009)). Here, there is no need to excuse compliance because the parties have already stipulated—and the court has ordered—that the 14-day deadline be extended. Before Plaintiff filed her reply arguing that the cross-motion is untimely, Plaintiff stipulated to an extension of deadlines, including an extension to the January 25, 2022 deadline to file a motion for reconsideration. (Doc. 139.) The court granted the stipulated extension of time. (Doc. 140.)

The court concludes that the DCF Defendants' partial cross-motion for reconsideration is timely and applies the standard recited above to both reconsideration motions.

II. Plaintiff's Reconsideration Motion and Request for Leave to Amend (Doc. 138)

A. Reconsideration

Plaintiff seeks reconsideration of the December 14, 2021 Opinion and Order for three reasons. She asserts that the court may have overlooked precedent indicating that: (1) her claims must each be independently evaluated under *Rooker-Feldman*; (2) *Rooker-Feldman* does not apply because her claims do not assert injuries caused by the Family Court judgment; and (3) the "fraud exception" to *Rooker-Feldman* applies. (*See* Doc. 138-1 at 2.)

The Judicial Defendants and the DCF Defendants have filed oppositions to Plaintiff's request for reconsideration. (Docs. 141, 150.)[2] Plaintiff does not seek reconsideration as to the Judicial Defendants. (Doc. 153 at 13.) The court therefore focuses here on the issues raised in Plaintiff's reconsideration motion and in the DCF Defendants' opposition.

1. Independent Evaluation of Claims

As the court previously noted, one essential element for *Rooker-Feldman* to apply is that the Plaintiff must be complaining of injuries caused by a state-court judgment. (Doc. 137 at 21.) The court recited Ms. Thayer's various legal theories in support of her claims against the DCF Defendants. (*See id.* at 5.) The court also noted the Supreme Court's statement in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293 (2005), that "[i]f a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines

[2] The remaining defendants have filed oppositions to Plaintiff's request for leave to amend. (Docs. 142, 143, 144.) The court considers the amendment issue below.

whether the defendant prevails under principles of preclusion." (*Id.* at 36 (cleaned up).) Ultimately, the court found that none of Ms. Thayer's claims are "independent of her direct attack on the judgment of the Family Division." (*Id.* at 37.)

Also in its December 14, 2021 Opinion and Order, the court noted that some courts have held that the *Rooker-Feldman* analysis must be performed "claim-by-claim." *See, e.g.*, *Behr v. Campbell*, 8 F.4th 1206, 1213 (11th Cir. 2021) ("The question isn't whether the whole complaint seems to challenge a previous state court judgment, but whether resolution of each individual claim requires review and rejection of a state court judgment.").[3] The *Behr* court stated that this "targeted" claim-by-claim approach is necessary because *Rooker-Feldman* is a narrow and limited doctrine. *See Behr*, 8 F.4th at 1212–13 (asserting that *Rooker-Feldman* "will almost never apply").

But this court found that, even after *Exxon Mobil*, "the weight of authority within the Second Circuit indicates that [the] *Rooker-Feldman* doctrine is not quite that narrow." (Doc. 137 at 30.)[4] The court recognized that it was required to "scrutinize the injury of which a plaintiff complains as a necessary step toward determining whether the suit impermissibly seeks review

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[3] In her motion for reconsideration, Plaintiff cites other cases for the same proposition. *See, e.g.*, *Gifford v. United N. Mortg. Brokers, Ltd.*, No. 18 Civ. 6324 (PAE)(HBP), 2019 WL 2912489, at *6 (S.D.N.Y. July 8, 2019) (denying motion for leave to amend because *Rooker-Feldman* barred multiple proposed counts; conducting an "individual analysis" of each proposed claim "to determine whether plaintiff alleges injuries caused by the state court judgment and whether adjudication of plaintiff's claims would invite a review and rejection of that judgment"); *Wenegieme v. U.S. Bank Nat'l Ass'n*, No. 16 Civ. 6548 (ER), 2017 WL 1857254, at *7 (S.D.N.Y. May 4, 2017) ("The Court must therefore consider whether each specific claim is substantively barred by the *Rooker-Feldman* doctrine.").

[4] Other courts have similarly declined to adopt so narrow an interpretation of *Rooker-Feldman*. *See Trapp v. Missouri*, No. 2:21-cv-04006-MDH, 2021 WL 5406843, at *7 (W.D. Mo. Nov. 18, 2021) (rejecting contention that the Eighth Circuit follows *Behr*'s interpretation of *Rooker-Feldman*; granting motion to dismiss counts seeking declaratory relief and damages as barred by *Rooker-Feldman*), *appeal filed*, No. 21-3726 (8th Cir. Nov. 30, 2021).

and rejection of a state court judgment." *Charles v. Levitt*, 716 F. App'x 18, 21 (2d Cir. 2017) (summary order). And the court concluded that "[i]n light of the alleged injuries and the relief requested, . . . as against the DCF Defendants, the First Amended Complaint is, as a whole, a complaint directed at alleged injuries caused by state-court judgments." (Doc. 137 at 32.)

Plaintiff argues that the court improperly considered the First Amended Complaint "as a whole" and that independent review of each claim is "necessary to determine whether certain claims may be outside the scope of *Rooker-Feldman* because they were never addressed in the underlying proceeding." (Doc. 138-1 at 10.) The DCF Defendants maintain that the court did not "impermissibly group[] Ms. Thayer's proposed claims" and that it "rightly found that each of those claims, while nominally based on a different legal theory, complains of an injury caused by a state court order." (Doc. 150 at 3.) In reply, Plaintiff notes that she does not seek reconsideration of the dismissal of her claim for declaratory or injunctive relief—Count VIII in the First Amended Complaint—and that her remaining claims for damages must be addressed independently under *Gifford*, 2019 WL 2912489. (*See* Doc. 153 at 4–5 & n.1.)

Plaintiff's decision not to seek reconsideration of the dismissal of Count VIII creates a further wrinkle in this case. Without Count VIII, the First Amended Complaint is a significantly different pleading. The court concludes, however, that even without Count VIII, there is no basis to reconsider the applicability of *Rooker-Feldman* to Ms. Thayer's remaining counts against the DCF Defendants.

The court acknowledges that in some cases it might be necessary to perform an "individual analysis" of each claim to determine if *Rooker-Feldman*'s "substantive" requirements are met. *Gifford*, 2019 WL 2912489, at *6. A suit might include some claims that *Rooker-Feldman* bars because the claims ask a federal district court to review a state-court

decision, and simultaneously might include some other "independent" claims that *Rooker-Feldman* does not prohibit. "How do we determine whether a federal suit raises an independent, non-barred claim?" *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 86 (2d Cir. 2005). The Second Circuit has instructed that courts must focus on whether the federal plaintiff "*complain[s] of an injury* caused by a state judgment." *Id.* at 87.

Here, each of Ms. Thayer's remaining counts in the First Amended Complaint against the DCF Defendants (Counts I–V of that pleading) complains of the following alleged injuries:

> [L]oss of custody of her children for almost four years and the indefinite future; the physical, emotional, and psychological damage resulting from the loss of custody of, and separation from, Plaintiff's children; litigation expenses, including attorneys' fees and costs; loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish and distress; and other compensatory damages, in an amount to be determined at trial.

(Doc. 25 ¶¶ 195, 213, 237, 245, 257.) As the court previously observed, the Family Division's March 2019 Final Order terminating Ms. Thayer's parental rights is the single most tangible official action reflecting the destruction of her family that Ms. Thayer alleges. (Doc. 137 at 30.) Ms. Thayer alleges some events that occurred before the March 2019 Final Order, but all of her injuries alleged in Counts I–V were caused by state-court orders. (*Id.* at 31.) Interlocutory orders issued by the Family Division before the March 2019 Final Order qualify as "judgments" for *Rooker-Feldman* purposes. *See Green v. Mattingly*, 585 F.3d 97, 103 (2d Cir. 2009) (suggesting that *Rooker-Feldman* would likely bar review of a family court's temporary removal order if that court had also entered a final order of disposition permanently removing the child from the plaintiff's custody).

Ms. Thayer's arguments to the contrary are unpersuasive. In Counts I and II, Ms. Thayer alleges that DCF officials violated her due process rights at times prior to the Family Division's March 2019 Final Order by "(i) conducting an initial investigation using inadequate procedures;

(ii) removing Ms. Thayer's children from her home and custody without using any procedure that complies with due process, prior to any investigation; and (iii) forcing Ms. Thayer to enter into an unenforceable 'voluntary relinquishment.'" (Doc. 25 ¶ 184; *see also id.* ¶ 201.) Ms. Thayer asserts that these claims do not challenge any state-court judgment, but instead attack "the underlying conduct, practices, and policies, that governed those judgments." (Doc. 138-1 at 12.) The court disagrees; none of these claims are "independent" within the meaning of *Exxon Mobil*.

The court previously recognized that the allegedly flawed investigation was not conducted pursuant to any court order. (Doc. 137 at 31 n.12.) The court continues to hold that the initial investigation itself did not injure Ms. Thayer and that "[s]he is complaining of injuries caused by court orders that relied on that allegedly flawed investigation." (*Id.*) Regarding the challenge to DCF officials' removal of the children from Ms. Thayer's home, the record indicates that the temporary removal of the children on October 29, 2015 was carried out pursuant to court orders. (*See* Docs. 53-2, 53-3 (emergency care orders).) Ms. Thayer "cannot escape *Rooker-Feldman* simply by alleging in federal court that [s]he was injured by the state employees who took [her] child rather than by the judgment authorizing them to take the child." *Hoblock*, 422 F.3d at 88. Similarly, Ms. Thayer cannot avoid *Rooker-Feldman*'s application to her challenge to the voluntary relinquishment by attacking the alleged "underlying conduct" of DCF officials; that challenge would require review and rejection of the Family Division's finding that Ms. Thayer relinquished her rights voluntarily and without duress or coercion. (Doc. 53-35 ¶ 10.)

In Count III Ms. Thayer asserts a Fourteenth Amendment violation based on her allegations that DCF officials required her to participate in improper "treatment" for behavioral

issues that did not actually exist. (*See* Doc. 25 ¶ 226.) She contends that this claim is "independent of any state court order, and pre-dates the Family Court judgment." (Doc. 138-1 at 12.) It is true that the services at issue pre-dated the Family Division's March 2019 Final Order. But as the court previously stated, "[t]he behavioral and mental health services that Ms. Thayer challenges were part of case plans that the Family Division ordered under 33 V.S.A. § 5318(b)." (Doc. 137 at 34.) The record evidence shows multiple court orders that required Ms. Thayer to attend therapy and receive other services. (*See* Docs. 53-7, 53-12, 53-24.) Ms. Thayer has identified no allegations or evidence in support of her contention that the services at issue were "independent" of any court order.

Ms. Thayer's Motion for Reconsideration does not appear to seek reconsideration as to her ADA and Rehabilitation Act claims (Counts IV and V of the First Amended Complaint). (*See* Doc. 138-1 at 11–12; Doc. 138-2.) But in her reply memorandum she argues that her ADA and Rehabilitation Act claims should survive. (Doc. 153 at 11.) That argument is untimely. *See Chepilko v. Cigna Life Ins. Co. of N.Y.*, 952 F. Supp. 2d 629, 633 (S.D.N.Y. 2013) (argument "made for the first time in reply papers on a motion for reconsideration" was "plainly untimely"). It also lacks merit for the following reasons.

First, the court rejects Ms. Thayer's argument that the court failed to explain how *Rooker-Feldman* applies to the ADA and Rehabilitation Act claims. Those counts rest on the same alleged injury as Ms. Thayer's other causes of action. *See supra* (describing alleged injuries in Counts I–V). *Rooker-Feldman* applies to Ms. Thayer's claims in Counts IV and V because in those counts she complains of injuries caused by the Family Division's judgment.

Second, the court rejects Ms. Thayer's argument that *Rooker-Feldman* cannot apply to the ADA and Rehabilitation Act claims because, in her view, "there was no room to entertain

these claims in the underlying Family Court proceeding." (Doc. 153 at 12.) For that proposition she relies on *In re B.S.*, 166 Vt. 345, 693 A.2d 716 (1997). In that case, the Vermont Supreme Court held that a defendant in a TPR proceeding cannot raise ADA violations as a defense. *Id.* at 354, 693 A.2d at 722. But the Court was careful not to "suggest that parents lack any remedy for . . . alleged violations of the ADA." *Id.* And—critically—even though Ms. Thayer could not raise alleged ADA violations as a defense in the TPR proceedings, that does not prevent operation of *Rooker-Feldman* to bar an ADA or Rehabilitation Act claim. *See Hoblock*, 422 F.3d at 87 ("[A] federal plaintiff cannot escape the *Rooker-Feldman* bar simply by relying on a legal theory not raised in state court.").

Ms. Thayer further asserts that two other claims that she sought to raise in her proposed Second Amended Complaint (Doc. 43-2) should survive: a claim for intentional infliction of emotional distress (IIED) (Count IX) and a claim for civil conspiracy (Count XI). The court previously concluded that *Rooker-Feldman* bars those claims. (Doc. 137 at 43.) Ms. Thayer's arguments for reconsideration as to those claims are also unconvincing.

In the IIED claim, Ms. Thayer alleges that DCF officials "took affirmative acts to prevent Plaintiffs from having contact with their family members and to deprive Plaintiffs of their Constitutional rights to freely associate with and participate in the upbringing of their kin." (Doc. 43-2 ¶ 363.) She further alleges that the officials "know or should have known that the return of the children to their real family's custody was in the children's best interests." (*Id.* ¶ 364.) Insofar as the IIED claim is a repackaged version of the constitutional claims discussed above, *Rooker-Feldman* bars it for the same reason that it bars the constitutional claims. Insofar as the claim alleges that DCF officials failed to return the children to Ms. Thayer's custody, *Rooker-Feldman* applies because the Family Division's orders controlled the issue of custody.

In the civil conspiracy claim, Ms. Thayer alleges that DCF officials and the Donnelly Defendants "acted individually and in concert, tacitly or directly, to deprive Plaintiffs of their civil rights, including their rights to substantive and procedural due process." (Doc. 43-2 ¶ 376.) But Ms. Thayer offers no basis to conclude that her conspiracy claim is anything other than derivative of the claims discussed above that *Rooker-Feldman* bars. *Cf. Qureshi v. People's United Bank*, No. 2:18-cv-00163, 2020 WL 2079922, at *19 (D. Vt. Apr. 30, 2020) (civil conspiracy claims were derivative because they alleged no distinct injuries or individualized duties). The conspiracy claim must be dismissed because *Rooker-Feldman* bars the underlying claims.

The decision in *Pennicott v. JPMorgan Chase Bank, N.A.*, No. 16 CV 3044 (VB), 2018 WL 1891312 (S.D.N.Y. Apr. 18, 2018), does not require a different conclusion. The court in that case held that *Rooker-Feldman* did not bar a damages claim for civil conspiracy because that claim did "not require a ruling that the foreclosure was improper." *Id.* at *4. *Pennicott* is distinguishable. To the extent the *Pennicott* court found *Rooker-Feldman* inapplicable to the conspiracy claim because that claim sought only damages as a remedy, the court respectfully declines to follow that reasoning. *See Lomnicki v. Cardinal McCloskey Servs.*, No. 04-CV-4548 (KMK), 2007 WL 2176059, at *5 (S.D.N.Y. July 26, 2007) ("Plaintiff does not avoid *Rooker-Feldman* by seeking damages instead of injunctive relief."). Moreover, even if *Rooker-Feldman* does not itself bar the conspiracy claim, the claim is barred because it is derivative and *Rooker-Feldman* bars all of the underlying claims.

2. Whether Claims Assert Injuries Caused by Family Court Judgment

Ms. Thayer argues that the court overlooked two principles that apply to the evaluation of whether her claims complain of injury *caused* by a state judgment. First, she asserts that the

Family Division's orders did not cause her injuries, and instead the state court merely ratified or acquiesced in the DCF Defendants' conduct. (Doc. 138-1 at 14.) Second, she suggests that the court may have conflated the form of relief that she seeks with the injuries that she alleges. (*Id.* at 17.) The DCF Defendants maintain that state court orders caused the injuries that Ms. Thayer claims. (Doc. 150 at 5.) The court begins with Ms. Thayer's first argument.

Ms. Thayer argues that the court improperly applied a "less demanding" form of causality than *Rooker-Feldman*'s causation element. (Doc. 138-1 at 14.) It is true that the introductory paragraph of the court's December 14, 2021 Opinion and Order describes Ms. Thayer's claims as "*aris[ing] from* her assertion that she 'has had her children taken from her unlawfully . . . .'" (Doc. 137 at 1 (emphasis added) (quoting Doc. 25 ¶ 1).) And it is also true that courts have distinguished the phrases "arise from" and "caused by." *See, e.g.*, *Wausau Underwriters Ins. Co. v. Old Republic Gen. Ins. Co.*, 122 F. Supp. 3d 44, 52 (S.D.N.Y. 2015) ("[W]hether an injury was legally caused by a party's actions is a much more demanding question than whether the injury arose out of those actions.").

But the court's statement in the introductory paragraph of the 73-page Opinion and Order was not a recitation of the applicable legal standard. Rather, the court was offering a general introduction to Ms. Thayer and her claims in this lawsuit. All of the legal analysis of the *Rooker-Feldman* doctrine recites and applies the "caused by" standard. (*See* Doc. 137 at 21, 28, 31, 32, 35, 43.) The court rejects Ms. Thayer's contention that the Opinion and Order applied the wrong standard.

The court also rejects Ms. Thayer's argument that her injuries were caused by the Nonjudicial Defendants' misconduct rather than the Family Division's judgments. (Doc. 138-1 at 15.) Ms. Thayer does indeed allege that the DCF Defendants engaged in misconduct. And a

plaintiff may "seek damages for injuries caused by a defendant's misconduct in procuring a state court judgment." *Limtung v. Thomas*, No. 19-CV-3646 (RPK) (MMH), 2021 WL 4443710, at *5 (E.D.N.Y. Sept. 28, 2021) (quoting *Dorce v. City of New York*, 2 F.4th 82, 104 (2d Cir. 2021)).

But as the Second Circuit has recognized, "in some circumstances, federal suits that purport to complain of injury by individuals in reality complain of injury by state-court judgments." *Hoblock*, 422 F.3d at 88. "The challenge is to identify such suits." *Id.* The Second Circuit has articulated the following formula to guide that inquiry: "a federal suit complains of injury from a state-court judgment, even if it appears to complain only of a third party's actions, when the third party's actions are produced by a state-court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Id.* Nothing in *Limtung* or *Dorce* alters this test.

Ms. Thayer asserts that her claims are "based on conduct that was simply ratified by state court decisions, not 'caused by' them." (Doc. 138-1 at 16.) As the court previously recognized, certain of the acts that Ms. Thayer alleges occurred before the Family Division's March 2019 Final Order and could not have been caused by that order. (Doc. 137 at 31.) Ms. Thayer suggests that some of this earlier conduct "may have been ratified at times." (Doc. 138-1 at 16.) But she cites no allegations or evidence for this speculation. Moreover, the court has already discussed how specific events before the Family Division's March 2019 decision were still caused by that court's earlier orders. (*See* Doc. 137 at 31, 33–34.)

The one event that Ms. Thayer cites in her reconsideration motion for her claim that the Family Division "ratified" the wrongful conduct of a third party is the "voluntary relinquishment" of her parental rights in November 2018. (Doc. 138-1 at 16.) She contends that the Family Division's acceptance of her relinquishment of parental rights was like the coercive

settlement agreements in *Sung Cho v. City of New York*, 910 F.3d 639 (2d Cir. 2018). In that case, each of the plaintiffs alleged that city officials used a so-called "no-fault eviction" process to compel them to enter into settlement agreements that waived their constitutional rights. After the plaintiffs signed the settlement agreements at issue, each agreement was "so ordered" by state courts. The district court dismissed the plaintiffs' claims on *Rooker-Feldman* grounds. The Second Circuit vacated the judgment and remanded, reasoning that the plaintiffs were "attempting to remedy an alleged injury caused when, prior to any judicial action, they were coerced to settle." *Id.* at *649. The court concluded that the case did "not entail the evil *Rooker-Feldman* was designed to prevent." *Id.*

This case differs significantly from *Sung Cho*. The injuries that Ms. Thayer alleges she sustained—most particularly the termination of her parental rights—occurred after years of judicial action related to the care and custody of her children. And the state court did not simply "so order" a private settlement. Instead, the Family Division received testimonial and documentary evidence from Ms. Thayer and from foster parents, and considered the arguments from Ms. Thayer's counsel and from representatives for the State, the foster parents, and the children. (*See* Doc. 53-34.) The Family Division was also actively involved in a colloquy about the voluntariness of the relinquishment and in making factual findings on that point. (*See id.* at 12–15.) As the court previously noted, Ms. Thayer's complaint is, at the most general level, the "destruction of her family." (Doc. 25 ¶ 1.) That is a complaint of an injury caused by the Family Division's March 2019 Final Order. (Doc. 53-35.)

Reviewing *Sung Cho* and other cases distinguishing *Sung Cho*, one court has recently observed that the "principle that emerges from all of the caselaw is that the Court 'must scrutinize the injury of which [the] plaintiff[s] complain as a necessary step toward determining

whether the suit impermissibly seeks review and rejection of a state court judgment, or permissibly seeks some other remedy.'" *Lorick v. Kilpatrick Townsend & Stockton LLP*, No. 18-CV-7178 (ENV), 2021 WL 7906510, at *9 (E.D.N.Y. Aug. 20, 2021) (alterations in original) (quoting *Charles v. Levitt*, 716 F. App'x 18, 21 (2d Cir. 2017) (summary order)). Quoting *Charles v. Levitt*, the December 14, 2021 Opinion and Order recited and applied that same principle. (Doc. 137 at 31–32.) Although the Opinion and Order did not cite *Sung Cho* or explicitly discuss possible "ratification" of third-party actions, the court applied the correct standard on this issue.

Ms. Thayer notes that the Opinion and Order did not quote the statement in *Charles v. Levitt* indicating that *Rooker-Feldman* is inapplicable where the plaintiff's suit "permissibly seeks some other remedy"—i.e., some remedy other than review and rejection of a state-court judgment. *Charles*, 716 F. App'x at 21. She argues that her request for damages is such an "other remedy." (Doc. 138-1 at 17.) And she insists that she "has very specifically not asked this Court to 'overturn' any state court judgments and has pleaded carefully past *Rooker-Feldman*." (*Id.* at 13.)

The court is unpersuaded. Ms. Thayer cannot avoid *Rooker-Feldman* by "clever pleading." *Hoblock*, 422 F.3d at 88. The court's Opinion and Order recognized that Ms. Thayer seeks damages. (Doc. 137 at 29.) And the court reasoned that, consistent with *Canning v. Administration for Children's Services*, 588 F. App'x 48 (2d Cir. 2014) (summary order), *Rooker-Feldman* still applied. (Doc. 137 at 30.) Since Ms. Thayer is not seeking reconsideration of the dismissal of her claim for declaratory or injunctive relief, this case is arguably now somewhat different than *Canning*, where the plaintiffs sought both damages and injunctive relief. Nevertheless, Ms. Thayer cannot "avoid *Rooker-Feldman* by seeking damages

instead of injunctive relief." *Lomnicki*, 2007 WL 2176059, at *5. Here, as in *Lomnicki*, the court would have to review the Family Division's decision to award damages to Ms. Thayer.

Ms. Thayer notes that the *Lomnicki* court found that *Rooker-Feldman* did not bar the plaintiff's third cause of action. In that case, the plaintiff complained of the treatment that her children received "once they were in Defendants' care, treatment that was not directed by the Family Court's orders." *Id.* She alleged that the children "were abused by their step-families and otherwise did not receive proper foster care." *Id.* The court reasoned that the injury complained of in the third cause of action "allegedly occurred after the Family Court judgment, but it was not 'caused by' that state-court judgment." *Id.* Ms. Thayer asserts that her claim for violation of her right to refuse medical treatment is similar. (Doc. 138-1 at 13.) The court disagrees because, as stated in the Opinion and Order, the behavioral and mental health services that she challenges were part of case plans that the Family Division ordered under 33 V.S.A. § 5318(b). (Doc. 137 at 34.)

Ms. Thayer also cites the decision in *Guest v. Allegheny County*, No. 20-130, 2020 WL 4041550 (W.D. Pa. July 17, 2020). The court in that case concluded that *Rooker-Feldman* did not bar the plaintiff's § 1983 claims because the plaintiff-parents did not seek injunctive relief overturning the judgments of the state court but instead sought "damages which are alleged to arise from Defendants' actions, particularly the representations by Ms. Horton to the court which resulted in the issuance of the ECA [emergency custody authorization] and the removal of the children." *Id.* at *5. The court agrees with the court in *Guest* that "[t]he form of relief is relevant." *Id.* But the form of relief is not dispositive. *See Lomnicki*, 2007 WL 2176059, at *5 ("Plaintiff does not avoid Rooker-Feldman by seeking damages instead of injunctive relief. In

order to award damages to Plaintiff, the Court would have to review the decision of the Family Court."). The court respectfully declines to follow *Guest* to the extent it holds to the contrary.

3. The "Fraud Exception"

Finally, Ms. Thayer argues that the court overlooked precedent indicating the applicability of the "fraud exception" to *Rooker-Feldman*. (Doc. 138-1 at 17.) The court's December 14, 2021 Opinion and Order discussed Ms. Thayer's fraud argument at length, distinguished cases that Ms. Thayer cited, and ultimately concluded that *Rooker-Feldman* still applied despite Ms. Thayer's contention that the judgment in the Family Division was obtained by fraud. (Doc. 137 at 37–41.)

The additional cases that Ms. Thayer cites in her reconsideration motion are unpersuasive. Two of the cases that she cites—*Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159 (3d Cir. 2010), and *Loubser v. Thacker*, 440 F.3d 439 (7th Cir. 2006)—are mentioned in the Second Circuit's decision in *Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 428 n.2 (2d Cir. 2014). As the *Vossbrinck* court observed, the courts in *Great Western* and *Loubser* found that "the *Rooker-Feldman* doctrine did not bar allegations that a state judicial process was corrupted by conspiracy in violation of due process." *Vossbrinck*, 773 F.3d at 428 n.2. At the same time, the *Vossbrinck* court held that *Rooker-Feldman* barred a claim asking a federal court to grant title to the plaintiff's property on the basis that a foreclosure judgment was obtained fraudulently. *Id.* at 427. The court reasoned that "[t]his would require the federal court to review the state proceedings and determine that the foreclosure judgment was issued in error." *Id.*

Ms. Thayer's case has now evolved to be somewhat different than *Vossbrinck* because she is not seeking reconsideration of the dismissal of her claim for declaratory or injunctive

relief. But as noted above, Ms. Thayer cannot "avoid *Rooker-Feldman* by seeking damages instead of injunctive relief." *Lomnicki*, 2007 WL 2176059, at *5. Here, as in *Lomnicki*, the court would have to review the Family Division's decision to award the damages that Ms. Thayer seeks. Although Ms. Thayer alleges that the state-court judgment was procured through fraud, it is impossible to read Ms. Thayer's claims as "independent from the claim that the state court judgment was erroneous." *In re Ward*, 423 B.R. 22, 29 (Bankr. E.D.N.Y. 2010).

The decisions in *Great Western* and *Loubser* are distinguishable. The court in *Great Western* found that:

> Great Western, by alleging a conspiracy between Defendants and the Pennsylvania judiciary to rule in favor of Rutter and ADR Options, is attacking the state-court judgments. But, like Nesses, Great Western is not merely contending that the state-court decisions were incorrect or that they were themselves in violation of the Constitution. Instead, Great Western claims that "people involved in the decision violated some independent right," that is, the right to an impartial forum.

Great Western, 615 F.3d at 172 (quoting *Nesses v. Shepard*, 68 F.3d 1003, 1005 (7th Cir. 1995)). Similarly, the *Loubser* court held that "[t]he claim that a defendant in a civil rights suit 'so far succeeded in corrupting the state judicial process as to obtain a favorable judgment' is not bared by the *Rooker-Feldman* doctrine." *Loubser*, 440 F.3d at 441 (quoting *Nesses*, 68 F.3d at 1005).

Here, in contrast, Ms. Thayer does not plausibly allege that the Family Division joined any conspiracy to violate her rights. That was the court's conclusion as it analyzed the claims against the Judicial Defendants in the December 14, 2021 Opinion and Order. (*See* Doc. 137 at 19 ("[T]he allegations are insufficient to support Plaintiff's conjecture that the Vermont judiciary has entered into a 'tacit deal' to violate parents' civil rights . . . ." (citation omitted)).) And Ms. Thayer does not seek reconsideration of the dismissal of the claim against the Judicial Defendants. (Doc. 153 at 13.)

Ms. Thayer's case remains more like *Vossbrinck*. She claims that the Family Division issued orders based on misrepresentations to the Family Division. That is insufficient to avoid *Rooker-Feldman*. *See Vossbrinck*, 773 F.3d at 427 (*Rooker-Feldman* applied where plaintiff was "asking the federal court to determine whether the state judgment was wrongfully issued in favor of parties who, contrary to their representations to the court, lacked standing to foreclose").

B. Amendment

Ms. Thayer's Motion for Reconsideration also requests "an opportunity to amend her Complaint to cure any deficiencies." (Doc. 138-1 at 7; *see also id.* at 19 (conclusion requesting "leave to file an amended Complaint").) Multiple defendants oppose that request. (Docs. 142, 143, 144.)[5] Ms. Thayer maintains that her "alternative request for leave to amend her claims" is appropriate. (Doc. 153 at 13–14.) She explains:

> Plaintiffs do not intend to join additional parties, but may amend claims based on discovery at a later date, which they are permitted to do by July 29, 2022, pursuant to the parties' Stipulated Discovery Schedule/Order entered on January 14, 2022. ECF No. 146. However, at this point in the case, as will be shown in a proposed amended Complaint (if permitted), Plaintiffs seek to cure the alleged defects and clarify that their claims do not seek review or reversal of the Family Court judgment.

(*Id.* at 14.)

Plaintiff's request for leave to amend is procedurally improper. Insofar as it is a motion to amend, it fails to comply with Local Rule 15 because Plaintiff has not included a redlined version of the proposed amendment or a non-redlined reproduction of the entire amended filing. Ms. Thayer correctly notes that the currently operative discovery schedule allows motions to

[5] The Judicial Defendants also filed an opposition to Ms. Thayer's request for amendment (Doc. 141 at 6), but Ms. Thayer has clarified that she does not seek to replead her claims against those defendants (Doc. 153 at 13). Defendants John W. Donnelly, Ph.D., PLLC and Lund Family Center, Inc. adopt defendant John W. Donnelly's arguments in opposition to amendment. (*See* Docs. 143, 144.)

amend the pleadings until July 29, 2022. (Doc. 146 ¶ 14.) But her vague request for leave to amend is not a procedurally proper motion to amend. Instead, Plaintiff only seeks leave to amend "to cure the alleged defects and clarify that their claims do not seek review or reversal of the Family Court judgment." (Doc. 153 at 14.) The court concludes that this request only "further underscores the fact that [her] present arguments are not a proper basis for reconsideration." *Rubenstein v. Knight-Swift Transp. Holdings Inc.*, No. 19 Civ. 7802 (KPF), 2021 WL 3855863, at *4 (S.D.N.Y. Aug. 27, 2021).

III. DCF Defendants' Partial Cross-Motion for Reconsideration (Doc. 163)

In its December 14, 2021 Opinion and Order, the court concluded that *Rooker-Feldman* bars "all of the First Amended Complaint's claims against the DCF Defendants." (Doc. 137 at 41.) Based on that conclusion, the court found it "unnecessary to consider the DCF Defendants' alternative arguments based on issue preclusion, the statute of limitations, and qualified immunity *insofar as those arguments relate to the First Amended Complaint*." (*Id.* (emphasis added) (citations omitted).) The First Amended Complaint, however, did not include Martha Thayer and Elam Thayer ("Grandparents") as plaintiffs. (*See* Doc. 25.)

Plaintiff's "Motion for Permissive Joinder" sought to add Ms. Thayer's parents as additional plaintiffs. (Doc. 43.) The DCF Defendants argued that joinder of Grandparents as additional plaintiffs would be futile on qualified immunity grounds. (Doc. 53 at 34; Doc. 74 at 17.) The court's December 14, 2021 Opinion and Order considered the qualified immunity issue and concluded that "a more complete factual record is necessary" to analyze the qualified immunity defense to Grandparents' due process claims and their proposed claims in Counts IV–V and IX–XI. (Doc. 137 at 57.) The Opinion and Order also observed that it was not entirely clear whether the DCF Defendants also argued that *Rooker-Feldman* barred Grandparents'

proposed claims and concluded that the briefing was inadequate to address the potential applicability of that doctrine to those claims. (*Id.* at 43 n.19.)

The Opinion and Order did not address whether Grandparents' claims might be time-barred or barred by issue preclusion and the voluntary relinquishment. The DCF Defendants now request that the court partially reconsider and clarify the Opinion and Order in two ways. First, they request that the court conclude that "significant portions of the Grandparent claims are time-barred." (Doc. 150 at 9.) Second, they request that the court "clarify the impact of its decision not to separately address their issue preclusion and voluntary relinquishment arguments on the scope of the remaining Grandparent claims." (*Id.*)

Ms. Thayer argues that: (1) the DCF Defendants have not met the reconsideration standard; (2) the statute of limitations does not bar Grandparents' claims; (3) issue preclusion does not bar Grandparents' claims; and (4) Grandparents' remaining claims are permissible. (Doc. 153 at 7–13.) The DCF Defendants maintain that the court "should leave for resolution on a more developed record only claims by the Grandparent Plaintiffs that they had rights as Grandparents to potentially care for their grandchildren that the DCF defendants abridged on or after July 3, 2017." (Doc. 156 at 3.)

A. The Reconsideration Standard

The court applies the reconsideration standard articulated above, analyzing whether there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Lareau*, 2019 WL 4963057, at *2. Ms. Thayer relies on *Pem-America, Inc. v. Sunham Home Fashions, LLC* for the proposition that courts "cannot reconsider issues that were never considered." No. 03 Civ. 1377(JFK)(RLE), 2008 WL 394787, at *2 (S.D.N.Y. Feb. 13, 2008). But the court addressing the discovery

dispute in that case did not rule on a request for "all" documents because the court understood that only a specific subset of documents remained at issue. *See id.* Recognizing that its understanding might have been incorrect, the court concluded that it could not "reconsider" any such unresolved issues, but that the parties could submit letters "to address any outstanding discovery issues." *Id.*

Similarly, courts have analyzed issues on motions to reconsider where the issues were raised in the original motion but not addressed in the resulting order. *See, e.g.*, *Kashef v. BNP Paribas SA*, No. 16-cv-03228 (AJN), 2021 WL 1614406, at *1 (S.D.N.Y. Apr. 26, 2021) (agreeing that the court did not directly address an argument in its Opinion and Order but concluding that court would have rejected the argument); *Vaughn v. Consumer Home Mortg. Co.*, 470 F. Supp. 2d 248, 258 (E.D.N.Y. 2007) (reconsideration motion need not be denied "simply because the cases or arguments that the court is alleged to have overlooked were before it when it issued its initial ruling"); *In re Rome Fam. Corp.*, No. 02-11771, 2010 WL 1381093, at *9 (Bankr. D. Vt. Mar. 31, 2010) (considering merits of arguments that defendant argued the court failed to consider in its initial decision).

Here, in opposition to the "Motion for Permissive Joinder," the DCF Defendants argued that issue preclusion and the voluntary relinquishment bar Plaintiffs' claims. (Doc. 56-41 at 8.) They also argued that "all of Plaintiffs' claims arising out of the proceedings before August 1, 2016 are time barred." (*Id.* at 18.) Ms. Thayer opposed both of those arguments. (Doc. 70 at 23, 32.) She further argued that issue preclusion and the statute of limitations do not bar Grandparents' claims. (*See id.* at 42 ("For the reasons set forth herein, Plaintiffs' claims survive dismissal . . . .").) Although the parties and the court focused primarily on *Rooker-Feldman*, the

issue-preclusion and time-bar questions were properly raised. The court will consider these issues here.

B. Issue Preclusion—Effect on Grandparents' Claims

"The doctrine of collateral estoppel, also known as issue preclusion, prevents relitigation of an issue that has been raised and decided in an earlier proceeding." *Ernst v. Kauffman*, 50 F. Supp. 3d 553, 568 (D. Vt. 2014). "A federal court must 'refer to the preclusion law of the State in which judgment was rendered' to determine the preclusive effect of the judgment." *Id.* (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Under Vermont law, issue preclusion applies to a given issue if:

> (1) [P]reclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Id. (alteration in original) (quoting *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265, 583 A.2d 583, 587 (1990)).

The court begins with the first element required for issue preclusion. In their opposition to the "Motion for Permissive Joinder," the DCF Defendants asserted that the first element was satisfied because Ms. Thayer was a party to the Family Court proceeding. (Doc. 56-41 at 9.) Ms. Thayer agreed that she was a party to the Family Court proceeding but argued that the other four elements were not met. (Doc. 70 at 23.) In their reconsideration motion, the DCF Defendants maintain that the first preclusion element is met as to Grandparents because Grandparents are in privity with Ms. Thayer. (Doc. 150 at 13.) Ms. Thayer argues that "Grandparents were not in privity with Ms. Thayer in the Family Court case." (Doc. 153 at 10.)

"A privity relationship generally involves a party so identified in interest with the other party that they represent one single legal right." *Lamb v. Geovjian*, 165 Vt. 375, 380, 683 A.2d

731, 735 (1996) (quoting *Dep't of Human Servs. v. Comeau*, 663 A.2d 46, 48 (Me. 1995)). Courts evaluate whether the parties "have really and substantially [the] same interest in successive proceedings." *Id.* (citing *First Wis. Mortg. Tr. v. Wyman's, Inc.*, 139 Vt. 350, 358–59, 428 A.2d 1119, 1124 (1981)).

The court concludes that the interests at stake in the Family Court proceedings are different from Grandparents' interests in this federal civil rights case. In the Family Division, Ms. Thayer litigated her rights as a parent, including her interest in custody of her three children. Although Grandparents were not parties to the Family Division proceedings, they may have had some rights in those proceedings as potential kinship caregivers. Grandparents' rights were not in conflict with Ms. Thayer's rights (*see* Doc. 137 at 52), but they are not the same rights. The court concludes that Grandparents were not in privity with Ms. Thayer in the Family Division proceedings. Issue preclusion therefore cannot apply to bar Grandparents' claims in this case.

C. Statute of Limitations—Effect on Grandparents' Claims

Although the DCF Defendants originally argued that the statute of limitations barred all of Plaintiffs' claims arising out of proceedings before August 1, 2016 (Doc. 56-41 at 18), they now argue that the statute of limitations bars all of Grandparents' claims based on conduct before June 3, 2017 (*see* Doc. 150 at 11). They contend that the applicable limitations period is three years and that the only timely Grandparent claims are those that are based on conduct that occurred within three years prior to June 3, 2020—the date Grandparents first sought to assert claims in this case.[6] (*See* Doc. 150 at 11.) Thus, according to the DCF Defendants, the statute of

[6] The DCF Defendants' reconsideration motion refers to "July 3, 2020" (Doc. 150 at 11) but this appears to be a typographical error because the Motion for Leave to File a Second Amended Complaint (and thereby add Grandparents as plaintiffs) was filed on *June* 3, 2020. (Doc. 43.) The DCF Defendants' reply refers to the June 3 date. (Doc. 156 at 9.)

limitations bars all of Grandparents' claims arising out of the initial CHINS proceeding, which concluded on October 13, 2016. (Doc. 150 at 11.)

Grandparents maintain that the date their claims accrued is a question of fact that cannot be determined in the present procedural context. (*See* Doc. 153 at 9.) Alternatively, they suggest that their claims accrued on November 30, 2018—the date that the Family Division accepted Ms. Thayer's relinquishment of parental rights—and that their claims are timely. (*Id.*) The DCF Defendants reply that Grandparents' accrual argument "ignores the fact that this case arises out of two separate proceedings"—namely, the CHINS proceeding and the TPR proceeding. (Doc. 156 at 6.)

The parties agree that—at least for Grandparents' § 1983 claims—the length of the applicable statute of limitations is three years. The court concurs on that point. *See Demarest v. Town of Underhill*, No. 2:21-cv-167, 2022 WL 911146, at *6 (D. Vt. Mar. 29, 2022) ("Section 1983 actions that are filed in Vermont are subject to Vermont's three-year statute of limitations for personal injury actions.").[7] But the parties disagree on when the three-year clock started ticking—i.e., the accrual date. The accrual date for a § 1983 action is a "question of federal law that is *not* resolved by reference to state law." *Demarest*, 2022 WL 911146, at *6 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

[7] Grandparents have brought other claims in addition to their § 1983 claims. The court has previously dismissed their loss-of-consortium claim. (Doc. 137 at 65.) That leaves their claims under the ADA and Rehabilitation Act, plus their claims for IIED and civil conspiracy. A three-year period is likely to apply for those claims as well. *See Vega-Ruiz v. Northwell Health*, 992 F.3d 61, 63 (2d Cir. 2021) (Rehabilitation Act); *Purcell v. N.Y. Inst. of Tech. – Coll. of Osteopathic Med.*, 931 F.3d 59, 62–63 (2d Cir. 2019) (ADA); *Costello v. Gannett Satellite Info. Network Inc.*, 939 F. Supp. 313, 315 (D. Vt. 1996) (IIED); *State v. Atl. Richfield Co.*, No. 340-6-14 Wncv, 2018 WL 11358617, at *11 (Vt. Super. Ct. July 31, 2018) (applying same limitations period for civil conspiracy as for underlying torts).

Under federal law, accrual generally occurs "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* (quoting *Wallace*, 549 U.S. at 388). However, the Second Circuit has recognized that the "discovery rule" applies to § 1983 claims. *See Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1156 (2d Cir. 1995). Under that rule, the accrual date is determined by "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* (quoting *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980)).

Determination of the plaintiff's knowledge or reason to know of the injury and its cause can require resolving factual questions. *See Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 49–50 (S.D.N.Y. 2001) (court ruling on summary judgment could not "conclusively find that plaintiffs, exercising reasonable diligence, did or should have had notice of their injury"). But such a determination can also be made on a motion to dismiss, depending on the circumstances. *See Singleton*, 632 F.2d at 191 (affirming grant of motion to dismiss and determining accrual date under discovery rule). Grandparents offer no analysis as to why this case might be like *Thompson*, and—to the contrary—they assert that an accrual date *is* ascertainable and that the date is November 30, 2018. (Doc. 153 at 9.)

Here, Grandparents allege that Defendants "improperly and wrongfully deprived Grandparents of their right to adopt their granddaughter." (Doc. 43-2 at 4.) They claim that they were "not made aware of their injury until their daughter, Ms. Thayer, was coerced into 'voluntarily' giving up her parental rights." (Doc. 153 at 9.) The Family Division accepted the voluntary relinquishment on November 30, 2018. (Doc. 53-34.)

Notably, Grandparents' proposed November 30, 2018 accrual date is *after* the June 3, 2017 accrual date that the DCF Defendants propose. Both dates are before the Family Division's

March 1, 2019 Final Order. (Doc. 53-35.) Thus there appears to be no dispute that Grandparents' claims arising out of the TPR proceedings are timely. (*See* Doc. 156 at 9.) Since neither proposed accrual date is before the October 13, 2016 CHINS judgment (Doc. 53-24), the court agrees with the DCF Defendants that the statute of limitations bars any Grandparent claims arising out of the initial removal, nonreturn, and temporary placements of their grandchildren during the CHINS proceeding.

The court rejects the DCF Defendants' argument that the statute of limitations bars any claim by Grandparents "that DCF improperly did not pursue an ICPC [Interstate Compact on Placement of Children] placement of Sheera." (Doc. 156 at 9.) The alleged ICPC failures overlap with the CHINS proceeding to some extent since Grandparents allegedly filled out ICPC paperwork in March 2016—before the October 2016 CHINS judgment. (Doc. 43-2 at 28.) But some of the alleged conduct regarding the ICPC issue occurred after June 2017—the date that the DCF Defendants advocate as the accrual date—and potentially impacted Grandparents' ability to adopt Sheera. Although Grandparents claim they were not aware of their alleged injuries until November 2018, that is not necessarily inconsistent with their allegation that Defendant Brown failed to act on the ICPC and told Ms. Thayer that it was "too late" for the ICPC. (Doc. 43-2 at 32.) The court cannot presume at this point that Ms. Thayer shared that communication with her parents. The court will consider the ICPC claims as arising out of the TPR proceedings and therefore timely.

D. Remaining Grandparent Claims

As noted above, Grandparents have brought various claims in addition to their § 1983 claims. The court has previously dismissed their loss-of-consortium claim. (Doc. 137 at 65.)

That leaves their claims under the ADA and Rehabilitation Act (Counts IV and V of the First Amended Complaint), plus their claims for IIED and civil conspiracy (Counts IX and XI).

Regarding Counts IV and V, the DCF Defendants argue that Grandparents cannot "assert claims on behalf of Ms. Thayer that she is barred from relitigating." (Doc. 150 at 12.) This appears to be an argument about standing or the identity of the "real party in interest" for purposes of Counts IV and V. *See Kindred Nursing Ctrs. E., LLC v. Estate of Nyce*, No. 5:16-cv-73, 2017 WL 2377876, at *2 (D. Vt. May 31, 2017) ("The real party in interest principle ensures that only a person who possesses the right to enforce a claim and who has a significant interest in the litigation can bring the claim." (cleaned up)). This issue was not raised in the DCF Defendants' Motion to Dismiss and the court declines to address it on reconsideration. *See Ranta v. City of New York*, No. 14-CV-3794 (FB) (LB), 2019 WL 2568725, at *1 (E.D.N.Y. June 20, 2019) ("Parties may not use a motion for reconsideration to 'advance new facts, issues, or arguments not previously presented to the Court.'" (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stroh Cos.*, 265 F.3d 97, 115 (2d Cir. 2001))).

Similarly, regarding Counts IX and XI, the DCF Defendants argue that Grandparents lack standing "to assert Ms. Thayer's barred claims that her parental rights were violated and improperly terminated." (Doc. 150 at 13.) That might be true, but the court declines to address this new issue on reconsideration. Notably, the DCF Defendants concede that "Counts IX and XI can be read as asserting both claims that belong to the Grandparent Plaintiffs and claims that do not." (*Id.* at 12.) The DCF Defendants do not appear to seek dismissal of Counts IX and XI insofar as they assert claims that belong to Grandparents. If Grandparents attempt to prosecute Counts IX and XI as claims that do not belong to them, the court will consider the DCF Defendants' standing argument at that time.

Conclusion

Plaintiff's Motion for Reconsideration and Request for Leave to Amend (Doc. 138) is DENIED.

The DCF Defendants' Cross-Motion for Reconsideration (Doc. 163) is GRANTED IN PART and DENIED IN PART. Issue preclusion does not bar Grandparents' claims. The statute of limitations bars any Grandparent claims arising out of the initial removal, nonreturn, and temporary placements of their grandchildren during the CHINS proceeding. Grandparents' claims arising out of the TPR proceedings are timely.

Dated at Burlington, in the District of Vermont, this 24th day of May, 2022.

Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KEZIAH THAYER, MARTHA THAYER, and ELAM THAYER, Plaintiffs, v. LAURA KNOWLES, Supervisor Vermont Department for Children and Families ("DCF"); KAREN SHEA, Former Deputy Commissioner for the DCF Family Services Division ("FSD"); MONICA BROWN, DCF Case Worker; CHRISTOPHER CONWAY, DCF Case Worker; JENNIFER BURKEY, DCF District Director, each in their individual capacities; KENNETH SCHATZ, Commissioner, DCF, in his individual and official capacities; JOHN W. DONNELLY, individually; and JOHN W. DONNELLY, Ph.D., PLLC; CHRISTINE JOHNSON, Deputy Commissioner of DCF, for the FSD; the VERMONT DEPARTMENT OF CHILDREN AND FAMILIES, Defendants.	Case No. 5:19-cv-223

ORDER ON DONNELLY DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS
(Doc. 210)

Plaintiff Keziah Thayer ("Ms. Thayer") and her biological parents Martha and Elam Thayer ("Grandparents")[1] allege that the above-captioned defendants created or participated in "a system that they each have reason to know is stripping fit parents and families from their children (and grandchildren)." (Doc. 188 ¶ 3.) Plaintiffs claim that this system of "sophisticated

[1] All plaintiffs are proceeding under pseudonyms to protect their privacy.

child-theft" resulted in Ms. Thayer's loss of custody of her three children and deprived Grandparents of their right to adopt their granddaughter. (*Id.* ¶¶ 1–3.) Plaintiffs allege that John W. Donnelly and John W. Donnelly, Ph.D., PLLC (the "Donnelly Defendants") authored a false and misleading "putatively clinical report stating that Ms. Thayer was an unfit parent" and that other defendants "used that report as fodder to make a false case that Ms. Thayer's children should be permanently removed." (*Id.* ¶ 26.) In their Second Amended Complaint, Plaintiffs assert twelve causes of action, including the following claims against the Donnelly Defendants:

- Ms. Thayer's claim for wrongful interference with custody (Count VI);
- Ms. Thayer's claim under 42 U.S.C. § 1983 for violations of her due process rights (Count VII);
- Grandparents' claim for loss of consortium (Count X); and
- A claim by all plaintiffs for civil conspiracy (Count XI).

The court previously dismissed Count X in its entirety. (Doc. 137 at 65; *see also* Doc. 180 at 28 (discussing remaining Grandparent claims).) The court also previously ruled that the *Rooker-Feldman* doctrine bars Ms. Thayer from bringing the civil conspiracy claim in Count XI. (Doc. 137 at 43.) The court dismissed Count XI insofar as Ms. Thayer sought to assert that claim, but left Count XI in the case insofar as Grandparents asserted that claim. (*Id.* at 72–73.)

Currently pending is the Donnelly Defendants' motion to dismiss the remaining claims against them in Counts VI, VII, and XI. (Doc. 210.) The Donnelly Defendants argue that the claims against them are "highly similar (if not nearly identical)" to the claims that the court recently dismissed against the Lund Family Center, Inc. ("Lund") (*see* Doc. 208), and that the claims against the Donnelly Defendants should likewise be dismissed. (Doc. 210 at 1.) The

Donnelly Defendants also raise an absolute-immunity defense to Ms. Thayer's § 1983 claim that did not appear in Lund's motion to dismiss. (*Id.* at 20.)

Plaintiffs have filed an opposition stating that they "do not agree that the claims as to Lund were properly dismissed" but acknowledging that their claims against the Donnelly Defendants "are substantially similar" and that briefing the issues again would be unproductive. (Doc. 216 at 2.) Plaintiffs note that any decision on the Donnelly Defendants' absolute-immunity defense "would be effectively *dicta*, given the Court's prior decision," but Plaintiffs have briefed that issue and state that they "reserve all rights to appeal any decision finding the Donnelly Defendants are immune from suit, including prior decisions from the Court." (*Id.* at 2–3.) In reply, the Donnelly Defendants assert that their motion should be granted based on Plaintiffs' concession about applicability of the court's prior ruling on Lund's motion to dismiss. (Doc. 217 at 1–2.) The Donnelly Defendants further contend that, if the court does reach the absolute-immunity defense, "it should conclude that Count VII is subject to dismissal because the Donnelly Defendants are immune from suit under Section 1983 pursuant to *Briscoe v. LaHue*, 460 U.S. 325 (1983) and its progeny." (*Id.* at 3.)

The court presumes familiarity with its prior ruling granting Lund's motion to dismiss. (Doc. 208.) Although the Donnelly Defendants argue for dismissal of Counts VI and VII under *Rooker-Feldman*, the court bypasses that issue by assuming hypothetical statutory jurisdiction. (*See id.* at 5 (same election for Lund's motion to dismiss).) Under the same Rule 12(c) standard that applied on Lund's motion to dismiss (*see id.* at 6), the court concludes that the Donnelly Defendants are entitled to dismissal of the remaining claims against them. The analysis that applied to Lund's motion applies equally to the Donnelly Defendants' motion. The court summarizes briefly below.

The Donnelly Defendants are entitled to judgment on the pleadings as to Count VI because Ms. Thayer has not alleged a plausible claim under § 700 of the Restatement (Second) of Torts. (*See id.* at 8–11.) Ms. Thayer's unlawful-interference-with-custody claim is based on her allegation that the Donnelly Defendants produced a false and misleading clinical report about her fitness as a parent. Such allegations cannot support a § 700 claim. *See Padula-Wilson v. Landry*, 841 S.E.2d 864, 871 (Va. 2020) ("[D]ragging mental health professionals and guardians ad litem into court for their role in a custody and visitation case would be highly detrimental to the process. . . . [N]o cause of action for tortious interference with a parental or custodial relationship may be maintained against a guardian ad litem or an adverse expert witness based upon his/her expert testimony and/or participation in a child custody and visitation proceeding.").[2]

Ms. Thayer's due process claim against the Donnelly Defendants also fails. As the court concluded with respect to Lund, even assuming that the Donnelly Defendants could be deemed state actors, Ms. Thayer has failed to plausibly allege that they denied her federal constitutional rights. As to procedural due process, the Family Division's formal proceedings provided full procedural protections. Regarding substantive due process, the Donnelly Defendants' allegedly wrongful conduct does not rise to tortious interference with custody rights, much less the sort of conscience-shocking conduct that the federal or Vermont due process clauses prohibit. (*See* Doc. 208 at 13–15.)

Finally, the Donnelly Defendants are entitled to judgment on the pleadings as to Grandparents' civil conspiracy claim in Count XI. The allegedly false and misleading report that

[2] Vermont law applies to the wrongful-interference claim. (Doc. 208 at 7.) The court cites *Padula-Wilson* as persuasive authority to predict Vermont law in this case.

the Donnelly Defendants produced was not tortious conduct for the reasons stated above, and Grandparents have not specified how production of such a report could otherwise be "unlawful in itself" as required for a Vermont civil conspiracy claim. (*See id.* at 16.) Grandparents' generalized allegations of conspiracy are insufficient to state a plausible civil conspiracy claim under § 1983. (*See id.* at 17–19.) These conclusions make it unnecessary to address the Donnelly Defendants' absolute-immunity argument.

The dismissal of the claims against the Donnelly Defendants is with prejudice. As in the case of the claims against the Lund Family Center, the plaintiffs have stated their claims clearly and with considerable factual detail. This is not a case in which improved or amended pleadings will change the outcome.

Conclusion

John W. Donnelly and John W. Donnelly, Ph.D., PLLC's Motion for Judgment on the Pleadings (Doc. 210) is GRANTED. All remaining claims against the Donnelly Defendants are DISMISSED WITH PREJUDICE.

Dated at Burlington, in the District of Vermont, this 16th day of February, 2023.

Geoffrey W. Crawford, Chief Judge
United States District Court

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1257

§ 1257. State courts; certiorari

Currentness

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Pub.L. 91-358, Title I, § 172(a)(1), July 29, 1970, 84 Stat. 590; Pub.L. 100-352, § 3, June 27, 1988, 102 Stat. 662.)

Notes of Decisions (270)

28 U.S.C.A. § 1257, 28 USCA § 1257
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Preemption Grounds by Molinelli-Freytes v. University of Puerto Rico, D.Puerto Rico, July 27, 2010

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights [Statutory Text & Notes of Decisions subdivisions I to IX]

Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in multiple documents.>

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

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

U.S. SUPREME COURT OCTOBER TERM 2024

<U.S. Supreme Court, Oct. Term 2024, Oral Argument - Questions Presented: >

<Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C.§ 1983 in state court. Johnson v. Alabama Sec'y of Lab. Fitzgerald Washington, No. SC-2022-0897, 2023 WL 4281620 (Ala. June 30, 2023), cert. granted sub nom. Williams v. Washington, 144 S. Ct. 679, 217 L. Ed. 2d 341 (2024), and cert. dismissed in part sub nom. Williams v. Washington, AL Sec. of Lab., 144 S. Ct. 636, 217 L. Ed. 2d 434 (2024); Nancy WILLIAMS, et al., Petitioners, v. FITZGERALD WASHINGTON, ALABAMA SECRETARY OF LABOR, Respondent., 2024 WL 4436422 (U.S.) (U.S.Oral.Arg.,2024).>

<In cases subject to the Prison Litigation Reform Act, do prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim? Richards v. Perttu, 96 F.4th 911 (6th Cir. 2024), cert. granted, No. 23-1324, 2024 WL 4394132 (U.S. Oct. 4, 2024).>

<Whether the Medicaid Act's any-qualified-provider provision unambiguously confers a private right upon a Medicaid beneficiary to choose a specific provider. Planned Parenthood S. Atl. v. Kerr, 95 F.4th 152 (4th Cir. 2024), cert. granted in part sub nom. Kerr v. Planned Parenthood, No. 23-1275, 2024 WL 5148085 (U.S. Dec. 18, 2024).>

Notes of Decisions (4832)

42 U.S.C.A. § 1983, 42 USCA § 1983
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

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