UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dwight D. Mitchell, individually and on behalf of his children X.M., A.M., and BRYCE MITCHELL; and STOP CHILD PROTECTION SERVICES FROM LEGALLY KIDNAPPING,

Plaintiffs,

vs.

Dakota County Social Services, *et al.*

Defendants.

Civil File No. 0:18-cv-1091 (WMW/BRT)

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendants Commissioner Emily Piper, Jacob Trotzky-Sirr, and Tanya Derby ("State Defendants") move to dismiss the Amended Complaint ("Complaint") filed by Plaintiffs. Plaintiffs' Complaint relates to a prior child-custody case adjudicated in Dakota County, Minnesota. Plaintiffs' Complaint also contains six broad facial challenges to several Minnesota child-protection statutes. For the reasons described below, Plaintiffs' claims against the State Defendants should be dismissed.

STATEMENT OF FACTS

The Complaint pertains primarily to Plaintiff Dwight Mitchell's contentious child-custody case, which was adjudicated in Dakota County, Minnesota. *In re Welfare of the Children of Eva Marina Mitchell*, 19HA-JV-14-255 (Dakota Cnty. Dist. Ct.) (filed Feb. 18, 2014); *In re Welfare of the Children of Eva Marina Mitchell*, 19HA-JV-15-1014

(Dakota Cnty. Dist. Ct.) (filed May 7, 2015).[1] In February 2014, Mitchell's three children were removed from his home after a babysitter reported physical abuse to police. (Doc. 8 at Preliminary Statement, ¶¶ 28-29.) Mitchell was thereafter charged with malicious punishment of a child, in violation of Minn. Stat. § 609.377, Subd. 2, to which he pleaded guilty. (*Id.* at ¶ 165, 180-84, Exs. 3, 25.)

Mitchell acknowledges that he "spank[ed]" his child "XM" prior to his arrest (*id.* at ¶ 28), that bruises were found on XM's body, (*id.* at ¶ 90), and that the mother of his children, as well as the children themselves, provided statements to authorities indicating that Mitchell had a long history of severe physical abuse. (*Id.* at ¶¶ 32, 62-63, 77, 89, 92.) Mitchell also acknowledges that XM told the authorities that he had been spanked with a belt and punched, causing significant observable bruising. (*Id.* at Ex. 13 at p. 61-62.) As a result of the above, and the related criminal charge, Mitchell admitted on July 10, 2014, that XM was "in need of protection or services." (*Id.* at Ex. 34 at pp. 208, 211.) The CHIPS petitions as to Mitchell's two other sons were dismissed. (*Id.* at p. 211.)

The voluminous court records attached to the Complaint indicate that after the parties agreed that XM was in need of protective services, Mitchell returned to New Jersey and XM refused to communicate with Mitchell, thwarting reunification efforts. (*Id.* Exs. 35, 36.) The records also indicate that Mitchell later opted to represent himself in the CHIPS litigation. (*Id.* at Ex. 42.) Ultimately, after a lengthy investigation into the

[1] The Court may consider public court documents without converting this motion into a motion for summary judgment. *See Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).

XM abuse allegations, parenting evaluations, therapy, and motion practice, Mitchell regained custody of XM in December 2015. (*Id.* at ¶¶ 228-29.)

PROCEDURAL HISTORY

On May 19, 2017, Mitchell filed a *pro se* complaint naming fourteen Minnesota State and Dakota County employees/entities as defendants. *Mitchell v. Dakota Cnty. Social Services, et al.*, Court File No. 17-CV-1693 WMW/KMM (D. Minn.). Of the fourteen defendants, three worked for the State of Minnesota: Minnesota Department of Human Services Commissioner Emily Piper, Jacob Trotzky-Sirr, and Tanya Derby ("State Defendants"). All named defendants filed Rule 12(b)(6) motions in that prior matter, resulting in a well-reasoned Report and Recommendation of Magistrate Kate Menendez, recommending dismissal of all defendants with prejudice. (*Id.* at Doc. 41 (hereinafter referred to as "Menendez R&R").) Mitchell then voluntarily dismissed the case. (*Id.* at Doc. 78.)

On May 24, 2018, Plaintiffs filed the underlying lawsuit, naming the same defendants and making substantially similar claims. (Doc. 1; Doc. 8 at ¶¶ 7-20.) The most notable differences between these lawsuits is that an association called Stop Child Protection Services From Legally Kidnapping ("SCPS") is now listed as a Plaintiff, and some additional facial constitutional claims have been pleaded. The Complaint contains twenty-five causes of action, which generally allege a conspiracy to deprive Mitchell of child custody. (*Id.* at ¶¶ 21-631.) Trotzky-Sirr served as the court-appointed guardian *ad-litem* assigned to advocate on behalf of Mitchell's children. (*Id.* at ¶ 19.) Derby was the public defender assigned to advocate on behalf of the children. (*Id.* at ¶¶ 20, 327.)

Commissioner Piper is named in her official capacity, but there are no factual allegations lodged against her. (*Id.* at ¶¶ 10, 304, 307, 317-18.) Sixteen of Plaintiffs' claims are asserted against the State Defendants:

Causes of Action	**Claim**	**Named State Defendant(s)**
Counts I-IV	Facial Constitutional Challenges	Commissioner Piper
Count VIII	"Procedural Due Process"	All State Defendants
Counts IX, XI and XV	As-Applied Constitutional Challenges	Trotzky-Sirr and Derby
Counts XVIII, XIX, XXI, XXII, XXIII, and XXIV	State-Law Claims	Trotzky-Sirr and Derby

STANDARD OF REVIEW

"Subject-matter jurisdiction is a threshold requirement which must be assured in every federal case." *Kronholm v. F.D.I.C.*, 915 F.2d 1171, 1174 (8th Cir. 1990). The existence of subject-matter jurisdiction is a question of law. *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990). A federal court must dismiss a claim if it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1), 12(h)(3). Under Rule 12, "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015) (internal quotation marks and citation omitted) (emendation in original). "If the asserted basis of federal jurisdiction is patently meritless, then dismissal for lack of jurisdiction is appropriate." *Biscanin v. Merrill Lynch & Co., Inc.*, 407 F.3d 905, 907 (8th Cir. 2005).

A motion to dismiss for failure to state a claim must be granted where the complaint does not allege "enough facts to state a claim to relief that is plausible on its

face" rather than merely "conceivable." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Courts must accept a plaintiff's specific factual allegations as true but are not required to accept a plaintiff's legal conclusions." *Brown v. Medtronic, Inc*., 628 F.3d 451, 459 (8th Cir. 2010).

ARGUMENT

As to the State Defendants, Plaintiffs' Complaint should be dismissed for several reasons. First, all facial constitutional claims should be dismissed for lack of standing and failure to state a claim. Second, State Defendants are entitled to various statutory and common law immunities and are not "persons" subject to suit under sections 1983, 1985, or 1986. Third, all claims against Commissioner Piper should be dismissed because there are no factual allegations against her. Finally, Plaintiff's Complaint should be dismissed for failure to state a claim. Alternatively, this Court should decline to exercise supplemental jurisdiction over any remaining state law claims.

I. ALL FACIAL CONSTITUTIONAL CLAIMS MUST BE DISMISSED.

Counts I through VI assert facial constitutional claims against Commissioner Piper in her official capacity. (Doc. 8 at Preliminary Statement, ¶¶ 10, 231-42, 303-07, 361-428.) Plaintiffs challenge numerous provisions of the following child protection statutes: Minn. Stat. § 260C.301 (Termination of Parental Rights); Minn. Stat. § 260C.007 (Juvenile Safety and Placement, Definitions); Minn. Stat. § 626.556 (Reporting of Maltreatment of Minors); and Minn. Stat. § 260.012 (Duty to Ensure Placement

Preventions and Family Reunification; Reasonable Efforts). For the following reasons, however, Plaintiffs lack standing to assert these facial constitutional claims, all of which fail as a matter of law.

A. Plaintiffs Lack Standing.

First and foremost, no Plaintiff has standing to assert their facial constitutional challenges. (Doc. 8 at ¶ 303.) Article III of the Constitution limits federal courts to hearing only cases and controversies. To establish standing, a plaintiff must show: (1) an injury that is concrete and particularized and actual or imminent; (2) a causal connection; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition, standing for prospective relief requires a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 107-08 (1983). For a facial challenge, "remedy is necessarily directed at the statute itself and must be injunctive and declaratory[.]" *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011).

In this case, Plaintiffs have not plausibly pleaded a threat of repeated injury. Mitchell and his children are not citizens of Minnesota and no longer live here. (Doc. 8 at ¶¶ 5-6, 21-24, 27.) Therefore, there is no threat of future enforcement of Minnesota's laws against them. *See Ivey v. Mooney*, Civ. No. 05-CV-2666 (JRT/FLN), 2008 WL 4527792, at *3-4 (D. Minn. Sept. 30, 2008); *Wilbur v. LaFauce*, 876 N.W.2d 813, at *1 (Iowa App. 2015) (holding that because mother "no longer lives in the state of Iowa, she lacked standing to challenge DHS future actions by declaratory action."). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding

injunctive relief[.]" *O'Shea*, 414 U.S. at 496-97; *see also Juidice v. Vail*, 430 U.S. 327, 332 (1977) (holding that people held in contempt for disobeying subpoena no longer had standing for injunctive relief when no longer subject to pending court proceedings).

Similarly, there are no facts alleged in the Complaint indicating that SCPS, or any of its members, face a "real and immediate threat of repeated injury." There are no facts in the Complaint describing the nature of this association or its membership. The Complaint simply alleges that SCPS "is an association of parents" who "have had experiences with the child-protection system in Minnesota[.]" (Doc. 8 at Preliminary Statement, ¶ 4.) These conclusory allegations are not sufficient to establish standing.

An "association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also Missouri Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 809 (8th Cir. 2007) (holding association to have standing if "its members would otherwise have standing to sue in their own right", as well as other requirements).

In this case, the Complaint contains no facts indicating how any SCPS member has been actually injured by the challenged statutes, nor any allegations plausibly alleging that any member faces "a real and immediate" threat of future injury. *See Warth*, 422 U.S. at 517; *Nat'l Fed'n of Blind of Mo. v. Cross*, 184 F.3d 973, 981 (8th Cir. 1999) (holding association failed to allege "concrete present or future injury" to support standing).

The conclusory assertion that some SCPS members have had "experiences with the child-protection system" is simply insufficient without describing what those experiences are and how they may plausibly be repeated. General parental concern is not enough. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.").[2]

Plaintiffs' lack of standing to obtain prospective relief becomes all the more apparent when looking at the cope of their expansive facial claims. Plaintiffs identify over ten separate provisions, of four Minnesota statutes, as being facially unconstitutional without alleging how any of these provisions were actually applied against them, or are likely to be applied in the future. The purpose of the standing requirement is to prevent precisely what Plaintiffs are attempting here: obtain a court ruling without a "personal stake in the outcome." *Gill v. Whitford*, __S. Ct. __, 2018 WL 3013807, at *4 (June 18, 2018). The federal courts are not "a forum for generalized grievances." *Id.* at *11.

Plaintiffs identify no concrete or non-hypothetical future injury. Accordingly, Counts I-VI must be dismissed for lack of standing.

[2] Even if an SCPS member did allege the possibility of unconstitutional enforcement in the future, such an allegation likely would be too speculative to support standing. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.").

B. The Challenges Statutes Are Not Unconstitutional In "Every Conceivable Application."

Plaintiffs' various facial constitutional challenges also fail as a matter of law. A law may be considered invalid on its face only if it is unconstitutional in "every conceivable application." *See United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge is the "most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* Accordingly a "facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (internal quotation marks and citation omitted). Moreover, facial constitutional challenges are generally "disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008). Plaintiffs cannot satisfy this demanding standard.

1. Plaintiffs' Facial Vagueness Challenge Fails.

In Count I, Plaintiffs allege that various Minnesota child-protection statutes are unconstitutionally vague on their face. (Doc. 8 at ¶¶ 361-69.) A statute is vague when people "of common intelligence must necessarily guess at its meaning." *Broadrick v Oklahoma*, 413 U.S. 601, 607 (1973). However, it is "well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand" – *i.e.*, through an as-applied challenge. *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1027-28 (8th Cir. 2015); *see also Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not

threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."). Accordingly, because the child protection statutes do not implicate a first amendment right, Plaintiffs' facial vagueness challenges must be dismissed.[3]

2. Plaintiffs' Facial Substantive Due Process Claims Fail.

Three of the six separate Counts alleging facial constitutional challenges appear to claim the violation of substantive due process (Counts II, III and VI). All three fail.

The substantive due process clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used[.]" *Collins v. City of Harker Heights*, Tex. 503 U.S. 115, 125 (1992). This clause provides "heightened protection" for "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). To be considered "fundamental," a right must be "deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977). "[T]he doctrine of judicial self-restraint requires [the

[3] The Complaint does not contain an as-applied vagueness challenge. Regardless, such a claim fails. Plaintiffs allege that Minnesota's child-protection statutes are vague as to the "threshold of harm to the child required to be shown . . . before terminating parental rights." (Doc. 8 at ¶ 366.) Mitchell's parental rights, however, were not terminated. (Doc. 8 at Ex. 83.) *Matter of Welfare of A.K.K.*, 356 N.W.2d 337, 343 (Minn. App. 1984) ("[A] person may not question the constitutionality of a law which does not affect him personally[.]"). Regardless, a person of ordinary intelligence would understand that conduct qualifying as "malicious punishment of a child," resulting in injury to that child, is sufficient to render the child in need of protective services, and if not corrected, would serve as a basis to terminate parental rights. *In re Welfare of Children of N.F.*, 749 N.W.2d 802, 807 (Minn. 2008) ("[M]alicious punishment of a child constitutes physical abuse that renders the child in need of protection or services."); Minn. Stat. § 260C.007, Subd. 5, Subd. 14; Minn. Stat. § 626.556, Subd. 2(o)(1); Minn. Stat. § 260C.301, Subd. 1(5).

Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Absent a fundamental right, statutes pass constitutional muster if they are "rationally related to legitimate government interests." *Glucksberg*, 521 U.S at 728.

In Count II, Plaintiffs claim that they have a "fundamental right" to "use corporal punishment to discipline or correct a child." (Doc. 8 at ¶ 372.) While parents do have a fundamental right to the "care, custody, and management of their child," *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), this right has never been interpreted to include the right to harm a child. *Sweaney v. Ada Cnty., Idaho*, 119 F.3d 1385, 1389 (9th Cir. 1997) ("Sweaney has not cited any case that holds that the Fourth and Fourteenth Amendment protect a parent's right to inflict corporal punishment upon a child."). And, the Supreme Court has repeatedly upheld child-protection statutes, implicitly rejecting such a right. The State has an undisputable "compelling" interest in protecting children.[4] *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding that the Court does "not question the assertion that neglectful parents may be separated from their children."). In addition, all persons have a fundamental right to bodily integrity, a notion fundamentally at odds with Plaintiffs' claimed right to use corporal punishment that injures a child. *See Vacco v. Quill*, 521 U.S. 793, 807 (1997).

In any event, Minnesota's statutes do not prohibit all forms of physical discipline. *See* Minn. Stat. § 626.556, Subd. 2(k) ("Abuse does not include reasonable and moderate

[4] *See* Minn. Stat. § 160C.001 for the express purpose of Minnesota's child protection statutes.

physical discipline of a child[.]"); Minn. Stat. § 609.379 ("Reasonable force may be used upon or toward the person of a child[.]"); *In re Welfare of Children at N.F.*, 479 N.W.2d 802, 810 (Minn. 2008) (declining to adopt rule that would prohibit "all corporal punishment of children by their parents"). Accordingly, Count II is based on a false premise.

In Count III, Plaintiffs allege that certain child-protection statutes violate substantive due process because they allow for the termination of parental rights without a showing of harm "if the child is not separated from the parents." (Doc. 8 at ¶¶ 380-89.) As a result, Plaintiffs claim these statutes are not narrowly tailored. Plaintiffs are incorrect.

States have an undisputable compelling interest in protecting children from abuse. *See e.g.*, *Stanley*, 405 U.S. at 652; *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996) ("[T]he liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.").

Here, Minnesota law is sufficiently narrowly-tailored to the State's compelling interest. Minnesota's child-protection statutes are necessarily broad to encompass the various ways in which a child could be in need of protective services,[5] but are also

[5] *See e.g.*, *In re A.L.R.*, 324 N.W.2d 296, at *3 (Wis. App. 1982) ("Any statute regulating human behavior must of necessity be general enough to be effective."); *In re Welfare of AKK*, 356 N.W.2d 337, 344 (Minn. App. 1984) (noting that each child protection case "is
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sufficiently limited to specific circumstances wherein children are at serious risk of harm. *See* Minn. Stat. § 260C.301; Minn. Stat. § 260C.007; Minn. Stat. § 626.556.

The Supreme Court has held that the state may not remove a child from their parent's custody "without some showing of unfitness and for the sole reason" of the child's best interests. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Minnesota law meets and exceeds this standard, particularly because the law presumes that a child's best interest is served by remaining in the custody of their parents, a presumption that must be overcome before terminating parental rights. *In re Martinson*, 177 N.W.2d 808, 810 (Minn. 1970). Accordingly, Count III fails as a matter of law because Plaintiffs cannot show that the challenged statutory provisions are unconstitutional in "every conceivable application."

Finally, in Count VI, Plaintiffs allege that Minn. Stat. § 260C.006, Subd. 6(2)(i)-(iii) lacks a rational basis on its face. (Doc. 8 at ¶¶ 417-428.) This statutory provision defines the term "*child in need of protection of services*," as a child who has been a victim of abuse or that resides in a home where such abuse occurs. There can be no doubt that this definition, on its face, is rationally related to the State's interest in protecting children. While Plaintiffs set forth a confusing hypothetical, wherein this provision purportedly has a "bizarre implication," such an implication cannot establish

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unique, and the courts and social service agencies must have a certain amount of freedom to determine what is necessary in a particular fact situation.").

that the law is unconstitutional in "every conceivable application." Count VI must be dismissed.

3. Plaintiffs' Facial Procedural Due Process Claim Fails.

In Count IV, Plaintiffs challenge various Minnesota statutes as violating procedural due process. (Doc. 8 at ¶¶ 390-402.) It cannot be disputed that the termination of parental rights "must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky*, 455 U.S. at 753. Minnesota's child protection statutes, however, on their face, provide more than adequate notice and opportunity to be heard. *See* Minn. Stat. § 260C.163 ("A parent with a legally recognized parent and child relationship must be provided the right to be heard in any review or hearing held with respect to the child[.]"). Plaintiffs' arguments to the contrary are without merit.

First, Plaintiffs claim that the listed statutes fail to require that "exculpatory information" be disclosed, citing *Brady v. Maryland*, 373 U.S. 83 (1963). (Doc. 8 at 393.) *Brady*, however, applies to criminal, not child-protection cases. *Millspaugh v. Cnty. Dep't of Pub. Welfare of Wabash Cnty.*, 937 F.2d 1172, 1177, n.1 (7th Cir. 1991). Regardless, Rule 17 of the Minnesota Rules of Juvenile Protection Procedure provides for necessary discovery mechanisms and the listed child-protection statutes do not preclude exculpatory information from being produced.

Plaintiffs also claim that Minnesota's statutes prohibit "a parental challenge to the adequacy of the government's reunification plan." (Doc. 8 at ¶ 395.) This allegation is untrue. Parents are never prohibited from seeking relief from the Court. *See* Minn. R.

Juv. Prot. P. 21.02 ("A party shall have the right to: . . . (l) request review of the court's disposition upon a showing of a substantial change of circumstances or that the previous disposition was inappropriate[.]"). Plaintiffs' assertion that parents are somehow limited to bringing motions to dismiss under Rule 15.04 is unsupportable. (Doc. 8 at ¶ 395.) And, while Plaintiffs challenge the provisions of Minn. Stat. § 260.012, they misapprehend the meaning of this statute, which expressly *requires* the Court to ensure reunification efforts are being pursued unless certain limited circumstances are found to exist.[6]

Finally, Plaintiffs challenge the presumption set forth in Minn. Stat. § 260C.301, Subd. 1(b)(5)(i)-(iv). (Doc. 8 at ¶ 397.) The Minnesota Supreme Court, however, has already upheld similar presumptions as constitutional. Applying strict scrutiny, the Court held that such presumptions "directly serve[] the compelling government interest of protecting children because" they facilitate "the more expeditious resolution of cases involving children in need of protection." *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 135 (Minn. 2014).

Moreover, child-protection presumptions most often inure to parents' benefit. For example, parents are presumed to be suitable "to be entrusted with the care of his child" and it is further presumed that it is "in the best interest of a child to be in the custody of his natural parent." *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980); *see*

[6] *See In re Children of T.R.*, 750 N.W.2d 656, 665-66 (Minn. 2008).

also In re P.T., 657 N.W.2d 577, 588 (Minn. App. 2003) (upholding statutory child-protection presumption). For these reasons, Count IV must be dismissed.

4. Plaintiffs' Facial Equal Protection Claim Fails.

In Count V, Plaintiffs claim that Minnesota's child protection statutes violate equal protection by using the phrase "culture," which they claim is a proxy for race discrimination. (Doc. 8 at ¶¶ 403-16.) This claim is entirely unsupported. The challenged statutes require child protective services to consider the culture in which the child is being raised in assessing the child-rearing practices at issue. Minn. Stat. § 626.556, Subd. 2(f), (g), (r). This consideration of culture applies equally to all persons, so there cannot be an equal protection violation. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (holding that equal protection requires "that all persons similarly situated should be treated alike.").

II. All Of MITCHELL'S CLAIMS AGAINST TROTZKY-SIRR AND DERBY ARE BARRED BY ABSOLUTE IMMUNITY.

A. Absolute Quasi-Judicial Immunity Bars Mitchell's Claims Against Trotzky-Sirr.

Guardians *ad litem* ("GAL") are appointed by the court to represent the interests of children. Minn. Stat. § 518.165. It is well-established that court staff and appointees are entitled to absolute quasi-judicial immunity, for state and federal claims, for actions taken while performing their official duties. *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir. 1987) (abrogated on other grounds). Such immunity applies to GALs. *See e.g.*, *Dornheim v. Sholes*, 430 F.3d 919, 925 (8th Cir. 2005) (granting absolute quasi-judicial immunity to GAL); *Brown v.*

Delmuro, 163 F.3d 601, at *1 (8th Cir. 1998) (same); *McCuen v. Polk Cnty., Ia.*, 893 F.2d 172, 174 (8th Cir. 1990) (same); *Rice v. Rice*, No. CV 17-796 ADM/HB, 2017 WL 4174550, at *5 (D. Minn. Sept. 19, 2017) (same); *Kent v. Todd Cnty.*, No. CIV 99-44 JRT RLE, 2001 WL 228433, at *7 (D. Minn. Feb. 21, 2001) (same). On this basis alone, all claims against Trotzky-Sirr must be dismissed, as was determined by Magistrate Menendez. (Menendez R&R at 23.)

Mitchell's unsupported claim that Trotzky-Sirr provided false information to the court, even if credited as true, does not overcome absolute quasi-judicial immunity. *Weseman v. Meeker Cnty.*, 659 F. Supp. 1571, 1577 (D. Minn. 1987) (granting quasi-judicial immunity despite claim of reporting false information to the court). The same is true for Mitchell's claim that Trotzky-Sirr acted with malice. *Wells v. Schnick*, No. CIVA 08-144 RHK/RLE, 2008 WL 4110697, at *15 (D. Minn. Aug. 27, 2008) ("GALs have absolute quasi-judicial immunity for their investigations, reports, and recommendations, even in the face of the Plaintiff's claims of malice and bad faith."); *Brown v. Delmuro*, 163 F.3d 601, at *1 (8th Cir. 1998) (granting motion to dismiss GAL accused of engaging in a conspiracy with other court officers). Accordingly, all claims against Trotzky-Sirr are barred.

B. Absolute Immunity Also Bars Mitchell's Claims Against Derby.

"[A]n attorney acting within the scope of h[er] employment as [an] attorney is immune from liability to third persons for actions arising out of that professional relationship." *McDonald v. Stewart*, 182 N.W.2d 437, 440 (Minn. 1970). And, as Mitchell admits, government attorneys are entitled to absolute immunity from federal

suits for damages "where they perform duties traditionally within the scope of their role as a government advocate[.]" *Glover v. Missouri Child Support Enf't Agency*, No. 4:15CV00022 AGF, 2015 WL 4656488, at *2 (E.D. Mo. Aug. 5, 2015); *see also Edwards v. Washington*, No. 2:11–3518 SB–BM, 2012 WL 1229506, at *3 (D.S.C. Jan. 5, 2012) (granting attorney immunity on fraud claim related to child custody litigation); (Doc. 8 at ¶ 327). This absolute immunity can be lost only in the face of intentional, fraudulent conduct. *See Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1031 (8th Cir. 2012). Magistrate Menendez correctly found that Derby is immune for all claims pertaining to her representation of Mitchell's children. (Menendez R&R at 23.)

Mitchell's Complaint contains no sufficiently specific allegations of fraud to overcome the immunity to which Derby is entitled. Indeed, there are no specific factual allegations against Derby at all, except for broad, conclusory statements pertaining to Derby's role as an advocate, which are insufficient to plead fraud under Federal Rule of Civil Procedure 9(b). *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1064 (8th Cir. 2005) ("[C]onclusory allegations and speculation without factual grounds are insufficient to support a claim of conspiracy[.]") (internal quotation marks and citation omitted); *Johnson v. Perdue*, 862 F.3d 712, 718 (8th Cir. 2017) (holding "conclusory allegations that the defendants conspired "through mutual decisions and correspondence" to be insufficient to plead conspiracy). Implausible allegations, based upon information and belief, need not be credited. *Segura v. Fed. Nat. Mortg. Ass'n*, No. CIV. 13-531 SRN/JJK, 2013 WL 3034096, at *3 (D. Minn. June 17, 2013).

While Plaintiff claims that Derby intentionally collaborated with others to place XM into the custody of his mother (Doc. 8 at ¶¶ 142, 164), he fails to recognize that it was Derby's job to take action based on the requests of XM. And, there can be no conspiracy to perform legal actions. *Lipka v. Minn. Sch. Employees Ass'n, Local 1980*, 537 N.W.2d 624, 632 (Minn. App. 1995) ("Conspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means."); *see also* Minn. R. Prof. Conduct 1.2. Moreover, Plaintiff makes no allegations against Derby outside of her role as an attorney. *See also Dzubiak v Mott*, 503 N.W. 2d 771, 773 (Minn. 1993) ("[P]ublic defenders are immune from suit for legal malpractice.").

Mitchell's claims against Derby are also barred by *Polk County v. Dodson*, 454 U.S. 312, 318-25 (1981), which held that public defenders are not subject to liability under the federal civil rights statutes when performing a lawyer's traditional functions as counsel. Accordingly, for all these reasons, all claims against Derby should be dismissed.

III. MITCHELL HAS NOT PLEADED A CLAIM AGAINST COMMISSIONER PIPER.

Although Mitchell includes Commissioner Piper as separate Defendant in this case for purposes of Count VIII, there are no specific allegations anywhere in the Complaint against her. She is listed in Paragraphs 10, 231-41, 303-07, 317 alone. (Doc. 8 at ¶¶ 10, 231-41, 303-07, 317.) These paragraphs merely refer to Commissioner Piper's official duties and allege a generalized failure to train and supervise. (*Id.* at ¶¶ 236, 307.) Accordingly, Mitchell has not pleaded a viable claim against Commissioner Piper.

Any failure to train or supervise claim against Commissioner Piper necessarily fails. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); *Wilson v. City of N. Little Rock*, 801 F.2d 316, 322, and n.3 (8th Cir. 1986). Mitchell must plead facts showing Commissioner Piper's personal involvement in the alleged constitutional wrongdoing, which he fails to do. *Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999). Alleging liability based on the chain of command is insufficient to establish supervisory liability. *See Bailey v. Wood*, 909 F.2d 1197, 1199- 1200 (8th Cir. 1990) (citing *Ayers v. Coughlin*, 780 F.2d 205, 210 (2nd Cir. 1985)); *In re Scott Cnty.*, 672 F. Supp. 1152, 1174 (D. Minn. 1987). And, Commissioner Piper cannot be held liable under a theory of *respondeat superior*. *Rizzo*, 423 U.S. at 371; *Clemmons v. Armontrout*, 477 F.3d 962, 967 (8th Cir. 2007).

Mitchell asserts that all his claims against Commissioner Piper are for prospective injunctive relief. (Doc. 8 at ¶¶ 10, 303.) First, as noted above, Mitchell does not have standing to obtain such relief. (*Supra* at 6-7.) Moreover, Mitchell has failed to plead a viable claim for injunctive relief against Commissioner Piper. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1011-12 (D. Minn. 2014) (requiring authorization of unconstitutional policy or custom).

Mitchell asserts that Commissioner Piper is "legally obligated to ensure enforcement of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). (Doc. 8 at ¶ 10.) As Magistrate Menendez rightfully held, however, Mitchell has no constitutionally protected rights created by the UCCJEA. (Menendez R&R at 8-9.) *In re Scott Cnty.*, 672 F. Supp. at 1174 (noting that statutes relied upon did

not create constitutionally-protected right). All claims against Commissioner Piper must therefore be dismissed.

IV. MITCHELL'S AS-APPLIED CONSTITUTIONAL CLAIMS MUST BE DISMISSED.

Mitchell's as-applied constitutional claims must also be dismissed for various reasons, as described below.

A. ALL OFFICIAL-CAPACITY CLAIMS MUST BE DISMISSED.

A state is immune from suit in federal court unless the state has consented to be sued or Congress has expressly abrogated the state's immunity. U.S. Const. amend. XI; *see also Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Pennhurst*, 465 U.S. at 100. Federal courts lack jurisdiction over both federal and state-law claims against un-consenting states. *Pennhurst*, 465 U.S. at 121; *Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968-69 (8th Cir. 2000).

Minnesota has not waived its Eleventh Amendment immunity from suit in federal court. *See DeGidio v. Perpich*, 612 F. Supp. 1383, 1388-89 (D. Minn. 1985). This immunity applies to official capacity claims against individuals. *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Hahn v. Bauer*, No. 09-2220 (JNE/JJK), 2010 WL 396228, at *14 (D. Minn. Jan. 27, 2010). Accordingly, Mitchell's official-capacity claims seeking damages against State Defendants are barred by the Eleventh Amendment. Additionally, State Defendants are not "persons" subject to suit under sections 1983, 1985, or 1986. *Will*, 491 U.S. at 71; *Small v. Chao*, 398 F.3d 894, 898 (7th Cir. 2005).

B. ALL INDIVIDUAL-CAPACITY FEDERAL CLAIMS FAIL UNDER THE DOCTRINE OF QUALIFIED IMMUNITY.

State Defendants are entitled to qualified immunity. The Supreme Court has summarized the two-step process for determining qualified immunity as follows:

> First, a court must decide whether the facts that a Plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citations omitted). Here, State Defendants are entitled to qualified immunity because: (1) they have not violated Mitchells' constitutional rights; and (2) the constitutional rights, as alleged, were not "clearly established."

"To overcome qualified immunity, a plaintiff must be able to prove that every reasonable official would have understood that what he is doing violates a constitutional right . . . and that the constitutional question was beyond debate." *Story v. Foote*, 782 F.3d 968, 970 (8th Cir. 2015) (internal quotation marks and citation omitted). Such law must be "dictated by controlling authority or a robust consensus of cases of persuasive authority." *D.C. v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (internal quotation marks and citations omitted). This authority must also present "similar [factual] circumstances." *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."

Wesby, 138 S. Ct. at 590 (internal quotation marks and citation omitted). Accordingly, the analysis requires a "high degree of specificity," wherein the specific facts of the case are compared to the facts of then-existing controlling authority. *Id.* at 590-93.

In this, there is no controlling case law from the Supreme Court or Eighth Circuit finding a constitutional violation under facts similar to those alleged here – where various officials worked jointly to achieve a legal result pertaining to child protection. It is Mitchell's duty to demonstrate specific controlling case law, with "similar" facts, putting defendants on notice that their conduct violated his clearly-established rights. He will not be able to do so. Accordingly, State Defendants are entitled to qualified immunity.

C. MITCHELL OTHERWISE FAILS TO STATE A VIABLE FEDERAL CLAIM.

Mitchell's claims also fail as a matter of law. While the Complaint is lengthy, it contains no specific factual allegations against any of the State Defendants meeting the minimal pleading and plausibility standards of *Twombly*. Mitchell alleges the following federal claims against the State Defendants: procedural due process, substantive due process, equal protection, and conspiracy. State Defendants address these claims in turn below.

1. Mitchell's Due Process Claims Fail.

Mitchell fails to state a procedural or substantive due process claim against State Defendants. Procedural due process questions are examined in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures utilized were constitutionally sufficient. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

In this case, Mitchell's procedural due process claim fails because he was provided with all the process he is due. The public court records indicate that Mitchell was provided with notice and an opportunity to be heard by a neutral adjudicator on all issues pertaining to child-custody. Mitchell chose to represent himself for a period of time, but was present at all relevant hearings. (*See e.g.*, Doc. 8 at ¶¶ 76-87, 161, 166, 198.) While Mitchell is unhappy with the procedures used during his child-custody cases, such dissatisfaction is insufficient to support a procedural due process claim. *Boner v. Eminence R-1 Sch. Dist.*, 55 F.3d 1339, 1342 (8th Cir. 1995) (holding that due process "secures only an opportunity to be heard, not guaranteed or probable success"). Magistrate Menendez agreed with this conclusion. (Menendez R&R at 7-9.)

While Mitchell claims that State Defendants did not provide certain information to the Court, it is undisputed that Mitchell himself had access to such information (New Jersey court records) and was free to present it. Mitchell is simply dissatisfied about how State Defendants decided to exercise their professional discretion in advocating for the best interests of Mitchell's children, in light of substantial allegations of physical abuse.

Finally, to the extent that Mitchell disagreed with the results of his state-court matters, his proper remedy was appeal. *See* Minn. Stat. § 480A.06. Any challenge to the findings of the State court is barred by the *Rooker-Feldman* doctrine, as Magistrate Menendez correctly determined. (Menendez R&R at 21.)

Plaintiff's substantive due process claim also fails. To establish a substantive-due-process violation, Mitchell must demonstrate that a government official acted in a manner that shocks the conscience. *Washington*, 521 U.S. at 720-21; *Bandy-Bey v. Crist*, 578

F.3d 763, 767 (8th Cir. 2009); *see also Dodd v. Jones*, 623 F.3d 563, 567 (8th Cir. 2010). As a result, substantive due process is only concerned "with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (*en banc*).

Mitchell simply cannot meet this high standard as none of the facts alleged are conscious shocking. (Menendez R&R at 9-10.) Importantly, Mitchell does not allege that the State Defendants did not actually believe that the best interest of the children were best served by transferring custody to the biological mother. *Myers v. Morris*, 810 F.2d 1437, 1458 (8th Cir. 1987) ("No facts have been recited which would indicate that any of the deputies actually believed the plaintiffs were innocent or the children were lying when the deputies acted on the children's statements.") (abrogated on other grounds); *In re Scott Cnty.*, 672 F. Supp. at 1173. And, as recognized by other courts, cases such as Mitchell's do not raise a viable substantive due process claim. *Swanson v. Swanson*, No. 4:09-CV-0171-JAJ, 2009 WL 10664801, at *2-3 (S.D. Iowa Aug. 18, 2009); *Fitzgerald v. Williamson*, 787 F.2d 403, 408 (8th Cir. 1986). For all these reasons, Mitchell's due process claims fail.

2. Mitchell's Equal-Protection Claim Fails.

Mitchell's unsupported allegation of racism against State Defendants is insufficient to plead an equal-protection claim. In order to succeed, Mitchell must establish that his treatment was "invidiously dissimilar" to the treatment received by

other similarly-situated persons. *Peck v. Hoff*, 660 F.2d 371, 372 (8th Cir. 1981); *Flittie v. Solem*, 827 F.2d 276, 281 (8th Cir. 1987). Mitchell, however, has set forth no factual allegations indicating that he was treated differently than other similarly-situated fathers. (Menendez R&R at 13-15.)

Simply claiming racism, without facts to support this claim, is insufficient to meet minimal pleading standards. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570; *Aldaco v. Holder*, No. CIV. 10-590 JRT/LIB, 2011 WL 825624, at *10 (D. Minn. Jan. 7, 2011); *Pigott v. Corrs. Corp. of Am.*, No. CIV. 07-2003 JNE/JJG, 2008 WL 3244001, at *4, n.5 (D. Minn. Aug. 6, 2008). Accordingly, Mitchell's equal-protection claim should be dismissed.

3. *Mitchell's Conspiracy Claims Fail.*

Mitchell alleges that a broad conspiracy occurred between all the named Defendants to deprive him of child custody. Section 1985 creates a cause of action against any person who conspires to interfere with the civil rights of another. Section 1986 creates a cause of action against any person who neglects to prevent wrongs covered by the Civil Rights Act.

There can be no viable claim under Section 1986 in the absence of a Section 1985 conspiracy. *Barstad v. Murray Cnty.*, 420 F.3d 880, 887 (8th Cir. 2005); *Jensen v. Henderson*, 315 F.3d 854, 863 (8th Cir. 2002). In order to establish a conspiracy under Section 1985, Mitchell must show the following:

> (1) that the defendants conspired, (2) with the intent to deprive the plaintiff, either directly or indirectly, of [his rights] under the laws, (3) an act in furtherance of the conspiracy, and (4) that they or their property were

> injured, or they were deprived of exercising any right or privilege of a citizen of the United States.

King v. Dingle, 702 F. Supp. 2d 1049, 1078 (D. Minn. 2010). Mitchell must allege with specificity that State Defendants reached an agreement regarding the purported conspiracy. *City of Omaha Emps. Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 652 (8th Cir. 1989).

Here, Mitchell has failed to plead any facts supporting a civil rights conspiracy. Rather, he has alleged that State Defendants work collaboratively with others to protect Mitchell's children in the face of substantial allegations of physical abuse. Nothing in the Complaint indicates that State Defendants did anything other than perform their official duties. State Defendants' work, in protecting the best interests of Mitchell's children, was not wrongful. (Magistrate Menendez R&R at 18 ("Working together regarding child protection as the law requires does not give rise to a conspiracy to deprive Mr. Mitchell of his rights."); *In re Scott Cnty.*, 672 F. Supp. at 1190 ("A commonly held belief that a crime has been committed is not a conspiracy."). Thus, Mitchell does not allege sufficient facts to support a Section 1985 conspiracy claim, and therefore, his Section 1986 claim must also be dismissed.

V. THIS COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER ANY REMAINING STATE-LAW CLAIM, ALL OF WHICH FAIL AS A MATTER OF LAW.

All of Mitchell's state-law claims against State Defendants fail for the reasons described below. This Court, however, should decline to exercise supplemental jurisdiction over these claims. *See, e.g.*, *Ivey v. Mooney*, No. 05-1215 (JMR/AJB), 2006

WL 618110, at *7 (D. Minn. Mar. 9, 2006) (holding that federal courts should decline to exercise supplemental jurisdiction over a state-law claim after dismissing the federal claims).

A. Mitchell Fails to Plead a Claim for Intentional Infliction of Emotional Distress.

To establish a claim for intentional infliction of emotional distress, a plaintiff must show: (1) that the complained of conduct was extreme and outrageous; (2) the conduct was intentional and reckless; (3) it caused the plaintiff emotional distress; and (4) the emotional distress was severe. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983).

Mitchell has failed to allege intentional infliction of emotional distress because he cannot show that State Defendants' conduct was extreme and outrageous. *See Elwood v. Rice Cnty.*, 423 N.W.2d 671, 679-80 (Minn. 1988); *Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902, 908 (Minn. App. 1987) (holding plaintiff must plead conduct so "atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community."). In addition, Plaintiff's intentional infliction of emotional distress claim fails because he cannot show that any State Defendant intended to cause Mitchell severe emotional distress. *See Dornfeld v. Oberg*, 503 N.W.2d 115, 119 (Minn. 1993). Accordingly, this claim must be dismissed.

B. Mitchell Fails To Plead Negligent Infliction of Emotional Distress.

To establish a claim for negligent infliction of emotional distress, a plaintiff must prove the four elements of a negligence claim, as well as three additional elements: 1) a

contemporaneous physical injury or presence within a zone of danger; 2) that he reasonably feared for his safety; and 3) that he suffered severe emotional distress with resultant physical injury. *K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995). Recovery is limited to those plaintiffs who were exposed to "grave personal peril for some specifically defined period of time." *Id.* at 558; *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443-44 (Minn. App. 1985). "[N]o cause of action exists for the negligent infliction of emotional distress absent either physical injury or physical danger to the plaintiff." *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 32 (Minn. 1982); *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 408 (Minn. 1998). Accordingly, Mitchell's negligent infliction of emotional distress claim fails because he has neither alleged that he was within a zone of physical danger, nor that he suffered a physical injury.

C. Mitchell Fails to Plead a Negligence Claim.

To support his negligence claim, Mitchell needs to prove: (1) duty; (2) breach; (3) causation; and (4) injury. *See Hudson v. Snyder Body, Inc.*, 326 N.W.3d 149, 157 (Minn. 1982). "[A]bsence of a legal duty, the negligence claim fails." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). In this case, State Defendants owed a duty to Mitchell's children, not Mitchell himself, and regardless, State Defendants are immune from damages claims pertaining to their professional role as advocates for the children, as described above. Finally, Mitchell's injuries, if any, were caused by the mother of Plaintiff's children, who he alleges filed false reports of child abuse and encouraged the children to do the same. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539

N.W.2d 789, 792 (Minn. 1995) (noting that a defendant does not have a duty to affirmatively protect a plaintiff from third-party harm). This claim must be dismissed.

D. Mitchell Fails to Plead a Malicious Prosecution Claim.

"[T]o state a claim for malicious prosecution a plaintiff must demonstrate that: (1) the action was brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of the defendant." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997). The cause of action for malicious prosecution "has always been carefully circumscribed, and not favored in law, the reason being that public policy favors prosecutions and affords such protection of another in good faith and on reasonable grounds as is essential to public justice." *Lundberg v. Scoggins*, 335 N.W.2d 235, 236 (Minn. 1983) (internal punctuation and citation omitted).

Mitchell's malicious prosecution claim fails for several reasons. First, the CHIPS termination proceedings were supported by probable cause (several witness reports, physical bruising on XM). Second, it was Dakota County that made a determination to pursue termination proceedings, not State Defendants. *See e.g.*, *Jacobson v. Mott*, No. 07-4420, 2009 WL 113379, at *10-11 (D. Minn. Jan. 16, 2009) ("Particularly, to establish a malicious prosecution claim, [the plaintiff] must show that the suit was both initiated and prosecuted with malicious intent."); *see also Dunham v. Roer*, 708 N.W.2d 552, 570 (Minn. App. 2006) (noting action brought by prosecutor, not defendant).

In addition, State Defendants' written and oral statements to the Court are absolutely immune and cannot form the basis of a state-law malicious prosecution claim. *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997); *Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306-10 (Minn. 2007) (applying absolute privilege to various claims sounding in defamation). This claim must be dismissed.

E. Mitchell Fails to Plead An Abuse of Process Claim.

There are two elements to an action for abuse of process:

> (a) the existence of an ulterior purpose, and (b) the act of using the process to accomplish a result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not.

Hoppe v. Klapperich, 28 N.W.2d 780, 786 (Minn. 1947) (emphasis in original); *see also Dunham*, 708 N.W.2d at 571.

Here, the Complaint provides no factual allegations to support the required element of an ulterior purpose. (Doc. 8 at ¶ 615.) A desire to advocate for the best interests of Mitchell's children is not an improper motive. Moreover, it is undisputed that no State Defendant was responsible for the petition itself, which was drafted and filed by others.

As to the second element, the Complaint fails to contain any allegations specifying an act that was not within the scope of the termination proceedings. To the contrary, State Defendants participated in the termination proceedings to obtain a result contemplated by those proceedings; termination. *See Young v. Klass*, 776 F. Supp. 2d 916, 925 (D. Minn. 2011).

F. Mitchell Fails to Plead a False Imprisonment Claim.

Under Minnesota law, "false imprisonment" is "any imprisonment which is not legally justifiable." *Kleidon v. Glascock*, 10 N.W.2d 394, 397 (Minn. 1943). A restraint is not an unlawful one when it is done pursuant to a court issued order that is valid on its face. *See Peterson v. Lutz*, 3 N.W.2d 489, 489 (Minn. 1942). In this case, county officials retained custody of Mitchell's children pursuant to court order. *K.D. ex rel. Deason v. Cnty. of Crow Wing*, No. CIV.03-6466 DWF/RLE, 2005 WL 958393, at *7 (D. Minn. Apr. 25, 2005) (finding that defendants "were acting within the bounds of Minnesota law when they placed [a child] in [protective] custody"). As a result, this claim should be dismissed.

G. Mitchell Fails to Plead a Conspiracy Claim.

Finally, Plaintiff's conspiracy claim fails as a matter of law because it is not supported by an underlying tort. *See Harding v. Ohio Cas. Ins. Co. of Hamilton, Ohio*, 41 N.W.2d 818, 824 (Minn. 1950) (concluding liability for conspiracy was predicated upon an underlying civil tort). Moreover, "[c]onspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means." *Lipka*, 537 N.W.2d at 632. Accordingly, because State Defendants were acting for a lawful purpose and by lawful means, this claim fails. In addition, Mitchell's state-law conspiracy claim fails for the same reasons his federal conspiracy claim fails: lack of specificity. *Bukowski v. Juranek*, 35 N.W.2d 427, 429 (Minn. 1948). Accordingly, Mitchell's conspiracy claim fails

CONCLUSION

For the foregoing reasons, State Defendants request that all claims against them be dismissed with prejudice.

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Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ Kathryn Iverson Landrum
Kathryn Iverson Landrum
Assistant Attorney General
Atty. Reg. No. 0389424

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1189 (Voice)
(651) 282-5832 (Fax)
kathryn.landrum@ag.state.mn.us

ATTORNEY FOR STATE DEFENDANTS