No. 21-2433

United States Court of Appeals
for the Eighth Circuit

J.T.H. and H.D.H.,

Plaintiffs-Appellees,

v.

SPRING COOK,

Defendant-Appellant.

Interlocutory Appeal from the United States District Court
for the Eastern District of Missouri
The Honorable Abbie Crites-Leoni

APPELLEES' BRIEF

Respectfully submitted,

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Summary of Case - and Request for Oral Argument

A Scott County, Missouri sheriff's deputy named Brandon Cook, while on duty and in uniform, sexually abused the 15-year-old son of a fellow deputy, for which said Brandon Cook has since been convicted of felony sodomy. The fellow deputy, J.T.H., demanded redress from County officials. Seven weeks later, while his demand was pending, a Children's Division investigator named Spring Cook, who routinely works hand-in-glove with the sheriff's department, opened a retaliatory investigation into both J.T.H. and victim's Mother, H.D.H. Spring Cook found Parents to be neglectful and therefore responsible for their son's abuse, because they had allowed their son to have an iPhone, drive a family car, and go on an age-appropriate date at a shopping mall. Four other investigating entities found either no evidence or no probable cause. Spring Cook's findings were eventually overturned by a state review board.

In this suit Parents assert, *inter alia*, a First Amendment retaliation claim. The district court denied Spring Cook's motion to dismiss as to that claim, and denied her claim of immunity. Parent-Appellees ask this Court to deny Appellant Spring Cook immunity, and reject her assertion that her findings of neglect were objectively reasonable. Her seizure cases are inapposite to the issue of her retaliatory motive. Her challenge of Mother's standing ignores Mother's harm.

Parents request 15 minutes for oral argument.

Table of Contents

SUMMARY OF CASE - AND REQUEST FOR ORAL ARGUMENT..... II

TABLE OF AUTHORITIES V

JURISDICTIONAL STATEMENT.....1

STATEMENT OF ISSUES 4

STATEMENT OF THE CASE.....6

SUMMARY OF ARGUMENT.....17

ARGUMENT.....19

Standard of Review 19

I. Spring Cook lacks qualified immunity because the Complaint plausibly alleges that she was motivated to retaliate against Parents for Father's speech, to chill him from demanding redress for their son's sexual abuse by a mutual colleague. 20

A. The law was clearly established at the requisite level of particularity prohibiting a reasonable official from retaliating against parents for making claims against county officials related to the sexual abuse of their child; in the alternative, the misconduct is so egregious and obvious to give fair warning. 20

B. Parents have plausibly pled their claim for First Amendment retaliation ... .31

i. Father's speech was a constitutionally protected activity on a matter of public concern 32

ii. An ordinary person of reasonable firmness would be chilled from speaking after a retaliatory State investigation and finding of child neglect 37

iii. Since this is not a seizure case, then But-For causation (or lack of Probable Cause) is not an element of the First Amendment claim.....39

iv. Spring Cook objectively lacked sufficient non-retaliatory grounds for her findings.....42

II. No precedent supports Spring Cook's assertion of absolute immunity for her functions opening an administrative investigation into Parents, and then making preliminary findings of parental neglect—as those are not

prosecutorial functions where there was no judicial process or sworn testimony.....45

III. This Court need consider Spring Cook's argument against Mother's standing, as she did not raise that issue in the district court, and standing is not closely related to the legal question of her immunities from suit. In the alternative, since Mother suffered her own injury caused by Spring Cook's retaliation, since Spring Cook infringed Mother's First Amendment right of intimate familial association, and since Mother lies within the "zone of interests" that the § 1983 statute and the First Amendment are designed to protect, then Mother has standing.....49

CONCLUSION.....54

Table of Authorities

Cases

Abubakari v. Schenker, No. 3:19-cv-00510, 2021 WL 1617159 (D. Conn. Apr. 26, 2021) 5. 52

Adam & Eve Jonesboro, LLC v. Perrin, 933 F.3d 951 (8th Cir. 2019).....34

Adkins v. Bd. of Education, 982 F.2d 952 (6th Cir. 1993).....52

Adler v. Pataki, 185 F.3d 35 (2d Cir. 1999) 52

Aebisher v. Ryan, 622 F.2d 651 (2d Cir. 1980) 38

Anderson v. City of Minneapolis, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, ___U.S.____, No. 19-656 (U.S. June 15, 2020).....21

Anderson v. Creighton, 483 U.S. 635 (1987) 29

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 21, 22, 27

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 45

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....19

B.S. v. Somerset County, 704 F.3d 250 (3d Cir. 2013).....46

Bank of America Corp. v. City of Miami, Fla., ___U.S. ___, 137 S. Ct. 1296 (2017) 53

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 38

Barber v. Miller, 809 F.3d 840 (6th Cir. 2016) 46

Baribeau v. City of Minneapolis, 596 F.3d 465 (8th Cir. 2010).....22, 13

Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973) 47

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 38, 39

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).....33

Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008) 46

Bennett v. Spear, 520 U.S. 154 (1997) .....

Bradford v. Huckabee, 394 F.3d 1012, 1015 (8th Cir. 2005).....19

Brosseau v. Haugen, 543 U.S. 194 (2004) 21

Brown v. New Mexico State Personnel Office, 399 F.3d 1248 (10th Cir. 2005) 44

Brownback v. King, 141 S. Ct. 740 (2021).....7

Buckley v. Fitzsimmons, 509 U.S 259 (1973) 49

Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990).....29

Butz v. Economous, 438 U.S. 478 (1978) 47

Carter v. Huterson, 831 F.3d 1104, 1107 (8th Cir. 2016).....19

Carroll v. Pfeffer, 262 F.3d 847 (8th Cir. 2001) 31

Carson v. Simon, 978 F.3d 1051 (8th Cir. 2020) 50, 51

Caudill v. Hollan, 431 F.3d 900 (6th Cir. 2005) 44

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).....29

Chestnut v. Wallace, 947 F.3d 1085 (8th Cir. 2020) 28

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 52

Clayton v. White Hall School Dist., 875 F.2d 676 (8th Cir. 1989).....53

Cody v. Weber, 256 F.3d 764 (8th Cir. 2001) 15

Connick v. Myers, 461 U.S. 138 (1983).....35, 37

Cook v. Billington, 737 F.3d 767 (D.C. Cir. 2013) 53

Copeland v. Locke, 613 F.3d 875 (8th Cir. 2010) 28

Cox v. Warwick Valley Central School District, 654 F.3d 267 (2d Cir. 2011) 53

Crawford-El v. Britton, 523 U.S. 574 (1998) 40

Crooks v. Lynch, 557 F.3d 846 (8th Cir 2009) 6

Darnell v. Ford, 903 F.2d 556 (8th Cir. 1990) 37

Dean v. Searcey, 893 F.3d 504 (8th Cir. 2018) 24

Delorme v. United States, 354 F.3d 810 (8th Cir. 2004) 50

Dist. of Columbia v. Wesby, 138 S. Ct. 577 (2018).....21

Doe v. Cassel, 403 F.3d 986 (8th Cir. 2005) 44

Drake v. Scott, 812 F.2d 395 (8th Cir. 1987) 2

Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1047 (2010) 3

Federal Election Com'n v. Akins, 524 U.S. 11 (1998) 50

Forrester v. White, 484 U.S. 219 (1987) 46

Gainor v. Rogers, 973 F.2d 1379 (8th Cir. 1992) 28

Garcia v. City of Trenton, 348 F.3d 726 (8th Cir. 2003) 4, 15, 25, 39

Goff v. Burton, 7 F.3d 734 (8th Cir. 1993) 15, 25

Gomez v. Toledo, 446 U.S. 635 (1980) 20-21

Hager v. Ark. Dep't of Health, 735 F.3d 1009, 1013 (8th Cir. 2013).....19

Hamner v. Burls, 937 F.3d 1171 (8th Cir. 2019) 21

Hardwick v. County of Orange, 844 F.3d 1112 (9th Cir. 2017).....46

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).....20

Hartman v. Moore, 547 U.S. 250 (2006) 14, 22, 28, 42

Hawkins v. Holloway, 316 F.3d 777 (8th Cir. 2003) 29

Hodak v. St. Peters, 535 F.3d 899 (8th Cir. 2008) 54

Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021).....30

Hope v. Pelzer, 536 U.S. 730 (2002) 21, 22, 29

Horvath v. City of Leander, 946 F.3d 787, 802 (5th Cir. 2020).....30

Hoyland v. McMenomy, 869 F.3d 644 (8th Cir. 2017) 27-28

Howard v. Norris, 616 F.3d 799 (8th Cir. 2010) 2

Ideker v. PPG Indus., Inc., 788 F.3d 849 (8th Cir. 2015) 6

Imber v. Pachtman, 424 U.S. 408 (1976) 46

In re SuperValu, Inc., 925 F.3d 955 (8th Cir. 2019) 33

Intern. Ass'n of Firefighters v. City, 283 F.3d 969 (8th Cir. 2002) 51, 54

J.T.H., et al. v. Scott County, 19MI-CV00222 (Mississippi County Circuit Court, Missouri, April 16, 2019) 32

James v. Paul, 49 S.W.3d 678 (Mo. 2001) 6

Jamison v. State, 218 S.W.3d 399 (Mo. 2007) 42, 51

Johnson v. City of Shelby, 574 U.S. 10 (2014) 34

Kalina v. Fletcher, 522 U.S. 118 (1997) 24, 46

Kiesling v. Holladay, 859 F.3d 529 (8th Cir. 2017) 24

Kilpatrick v. King, 499 F.3d 759 (8th Cir. 2007) 31, 40

Lewis v. City of St. Louis, 932 F.3d 646 (8th Cir. 2019) 20

Lewis v. Eufaula City Bd. of Education, 922 F.Supp.2d 1291 (M.D. Ala. 2012) 14, 52

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) .51, 53

Littrell v. City of Kansas City, 459 F.3d 918 (8th Cir. 2006) 38

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 50, 51

Malik v. Arapahoe County, 191 F.3d 1306 (10th Cir. 1999) 27

Manning v. Cotton, 862 F.3d 663, 668 (8th Cir. 2017) 30

Mazor v. Shelton, 637 F. Supp. 330 (N.D. Cal. 1986) 48

McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998 (8th Cir.2005) 2

McCann v. Fort Zumwalt School Dist., 50 F.Supp.2d 918 (E.D. Mo. 1999) 26

Messerschmidt v. Millender, *565* U.S. 535 (2012) 24

Mitchell v. Dakota Cnty. Soc. Srvcs., 959 F.3d 887 (8th Cir. 2020) 14, 43

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1

Mogard v. City of Milbank, *932* F.3d 1184 (8th Cir. 2019) 26

Montine v. City of Jersey City, 709 F.3d 181 (3d Cir. 2013) 53

Moran v. Clarke, 359 F.3d 2058 (8th Cir. 2004) 30

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 42, 43

Mullenix v. Luna, 577 U.S. 7 (2015) 23

Murphy v. Morris, 849 F.2d 1101 (8th Cir. 1988) 3, 14

Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987) 48

Nagle v. City of Jameston, 952 F.3d 923 (8th Cir. 2020 36

Naucke v. City of Park Hills, 284 F.3d 923 (8th Cir. 2002) .....*passim*

Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080 (8th Cir. 2005) 2

Nieves v. Bartlett, ___ U.S. ___, 139 S.Ct. 1715 (2019) .....*passim*

Osborne v. Grussing, 477 F.3d 1002 (8th Cir. 2007) 31, 40

Padilla v. South Harrison R-II School District, 181 F.3d 992 (8th Cir. 1999) 35

Payne v. Britten, 749 F.3d 697 (8th Cir. 2014) 1

Pearson v. Callahan, 555 U.S. 223 (2009) 20

Perry v. Adams, 993 F.3d 584 (8th Cir. 2021) 22-23

Peterson v. Kopp, 754 F.3d 594 (8th Cir. 2014) 15, 28

Qurashi v. St. Charles County, 986 F.3d 831 (8th Cir. 2021) 4, 25, 31, 40

Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984) 14

Rivera v. Leal, 359 F.3d 1350 (11th Cir. 2004).....4, 24, 46

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 52

S.M. v. Lincoln Cnty., 874 F.3d 581 (8th Cir. 2017) 27, 35

Sample v. City of Woodbury, 836 F.3d 913 (8th Cir 2016) 49

Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997).....29

Sause v. Bauer, 138 S. Ct. 2561, 2562 (2018).....30

Scott v. Harris, 550 U.S. 372 (2007) 1

Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994) 2

Sisney v. Reisch, 674 F.3d 839 (8th Cir. 2012).....21

Small v. McCrystal, 708 F.3d 997 (8th Cir. 2013).....28

Smith v. City of Minneapolis, 754 F.3d 541 (8th. Cir 2014).....21

Snyder v. Phelps, 562 U.S. 443 (2011).....36

Solomon v. Petray, 795 F.3d 777 (8th Cir. 2015).....25, 26

Sowards v. Loudon County, 203 F.3d 426 (6th Cir. 2000).....53

Stanley v. Georgia, 394 U.S. 557 (1969) 50

Stanley v. Hutchinson, No. 18-22, 2021 WL 4071912 (8th Cir. Sept. 8, 2021) 18, 23, 41, 48

State of Missouri v. Brandon L. Cook, 18CG-CR01279 (Cape Girardeau Circuit Court, Mo.) 8

Survivors Network of Those Abused by Priests, Inc. v. Joyce, 779 F.3d 785 (8th Cir. 2015) 27, 34

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993) 44

Taylor v. Riojas, 141 S.Ct. 52 (2020) 21, 22, 29

Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365 (8th Cir. 1996) .23, 47, 48

Thompson v. Adams, 268 F.3d 609 (8th Cir. 2001) 5, 52, 54

Thompson v. Monticello, Ark., 894 F.3d 993 (8th Cir. 2018) 24

Thompson v. N. Am. Stainless, 562 U.S. 170 (2011) 53

Thurairajah v. City of Fort Smith, 925 F.3d 979 (8th Cir. 2019) 28

Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994) 44

Triad Assocs., Inc. v. Robinson, 10 F.3d 492 (7th Cir. 1993) 2

Turkish Coal. of Am., Inc. v. Bruininks, 678 F.3d 617 (8th Cir. 2012) 35

United States v. Catlett, 584 F.2d 864 (8th Cir. 1978) 15

Van Kamp v. Goldstein, 555 U.S. 335 (2009) 47

Vanhorn v. Oelschlager, 502 F.3d 775 (8th Cir. 2007) 1

Villarreal v. City of Laredo, Tex., No. 20-40369 (5th Cir. Nov. 1, 2021) 28

Walker v. City of Pine Bluff, 414 F.3d 989 (8th Cir. 2005) 28

Ward v. Santa Fe Independent School District, 393 F.3d 599 (5th Cir. 2004) 26

Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226 (1990) 26

Williams v. City of Carl Junction, 480 F.3d 871 (8th Cir. 2007) 31

Williams v. Herron, 687 F.3d 971 (8th Cir. 2021).....44

Wilson v. Arkansas Dep't of Hum. Servs., 850 F.3d 368, 371–72 (8th Cir. 2017) ..19

Winslow v. Smith, 696 F.3d 716 (8th Cir. 2012).....49

Wishnatsky v. Rovner, 433 F.3d 608 (8th Cir. 2006).....3, 40

Constitutional Provisions

First Amendment, U.S. Const. .....*passim*

Fourth Amendment, U.S. Const.....*passim*

Fourteenth Amendment, U.S. Const. 27

Statutes

28 U.S.C. § 1292 ..... 1, 10

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 2201 1

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 54

RSMo. § 210.118 47

RSMo. § 210.110 42

RSMo. § 210.145 8

RSMo. § 210.152 9

RSMo. § 210.153 ..... 9, 46

RSMo. § 210.155 47

RSMo. § 590.010 8

RSMo. § 590.020 8

RSMo. § 590.050 8

Title VII 53

Title IX 10

Regulations

Arkansas Code § 12-18-801, *et seq.* 18, 23

Missouri 13 CSR 35.31.025 ..... 9, 46

Rules

Fed. R. App. P. 28 55

Fed. R. App. P. 32 32

Fed. R. Civ. P. 1 35

Fed. R. Civ. P. 9 34

Fed. R. Civ. P. 12 ..... 1, 11, 19

Restatements

Restatement (Second) of Judgments § 49 7

Restatement (Second) of Judgments § 85 6

Legal Scholarship

Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986 29

Jurisdictional Statement

Parents agree with Spring Cook that the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. Parents also agree that Spring Cook timely filed her notice of appeal. Parents further agree that this Court has pendent jurisdiction under 28 U.S.C. § 1292(a)(1) to hear this appeal insofar as the district court's order denying Spring Cook's Fed. R. Civ. P. 12(b)(6) motion to dismiss was immediately appealable under the collateral order doctrine as to Spring Cook's assertions of each of qualified immunity and absolute immunity in the alternative. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). That is because both the Supreme Court and this Court "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Payne v. Britten*, 749 F.3d 697 (8th Cir. 2014) (cleaned up). This Court has pendent jurisdiction over such interlocutory appeals because "[q]ualified immunity is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Scott v. Harris*, 550 U.S. 372, 376 n. 2 (2007) (quoting *Mitchell*, 472 U.S. at 526).

Absolute immunity is similarly appealable at the earliest stages since it is immunity from suit. *See Vanhorn v. Oelschlager*, 502 F.3d 775, 777 (8th Cir. 2007).

The Court's pendent jurisdiction also encompasses the related issue of whether a complaint failed to state a claim, as that is a "closely related issue[] of law" to immunity. *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir. 1987).

This Court need not, however, extend its pendent jurisdiction to consider Spring Cook's novel arguments against Mother's standing, because she failed to raise that issue in the district court below. *See Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), citing *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496-97 n. 2 (7th Cir. 1993) (refusing to extend pendent jurisdiction to "collateral" legal issues of standing unrelated to qualified immunity and finding no "'compelling reasons' for not deferring the limitations questions until the end of the lawsuit"); *see also McBurney v. Stew Hansen's Dodge City, Inc.*, 398 F.3d 998, 1002 (8th Cir.2005) ("Absent exceptional circumstances we will not consider arguments raised for the first time on appeal.").

Standing is not an issue that is effectively unreviewable on appeal from a final judgment. *Howard v. Norris*, 616 F.3d 799, 802 (8th Cir. 2010). Although standing can generally be raised *sua sponte* at any time, *Sierra Club v. Robertson*, 28 F.3d 753, 757 n. 4 (8th Cir. 1994), Spring Cook's novel standing arguments raised for the first time here are unrelated to her immunity, and thus outside this Court's pendent jurisdiction, *Nebraska Beef*, 398 F.3d at 1084, nor are they "closely involved" or "inextricably intertwined" with Spring Cook's assertions of

immunity, *id.* at n.2; *but see Murphy v. Morris,* 849 F.2d 1101, 1106 (8th Cir. 1988). "The question of standing … is related only to whether [Plaintiff] may ultimately *recover* for the alleged violation and is collateral to the inquiry of whether the violation has been sufficiently plead." *Eng v. Cooley*, 552 F.3d 1062, 1069 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1047 (2010) (emphasis in original). If it otherwise affirms, this Court need not reach the issue of standing.

Statement of Issues

I. Spring Cook lacks qualified immunity because the Complaint plausibly alleges that she was motivated to retaliate against Parents for Father's speech as their minor son's next friend, to chill him from continuing to demand redress for their son's sexual abuse by a mutual colleague.

Garcia v. City of Trenton, 348 F.3d 726 (8th Cir. 2003)

Naucke v. City of Park Hills, 284 F.3d 923, 927-28 (8th Cir. 2002)

Qurashi v. St. Charles County, 986 F.3d 831, 835 (8th Cir. 2021)

II. No precedent supports Spring Cook's assertion of absolute immunity for her functions opening an administrative investigation in Parents, and then making preliminary findings of parental neglect—as those are not prosecutorial functions where there was no judicial process or sworn testimony.

Rivera v. Leal, 359 F.3d 1350, 1355 (11th Cir. 2004)

Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1373 (8th Cir. 1996)

III. This Court need not extend its pendent jurisdiction to consider Spring Cook's new argument against Mother's standing, as Spring Cook did not raise that issue in the district court, and standing is not closely related to the legal question of her immunity. In the alternative, Mother has standing because she suffered her own separate, concrete and particularized injury

caused by Spring Cook's retaliation. Spring Cook infringed Mother's First Amendment right of intimate familial association, and Mother lies within the "zone of interests" that the § 1983 statute and the First Amendment are designed to protect.

> *Abubakari v. Schenker*, No. 3:19-cv-00510, 2021 WL 1617159 at *7-10 (D. Conn. Apr. 26, 2021)
>
> *Thompson v. Adams*, 268 F.3d 609, 614 (8th Cir. 2001)

Statement of the Case

Brandon Cook, then a Scott County sheriff's deputy, was on duty, in uniform, and in his marked patrol car when he sexually abused Father J.T.H. and Mother H.D.H.'s 15-year-old son in May 2018. App. 12; R. Doc. 1, at 4. At the time, Brandon Cook and Father were fellow deputies and colleagues within the Scott County sheriff's department. App. 10, 12; R. Doc. 1, at 2, 4. Brandon Cook knew Parents' son, and had groomed him through the Sheriff's Explorer program for young people; at a crawfish boil at the County rodeo grounds; and through a smartphone app called Grindr. App. 12; R. Doc. 1, at 4. Shortly after the abuse, Brandon Cook was arrested and charged by the Missouri State Highway Patrol. App. 12; R. Doc. 1, at 4. This Court can take judicial notice[1] that after the Complaint was filed in this case, a Cape Girardeau jury found Brandon Cook guilty of felony statutory sodomy of Parents' son. The jury sentenced Brandon Cook to a prison term of two years.[2]

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[1] *See Crooks v. Lynch*, 557 F.3d 846, 858 (8th Cir 2009) (recognizing this Court may take judicial notice of public records).

[2] *State of Missouri v. Brandon L. Cook*, 18CG-CR01279 (Cape Girardeau Circuit Court, Mo.). The conviction has the effect of making the issue of Parents' abuse allegations true for the purposes of this Court's analysis under principles of collateral estoppel, since the burden of proof is higher in a criminal proceeding than a civil one. *See* Restatement (Second) of Judgments § 85, adopted by the Missouri Supreme Court, *James v. Paul*, 49 S.W.3d 678, 686 (Mo. 2001), and otherwise cited approvingly by this Court in *Ideker v. PPG Indus., Inc.*, 788 F.3d

In September 2018, Father, through counsel and as next friend of his minor son, wrote a demand letter to County officials asserting claims related to Brandon's Cook sexual abuse. App. 12; R. Doc. 1, at 4. Those claims were resolved without suit, but before they were resolved Spring Cook opened an investigation into Parents by calling out to the family home with a Scott County juvenile officer and two Highway Patrol troopers. App. 13; R. Doc. 1, at 5. Asserting that she had received a hotline call about the minor, she then repeatedly called out, interviewing the victim and other family members. App. 13; R. Doc. 1, at 5. Spring Cook is the circuit manager for the local Children's Division, a division of the Missouri Department of Social Services. App. 11; R. Doc. 1, at 3. Given the reality that Scott County deputies and CD officials (including Spring Cook) routinely work together "hand-in-glove," there is a custom and practice that child welfare investigations of local law enforcement families are referred to a CD office in another county. App. 14; R. Doc. 1, at 6. At the beginning of Spring Cook's investigation Parents, through counsel, requested both to Spring Cook and to other officials that Spring Cook recuse herself, and that the investigation be transferred

849, 853 (8th Cir. 2015). The Supreme Court recently relied on § 49 of the Restatement of Judgments. *Brownback v. King*, 141 S. Ct. 740, 748-750 (2021).

outside of Scott County.[3] App. 14; R. Doc. 1, at 6. Instead, Spring Cook proposed that the parents take the boy to a clinic to have his genitals and rectum inspected (months after the sexual abuse by Brandon Cook, and without considering the potential traumatic impact of the inspection), and that the parents submit a parenting plan. App. 15; R. Doc. 1, at 7. She also commented to Father that she would "get" his POST license.[4] App. 19, R. Doc. 1, at 11.

On January 7, 2019, still before the Brandon Cook claims were resolved, Spring Cook, as Scott County CD office supervisor, made preliminary written findings of neglect against Parents under a preponderance of the evidence standard, based on three incidents: (a) the Brandon Cook incident, (b) a second incident, initially unbeknownst to Parents, where a local adult Tae Kwan Do instructor who had taught the minor son was Facebook messaging him, giving him gifts, and ultimately having sex with him[5], and (c) a benign, age-appropriate incident where,

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[3] The involvement of local law enforcement is required by statute. RSMo. 210.145.7. While Spring Cook properly did not involve the Scott County sheriff's department in investigating one of their own deputies and his family, instead calling out to the Highway Patrol, she did not ask another circuit/county CD office to conduct the child welfare investigation.

[4] POST refers to Peace Officers Standards and Training, a program created by Missouri statute. RSMo. 590.010(4), 590.020-050, through which officers are licensed.

[5] Father took swift action to stop any further contact between his son and the Tae Kwan Do instructor upon discovering the Facebook contact. He confronted the instructor, told him that his son was a minor, and demanded that all contact cease. The instructor then assaulted Father. Using his law enforcement training, Father

with their mothers' approval, the minor son went on a date with another teenage boy at a shopping mall. App. 15-16; R. Doc. 1, at 7-8. The gravamen of Spring Cook's findings of neglect was that Parents permitted their son (by then 16 years old) to have an iPhone, access the internet, drive a car, and go on the date. App. 16; R. Doc. 1, at 8. By contrast, the juvenile officer found "no evidence" of neglect, and made written findings to that effect. App. 18; R. Doc. 1, at 10. After their own investigation, the Highway Patrol troopers found no probable cause. App. 18; R. Doc. 1, at 10.

Under RSMo. 210.152 and Missouri 13 CSR 35.31.025(2), Parents timely requested administrative review of Spring Cook's neglect finding. App. 16; R. Doc. 1, at 8. This is a two-part procedure: first, the circuit manager reviews the investigative report and findings, and either upholds or reverses the findings. App. 17; R. Doc. 1, at 9. Second, if the finding is upheld, then the review request is forwarded to the state Child Abuse and Neglect Review Board in Jefferson City. App. 19; R. Doc. 1, at 11. Spring Cook as circuit manager, however, reviewed her own investigative report and findings, thereby acting as her own rubber stamp and depriving Parents of any meaningful procedural benefit from a "second set of eyes" by a supervisor. App. 17; R. Doc. 1, at 9. The next step was the CANRB

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de-escalated the situation by laughing and retreating. Father did not report the assault.

review in Jefferson City. App. 19; R. Doc. 1, at 11. The CANRB review has none of the trappings of a quasi-judicial hearing as to either evidence or procedure: there is no hearing officer or administrative law judge, and there are no authenticated exhibits, no sworn testimony, no cross-examination, and no record or transcript. App. 19; R. Doc. 1, at 11. Rather, the review consists solely of an informal meeting of up to 20 minutes with a CD official and the accused parents before a mostly layperson board of political appointees. App. 19, 21-22; R. Doc. 1, at 11, 13-14. Pre-hearing discovery is not permitted. App. 19; R. Doc. 1, at 11. Even disclosure of the CD investigative file is not as of right. App. 19; R. Doc. 1, at 11. Here, partial disclosure was made only after written request to a State records agency, which demanded a substantial production fee. App. 19; R. Doc. 1, at 11. (The fee was later waived upon a showing of financial hardship, but then only a partial and incomplete records production was forthcoming. App. 20; R. Doc. 1, at 12.) There is a statutory right to counsel, however, which Parents exercised when they appeared before the CANRB.[6] App. 19-21; R. Doc. 1, at 11-13.

[6] In their Complaint, Parents also brought claims for prospective injunctive and declaratory relief against CD, based on Fourteenth Amendment procedural due process defects in Missouri's child abuse and neglect system as applied to parents. Particularly, Parents looked to a persuasive consensus of recent Title IX cases from other circuits involving procedural due process challenges to sexual misconduct findings. The district court dismissed those claims, declined to certify them for appeal under 28 U.S.C. § 1292(b), and they are not before this Court at least at this time.

Two days after its August 27, 2019 review, the CANRB summarily overturned Spring Cook's findings of parental neglect under the same preponderance of the evidence standard. App. 24; R. Doc. 1, at 16.

Two FBI agents later visited Spring Cook's office in March 2020, and subsequently asked Parents' daughter to come to the Sikeston police station. App. 24; R. Doc. 1, at 16. She complied, and underwent a lengthy interview about her brother's sexuality and her own sexual conduct in which she was told that she was the only family member known to "the authorities" to be cooperative. App. 225; R. Doc. 1, at 16-17. On inference, "the authorities" meant Spring Cook, as the agents had previously visited her CD office. App. 25; R. Doc. 1, at 17. The FBI then closed its investigation for lack of probable cause. App. 25; R. Doc. 1, at 17.

Parents filed their five-count Complaint on October 16, 2020. While the district court dismissed Parents' three procedural due process claims under Fed. R. Civ. P. 12(b)(6), as well as a Missouri state law claim, it found that Parents had stated a claim for First Amendment retaliation. App. 175-208; R. Doc. 47, at 1-34. The district court further denied each of Spring Cook's qualified and absolute immunity defenses, finding the law prohibiting such retaliation to be clearly established. App. 202-05; R. Doc. 47, at 28-31.

Parents allege that Father engaged in a protected First Amendment activity in writing a demand letter and making allegations against County officials related

to Brandon Cook's abuse of his son. App. 34-35; R. Doc. 1, at 26-27. Spring Cook then took adverse against Parents in finding them neglectful of their minor son. The potential damage to each parent was material. A finding of neglect would have placed Parents permanently on the state Child Abuse & Neglect Registry. App. 18-19; R. Doc. 1, at 10-11. Such a registration would have been a civil death sentence for Father's ability to continue to serve as a POST licensed law enforcement officer, and for Mother's ability to return to school teaching once her children got older. App. 19; R. Doc. 1, at 11.

Parents allege that Father's demand for redress to County officials played a part in Spring Cook's decision to investigate and make her findings of neglect; that is, Spring Cook was motivated at least in part to retaliate against Father because of his speech taken in his capacity as his son's next friend. App. 19; R. Doc. 1, at 11. A state finding of child neglect against either parent is highly stigmatic, particularly where it would deprive each parent of his or her occupation, and thus meets the "stigma plus" test, and would chill a person of ordinary firmness from engaging in speech. App. 31-32, 34; R. Doc. 1, at 23-24, 26.

The district court held that Parents had stated a plausible claim of retaliation, citing the following: Spring Cook's timing in opening her investigation seven weeks after Father asserted his claims, but before the claims were resolved; Spring Cook and Brandon Cook sharing a last name, and Spring Cook sharing a last name

with another deputy, as well as social media friendships; Spring Cook's refusal to recuse herself upon request despite a custom and practice to do so under such circumstances; Spring Cook's comment to Father about "getting" his POST law enforcement license; Spring Cook reviewing her own work upon administrative review despite the recusal request; the Juvenile Officer finding "no evidence" to support a finding of parental neglect; the Highway Patrol finding no probable cause to charge Parents; the CANRB overturning Spring Cook's findings of neglect; Spring Cook contacting the FBI after the CANRB decision to retaliate against Parents; and the FBI finding no probable cause and closing its investigation. App. 200-01, R. Doc. 47, at 26-27.

While the district court was skeptical that Parents are required to show no probable cause as an element of a First Amendment retaliation claim, as a matter of either pleading or proof, nevertheless the district court held that the pleading sufficiently alleged a lack of probable cause. App. 201, R. Doc. 47, at 27. The district court considered the following allegations: Deputy Brandon Cook, not the Parents, sexually abused the minor; Spring Cook's neglect findings were based on Parents allowing their 16-year-old son to have a smartphone with internet access, and to drive a vehicle; the son went on a benign and age-appropriate date with another minor at a shopping mall; Father confronted another alleged abuser to stop that abuser, and was assaulted by the abuser but did not report it; the CANRB

found that Spring Cook's findings were unsubstantiated; the Juvenile Officer found "no evidence" of neglect, and neither the Highway Patrol nor the FBI found probable cause to charge parents. App. 201, R. Doc. 47, at 27. As such, to the extent that no probable cause is required in a First Amendment retaliation context where there is no seizure, which is doubtful, Parents still had properly alleged the absence of probable cause. App. 201, R. Doc. 47, at 27. *See Hartman v. Moore,* 547 U.S. 250, 256 (2006); *but see Nieves v. Bartlett*___ U.S. ___, 139 S.Ct. 1715, 1722 (2019).

The district court then considered Spring Cook's immunity arguments. App. 202-05, R. Doc. 47, at 28-31. Although the district court first considered absolute immunity and only then proceeded to qualified immunity, Parents suggest that this Court has sometimes first resolved qualified immunity and declined to review absolute immunity if unnecessary. *See Lewis,* 932 F.3d at 648; *but see Ray v. Pickett,* 734 F.2d 370 (8th Cir. 1984) (comparing parole officer to police officer in function in denying absolute immunity, but ordering qualified immunity analysis on remand); *see also Murphy v. Morris,* 849 F.2d 1101 (8th Cir. 1988) (granting assistant AG absolute immunity for functions performed as state advocate). Since the two issues were raised together in this interlocutory appeal of a motion to dismiss, *cf. id.* at 1104, Parents will review qualified immunity first.

The district court held that Spring Cook lacks qualified immunity. App. 204-05, R. Doc. 47, at 30-31. Although in her district court briefing Spring Cook cited a line of Fourth Amendment seizure cases, *e.g.*, *Peterson v. Kopp,* 754 F.3d 594, 602 (8th Cir. 2014), and/or Fourteenth Amendment due process cases, *Mitchell v. Dakota Cnty. Soc. Srvcs.*, 959 F.3d 887 (8th Cir. 2020), the district court did not rely on these cases. *Cf.* App. 93-94, R. Doc. 12, at 51-52; App. 167, R. Doc. 42, at 24; App. 204-05, R. Dist. 4, at 30-31. The gravamen of Parents' First Amendment claim is that Spring Cook had an improper retaliatory motive in making her findings of parental neglect, in that it was intended to impede Parents' access to the courts. App. 198-99, R. Doc. 47, at 24-25. The district court further found that at least five precedents[7] of this Court have clearly established the right at the correct level of particularity: which defines the question as whether a reasonable official would believe it permissible to make findings of child neglect against parents for making claims against the government related to the sexual abuse of their child by a government official. App. 47, R. Doc. 47, at 31. Therefore, the district court held that the pleading did not on its face establish that Spring Cook has qualified immunity. App. 47, R. Doc. 47, at 31. The Court further held that causation is a "fact-intensive" issue, and that Spring Cook's

[7] *Cody v. Weber*, 256 F.3d 764, 771 (8th Cir 2001); *Goff*, 7 F.3d at 746; *Naucke*, 284 F.3d at 927-28; *United States v. Catlett*, 584 F.2d 864, 867 (8th Cir. 1978); *Garcia*, 348 F.3d at 729.

arguments against causation went to materials not yet in the record, rather than the sufficiency and plausibility of the pleading, and therefore dismissal was inappropriate. App. 199, R. Doc. 47, at 25.

The district court also held that social workers such as Spring Cook lack absolute immunity for the function of opening and making preliminary findings in child abuse and neglect investigations as those are not prosecutorial. App. 202-03, R. Doc. 47, at 28-29. The district court distinguished between the investigative functions of initially collecting evidence to recommend probable cause, versus the prosecutorial function of preparing evidence for court or testifying in court. App. 202-03, R. Doc. 47, at 28-29. While noting that social workers have absolute immunity for their sworn testimony in court proceedings, the district court distinguished that from Spring Cook's functions here in opening an investigation, making preliminary findings of neglect, and telephoning into the CANRB review in Jefferson City. App. 203, R. Doc. 47, at 29. The district court further held that Spring Cook cited no authority to extend absolute immunity to administrative investigations. App. 203, R. Doc. 47, at 29.

This interlocutory appeal by Spring Cook timely followed. App. 209-10, R. Doc. 56-57. In her appeal, Spring Cook adds a new challenge to Mother's standing to allege retaliation, an issue she failed to raise in the district court.

Summary of Argument

Spring Cook injured Parents with State findings of child neglect against each of them after Father, as their son's next friend, spoke out about his sexual abuse by their mutual colleague Brandon Cook while on duty and in uniform. She did so weeks after Father demanded redress from County officials with whom Spring Cook routinely worked "hand-in-glove." The district court correctly found that the pleading did not entitle Spring Cook to qualified or absolute immunity. This Court should affirm.

First, Spring Cook lacks qualified immunity because it was clearly established that a reasonable official could not make findings of child abuse in retaliation for parents making claims against county officials related to the sexual abuse of their child. In the alternative, this is an egregious and obvious case. To the extent this Court will also consider whether Parents have stated a claim, then Parents have plausibly pled First Amendment retaliation.

Second, Spring Cook lacks absolute immunity because she was functioning as an investigator when she opened an investigation and made findings of child neglect—none of which involved prosecutorial functions within a judicial proceeding. Nor did she testify in a judicial process. The Supreme Court and this Court have not extended absolute immunity in analyzing Spring Cook's investigative functions here, and this Court's recent Fourth Amendment precedent

Stanley v. Hutchinson is easily distinguishable on the facts and the law from the First Amendment claim here. No. 18-22, 2021 WL 4071912 at *1 (8th Cir. Sept. 8, 2021). *Stanley* involved the seizure of a child from the family home, and sworn testimony by the social worker in a probable cause judicial hearing and later during contested, quasi-judicial administrative proceedings before an administrative law judge. *See* Ark. Code § 12-18-801, *et seq*. Those acts by Defendant were prosecutorial in nature.

Third, Spring Cook's new argument against Mother's standing is not closely involved or inextricably intertwined with the immunity issues, and therefore need not be decided within the Court's pendent jurisdiction. If this Court will review merits, however, then Mother has standing because she was directly injured by Spring Cook's conduct in finding her neglectful of her child, and at least four precedents of this Court support her prudential standing in the First Amendment context. Further, the Supreme Court has recognized a parent's standing to assert First Amendment intimate association rights within the family, and Mother lies within the zone of interests protected by the § 1983 statute against retaliation for First Amendment speech.

Argument

Standard of Review

An interlocutory order denying a motion to dismiss based on qualified immunity is immediately appealable. *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009). The standard of review for each issue is *de novo*. *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005).

This Court's review of the denial of a Rule 12(b)(6) motion to dismiss based on qualified immunity is limited to the facts alleged in the complaint, which the Court accepts as true and view most favorably to the plaintiffs. *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013). The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *Wilson v. Arkansas Dep't of Hum. Servs.*, 850 F.3d 368, 371–72 (8th Cir. 2017) (cleaned up). "[D]efendants seeking dismissal under Rule 12(b)(6) based on an assertion of qualified immunity 'must show that they are entitled to qualified immunity on the face of the complaint.'" *Carter v. Huterson*, 831 F.3d 1104, 1107 (8th Cir. 2016) (quoting *Bradford*, 394 F.3d at 1015).

I. Spring Cook lacks qualified immunity because the Complaint plausibly alleges that she was motivated to retaliate against Parents for Father's speech as their minor son's next friend, to chill him from demanding redress for their son's sexual abuse by a mutual colleague.

A. The law was clearly established at the requisite level of particularity prohibiting a reasonable official from retaliating against parents for making claims against county officials related to the sexual abuse of their child; in the alternative, the misconduct is so egregious and obvious to give fair warning.

In ordering its analysis, this Court often first determines qualified immunity issues. *See, e.g., Lewis v. City of St. Louis*, 932 F.3d 646, 648 (8th Cir. 2019).

Qualified immunity protects public officials from § 1983 damage actions if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court analyzes "(1) whether the official's conduct violated a constitutional right; and (2) whether the violated right was clearly established." *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017). Parents begin their discussion with an analysis of whether the right was clearly established, the second prong of analysis. before turning to the constitutional violation and the claim itself. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Spring Cook asserts that the law was not clearly established that her retaliation against Parents for Father's exercise of his free speech rights was prohibited by the First Amendment. The Supreme Court has held that a defendant carries the burden of proof for immunity as an affirmative defense. *Gomez v.*

Toledo, 446 U.S. 635 (1980). The Court is among those circuits holding, however, that the burden shifts to a plaintiff to demonstrate that the law is clearly established. *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th. Cir 2014). A recent petition for certiorari to the Supreme Court from this Court illustrates that this circuit split as to burden of pleading has never been resolved. *Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, ___U.S.____, No. 19-656 (U.S. June 15, 2020).

A clearly established right is one in which existing legal precedent has placed the statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *accord Hamner v. Burls*, 937 F.3d 1171, 1177 (8th Cir. 2019). The state of the law at the time of the alleged violation must give officials "'fair warning' their conduct was unlawful." *Sisney v. Reisch*, 674 F.3d 839, 845 (8th Cir. 2012) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). There must be "precedent," "controlling authority," or a "robust consensus of cases of persuasive authority." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (internal citations and quotations omitted). There may also be the "rare 'obvious case' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Id.* at 590, quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *see also Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020) ("particularly egregious" conditions should have

provided notice to any reasonable officer). Although courts are cautioned against defining "clearly established law" with an excessive degree of generality, *al-Kidd*, 563 U.S. at 742, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor*, 141 S.Ct. at 52 (quoting *Hope*, 536 U.S. at 741). As such "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. The critical determination is "whether the state of the law" when defendants engaged in the conduct at issue provided "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id*.

A citizen's right to exercise First Amendment freedoms without facing retaliation from government officials is clearly established by the Supreme Court and this Court. *Baribeau v. City of Minneapolos*, 596 F.3d 465, 481 (8th Cir. 2010); *see also Hartman*, 547 U.S. at 256. That is even true in the case of Fourth Amendment claims (not present here) where there is probable cause for arrest, but "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727.

Spring Cook argues that her retaliatory conduct was not clearly established at the requisite level of particularity. Cook brief at 42-44. She cites to a Fourteenth Amendment deliberate indifference case that immunized an officer from an affirmative duty of notice to third parties of a potential suicide risk, *Perry*

v. Adams, 993 F.3d 584, 587 (8th Cir. 2021), and a Fourth Amendment case involving the use of force in a deadly car chase, *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). But these are not the correct type of immunity precedents for speech retaliation, and do not implicate the First Amendment.

Spring Cook's citation to *Stanley v. Hutchinson* is also unpersuasive, as that case concerned a Fourth Amendment seizure of children under exigent circumstances after a warrant search of a family home. Although a social worker believed that her report of abuse was unsupported by the evidence, she was pressured by a superior for "political" reasons to give false testimony in a probable cause judicial hearing and in subsequent quasi-judicial administrative proceedings before an administrative law judge. *See* Ark. Code § 12-18-801, *et seq*. This Court gave the social worker qualified immunity noting the search of the home was pursuant to warrant, and there were exigent circumstances leading to a belief that the children were in imminent danger. 2021 WL 4071912, No. 18-22 at *11-12. This Court also gave her absolute immunity for her perjured testimony in the probable cause judicial hearing and subsequent quasi-judicial administrative proceedings before the administrative law judge, *id.* at *13-14. *Stanley* trod no new ground, merely affirming existing precedent, *e.g*, *Thomason*, 85 F.3d at 1373. *Stanley* also presented no First Amendment claim before this Court.[8]

[8] The Stanleys abandoned their First Amendment claim on appeal. *Stanley* at n. 4.

By contrast, here there was neither warrant, seizure, nor exigent circumstances, because the sexual abuse occurred months before. Nor were there any judicial or quasi-judicial proceedings before an administrative law judge where Spring Cook testified in a prosecutorial function. Spring Cook provided no sworn testimony. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997); *Rivera v. Leal*, 359 F.3d 1350, 1355 (11th Cir. 2004) ("The sworn /unsworn distinction is more than critical; it is determinative.").

True, in the Fourth Amendment context, both the Supreme Court and this Court have repeatedly emphasized that particularity is required to give fair warning to government officials who otherwise effect searches and seizures in the course of their duties. *See, e.g.*, *Kiesling v. Holladay*, 859 F.3d 529, 535 (8th Cir. 2017) (relying on *Messerschmidt v. Millender*, 565 U.S. 535 (2012)). Even then, however, it is not necessary, of course, that the very action in question has previously been held unlawful. *Thompson v. Monticello, Ark.*, 894 F.3d 993, 999 (8th Cir. 2018) (quoting *Dean v. Searcey*, 893 F.3d 504, 518 (8th Cir. 2018)).

Such particularity as to the content of the speech or the government official to whom the speech is directed is not, however, the qualified immunity question presented in a First Amendment retaliation claim. The clearly-established right against First Amendment retaliation is not dependent on the content of the speech, or the government official to whom the speech was directed. The district court

defined the question at a relatively specific level: whether a reasonable official might have believed that it was permissible to make findings of child neglect in retaliation for parents making claims against county officials related to the sexual abuse of their child. App. 204-05, R. Doc. 47, at 30-31.

This Court has repeatedly held that the right to be free from retaliation for exercising the right to expression is clearly established. "It is well-settled that the 'as a general matter[,] the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … on the basis of his constitutionally protected speech.'" *Solomon v. Petray,* 795 F.3d 777, 797 (8th Cir. 2015) (internal citations omitted). This Court has repeatedly affirmed the right at this level of particularity, and required no more. *See, e.g., Qurashi v. St. Charles County,* 986 F.3d 831, 835 (8th Cir. 2021) (denying qualified immunity to officer who tear-gassed TV reporters filming Ferguson protests, despite lack of precedent on all fours).

The district court surveyed cases that hold as much in a variety of contexts. The prohibition on First Amendment retaliation is clearly established in the context of a prisoner filing a lawsuit, *Goff v. Burton,* 7 F.3d 734 (8th Cir. 1993); criticism of fire department policies, *Naucke v. City of Park Hills,* 284 F.3d 923, 927-28 (8th Cir. 2002); and a shopkeeper complaining to a mayor about sidewalk cyclists, *Garcia v. City of Trenton,* 348 F.3d 726 (8th Cir. 2003). Spring Cook tries to

distinguish these by stating that she is a third-party actor, and not the County government official to whom the protected speech was directed. But that does not give her immunity, because it was also clearly established that a government official may not retaliate for a citizen's speech against another official. *See, e.g., Solomon,* 795 F.3d at 797 (denying marshals qualified immunity for assaulting prisoner who wrote threatening letter to judge). Spring Cook also does not get immunity for Mother because she retaliated against both Father and Mother for only Father's speech. *See Naucke,* 284 F.3d at 929 (affirming punitive damages for retaliation against husband and brother for wife/sister's speech).

The pleading also properly alleges that Father was not speaking his claims pursuant to his official duties as a Sheriff's deputy. *Cf. Mogard v. City of Milbank, 932* F.3d 1184, 1189 (8th Cir. 2019) (officer's complaint made in the scope of his duties as an employee, not about a matter of public concern as a citizen). Rather, Father was speaking out as next friend of his minor son—that is, as a parent—to vindicate his son's rights. *See, e.g., McCann v. Fort Zumwalt School Dist.,* 50 F.Supp.2d 918 (E.D. Mo. 1999) (parents acting as next friend to vindicate their children's speech rights at school); *Westside Community Bd. of Ed. v. Mergens,* 496 U.S. 226, 233 (1990); *Ward v. Santa Fe Independent School District,* 393 F.3d 599, 601 (5th Cir. 2004).

Admittedly, the Eighth Circuit has not considered a First Amendment claim where a social worker found parents to be neglectful in retaliation for a parent making claims about their minor child's abuse by a government official who was a colleague of both the social worker and the parent. An exact match, however, is not required if the constitutional issue is "beyond debate." *al-Kidd*, 563 U.S. at 741. And precedents from other circuits are in accord. *See, e.g., Malik v. Arapahoe County*, 191 F.3d 1306, 1315-16 (10th Cir. 1999) (denying qualified immunity and finding that seizure of child was retaliation against mother for retaining an attorney).

Sexual abuse of a minor by an on-duty, uniformed police officer in his patrol car is clearly established to violate the substantive Due Process Clause of the Fourteenth Amendment because it is "an egregious, nonconsensual entry into the body which [i]s an exercise of power without any legitimate governmental objective." *S.M. v. Lincoln Cnty.*, 874 F.3d 581, 584 (8th Cir. 2017) (internal citation omitted). The underlying conduct here, sexual abuse of a minor, is also clearly established to be a matter of public concern. *See, e.g., Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015) (finding sexual abuse by priests to be a matter of public concern). Reporting such abuse is a beyond debate a First Amendment activity. This Court has denied qualified immunity to officials for arguably less consequential speech. *Hoyland v.*

McMenomy, 869 F.3d 644, 656-68 (8th Cir. 2017) (no qualified immunity for arrest of husband who videotaped arrest of his wife); *Chestnut v. Wallace* , 947 F.3d 1085, 1090-91 (8th Cir. 2020) (denying qualified immunity to officer who detained a man observing an arrest), relying on *Walker v. City of Pine Bluff* , 414 F.3d 989, 992-93 (8th Cir. 2005) (clearly established right to watch police-citizen interactions at a distance and without interfering as of June 1998); *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 984-85 (8th Cir. 2019) (denying qualified immunity to officer who arrested a man who drove by him during a traffic stop and yelled an expletive), relying on *Hartman*, 547 U.S. at 256 ("settled" that the First Amendment prohibits retaliatory actions against speech as of 1988); *Peterson*, 754 F.3d at 603 (denying qualified immunity to officer who pepper-sprayed arrestee after he asked for a badge number); *Small v. McCrystal*, 708 F.3d 997, 1008-09 (8th Cir. 2013) (denying qualified immunity to officers who arrested and prosecuted witnesses who expressed verbal "displeasure" about an arrest); *Copeland v. Locke*, 613 F.3d 875, 880 (8th Cir. 2010) (denying qualified immunity because "[n]o reasonable police officer could believe that he had arguable probable cause" to arrest an individual for verbally challenging an officer during a traffic stop); *Gainor v. Rogers*, 973 F.2d 1379, 1388 (8th Cir. 1992) (denying qualified immunity to officers who arrested a man carrying a cross after he argued with them); *see also Villarreal v. City of Laredo, Tex.*, No. 20-40369 (5th Cir. Nov. 1,

2021), citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (First Amendment prohibits arrest for speech content of "'You are a God damned racketeer' and 'a damned Fascist'"); *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) ("In 1990 when [the defendant] was arrested for his use of the 'f-word,' it was clearly established that speech is entitled to First Amendment protection."); *Buffkins v. City of Omaha*, 922 F.2d 465, 467 (8th Cir. 1990) ("I will have a nice day, asshole."). Judge Higginson of the Fifth Circuit noted how "[t]he original design of the First Amendment petition clause . . . included a governmental duty to consider petitioners' grievances." Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 142–43 (1986).

Based on this robust consensus of cases of persuasive authority, it is clearly established that an official taking action in retaliation for First Amendment protected speech is a constitutional violation. A reasonable official would have understood that finding parents to be neglectful of their minor child in retaliation for one parent's claims about his sexual abuse by a law enforcement colleague is impermissible. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the alternative, the allegations in the Complaint are so egregious and obvious that any reasonable official would have had fair warning. *Hope*, 530 U.S. at 741; *Taylor*, 141 S.Ct. at 54; *see also Hawkins v. Holloway*, 316 F.3d 777, 788

(8th Cir. 2003) (supervisor's alleged conduct so far beyond the bounds of the performance of his official duties that the rationale underlying qualified immunity is inapplicable); *accord. Moran v. Clarke*, 359 F.3d 2058 (8th Cir. 2004) (denying qualified immunity to officers who manufactured evidence and used questionable procedures in an attempt to scapegoat a fellow officer). In the First Amendment retaliation context, the Supreme Court recently denied qualified immunity to officers who seized a woman who dropped to her knees in prayer despite the lack of a factual precedent. *Sause v. Bauer*, 138 S. Ct. 2561, 2562 (2018) (per curiam).

This was not the type of factual situation where a police officer was faced with the split-second decision to use force in a dangerous setting. Nor was it a situation where a child was in imminent danger of harm from his parents, and there was even reasonable suspicion of abuse of neglect sufficient to seize the child and remove him from the family home under emergency circumstances. Spring Cook had the luxury of multiple call-outs to the family home to hatch her retaliatory scheme. "When it comes to the First Amendment, . . . we are concerned about government chilling the citizen—not the other way around." *Horvath v. City of Leander*, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *cf. Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of cert.) (contrasting calculated choices by civilian

officials from police officers making split-second decisions to use force in a dangerous setting).

B. Parents have plausibly pled their claim for First Amendment retaliation

To prevail on their First Amendment retaliation claim, Parents must show: (1) they engaged in protected activity; (2) Spring Cook caused an injury to them that would chill a person of ordinary firmness from continuing the activity; (3) and a causal connection between the retaliatory animus and injury. *See Quraishi*, 986 F.3d at 837, citing *Baribeau*, 596 F.3d at 481. To establish the causal connection, Parents must show they were "singled out" because of Father's exercise of constitutional rights. *Id.* Parents must show a causal connection between a defendant's retaliatory animus and their subsequent injury. *Osborne v. Grussing*, 477 F.3d 1002, 1005 (8th Cir. 2007) (cleaned up). Retaliation need not have been the sole motive, but it must have been a "substantial factor" in the decision. *Kilpatrick v. King*, 499 F.3d 759, 767 (8th Cir. 2007) (quoting *Wishnatsky v. Rovner*, 433 F.3d 608, 613 (8th Cir. 2006)). Parents must show that the officials' "adverse action caused [them] to suffer an injury that would 'chill a person of ordinary firmness' from continuing in the protected activity.'" *Williams v. City of Carl Junction*, 480 F.3d 871, 878 (8th Cir. 2007) (quoting *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001)). Parents plausibly pled each element.

i. Father's speech was a constitutionally protected activity on a matter of public concern

On September 7 and 17, 2018, Father, through counsel and as next friend of his minor son, asserted but did not file claims against the County related to the underlying occurrence.[9] App. 12, R. Dist. 1, at 4. Scott County deputies routinely work "hand-in-glove" with Spring Cook. App. 14, R. Dist. 1, at 6.

Spring Cook argues that these allegations are conclusory and lack factual support, that Mother did not engage in any protected speech, and that such speech was on a matter of purely private interest.

Spring Cook's argument elides other part of the Complaint, and misstates the standard of review. Here, the Complaint states the facts of the underlying occurrence that formed the basis for Father's speech when read as a whole, and not just the paragraphs under Count III. The facts of Brandon Cook's sexual abuse, and Spring Cook's investigation and findings, are elaborated in great detail. A reasonable inference is that those details were furnished in Father's complaint to the County, and indeed they were. Given the timing of the Spring Cook's investigation and findings, the fact that four other investigating entities found either "no evidence" or no probable cause for parental neglect or criminality, and

[9] A state court judge later approved the resolution in a friendly suit since a minor was involved. *J.T.H., et al. v. Scott County*, 19MI-CV00222 (Mississippi County Circuit Court, Missouri, April 16, 2019).

the lack of objective grounds for her findings, coupled with her refusal to recuse herself from the investigation of a law enforcement colleague despite request, and her comment about "getting" Father's POST license, there is "factual content" in the pleading "that allows the court to draw the reasonable inference" that Spring Cook is responsible for the retaliation misconduct alleged. *In re SuperValu, Inc.*, 925 F.3d 955, 962 (8th Cir. 2019). That is, she was motivated to retaliate against Parents because of Father's speech; put another way, Father's claims about their colleague's sexual abuse of his son played a part in her making findings of child neglect against Parents in order to chill Father from continuing to seek redress.

This is not a case where there was "some" evidence of child neglect leading to the child's abuse. Rather, this is a "no evidence" case. Accordingly, this is not a case where the district court found the pleading to be "just shy" of plausibility, but expected discovery would weed out groundless entitlement to relief. *Cf. Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 559 (2007).

This Court can take judicial notice of the truth of Father's allegations to the extent they encompass Brandon Cook's sexual abuse of the minor son. Thus Spring Cook's repeated use of the term "allegations," in quotation marks, is misplaced if meant to imply that Brandon Cook's underlying sexual misconduct is still controverted. It is not: a jury found him guilty beyond a reasonable doubt. *See* n. 2 above.

In the alternative, this Court should remand with direction to Parents to plead the details of Father's speech with greater particularity. Parents note, however, that there is no heightened pleading requirement, as there is no fraud or mistake element to their First Amendment claim. *Cf.* F. R. Civ. P. 9(b). The Supreme Court and this Court have rejected heightened pleading requirements generally for § 1983 claims. *Johnson*, 574 U.S. at 11; *see also Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005).

Secondarily, Spring Cook appears to deny that the First Amendment applies to Father's speech, or that it was a matter of public concern. Cook brief at 32-34. As to the former, she cites to a zoning challenge involving an adult business seeking to sell sex toys near churches, daycares, and residences. *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951 (8th Cir. 2019). This Court held that the commercial sale of sex-toys—without anything more as to expressive conduct—is not First Amendment speech, *id.* at 957-58. By contrast, this Court has recognized that speech involving sexual abuse by persons in authority is a matter of public concern, even where the abusers are not, as here, a state actor acting under color of law. *Survivors Network of Those Abused by Priests*, 779 F.3d at 785. Here, an injury caused by a government official to a minor member of the family unit—that is the sexual abuse of a minor by an on-duty, uniformed police officer in his patrol car—is undoubtedly an egregious and obvious case of unconstitutional

misconduct. *S.M.*, 874 F.3d at 584. The underlying conduct here is also a serious felony sex crime under Missouri law, for which Brandon Cook was convicted by a jury.

As to the latter, "petition[ing] the Government for a redress of grievances" is a paradigmatic example of speech and expressive conduct under the plain text of the First Amendment. This Court has assumed without deciding that sending a demand letter by counsel together an unfiled complaint constitutes First Amendment protected speech for the purposes of analyzing a free speech claim. *Turkish Coal. of Am., Inc. v. Bruininks*, 678 F.3d 617, 620-21 (8th Cir. 2012).[10]

Since Father was speaking in his capacity as his son's next friend, and not as a sheriff's deputy on the job, then the line of cases analyzing whether a government employee's speech is on a matter of public concern is inapposite here. Cook brief at 33-34, citing, *e.g.*, *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Padilla v. South Harrison R-II School District*, 181 F.3d 992, 996 (8th Cir. 1999). Even Spring Cook herself appears to later concede as much in attempting to characterize Father's speech as a "purely private interest" rather than an employment matter. Cook brief at 34. Further, the cases she cites are

[10] The public policy implications of requiring a grievant to file a lawsuit rather than petition by sending a demand through counsel are obvious: such a process would clog up court dockets, and avoid their "just, speedy and inexpensive resolution." *Cf.* Fed. R. Civ. P. 1.

distinguishable. In *Nagle v. City of Jameston*, a police officer was disciplined after granting a press interview. He purported to speak for the police department, but instead discussed his false accusation, made on his personal Facebook page under an alias, that a colleague misused a County-owned jet ski for personal purposes. 952 F.3d 923, 926-27, 930 (8th Cir. 2020). This Court held that even assuming that the speech was made by the officer in his capacity as a citizen rather than as a government employee, his employer's termination over his conduct was warranted in light of the employer's interest in workplace harmony, *id.* at 931. Nor did it help that this Court found that Nagle was dishonest in his allegations, impairing his credibility to continue his employment, *id.*

The Supreme Court has held that while "the boundaries of the public concern test are not well defined," nevertheless it can "be fairly considered as relating to any matter of political, social, or other concern to the community … or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). The *Snyder* court differentiated its holdings as to speech with more private boundaries, such as the parody of a public figure having sex with his mother in an outhouse, or a false credit report of bankruptcy by a credit agency to five subscribers, *id.* at 452. By contrast, a police officer who sexually abuses a minor while on the job is of broad interest to society at large. The mere fact that

Father's speech implicated his son's interest does not lessen the public concern of the speech. This Court has applied *Connick* for the proposition that "One's personal gain from speech does not eliminate constitutional protections from speech that is otherwise political." *Darnell v. Ford*, 903 F.2d 556, 563 (8th Cir. 1990) (citing 461 U.S. at 147).

ii. An ordinary person of reasonable firmness would be chilled from speaking after a retaliatory State investigation and finding of child neglect

Spring Cook next argues that her retaliatory conduct would not chill an ordinary person of reasonable firmness from speaking. She frames her alleged retaliatory conduct to be only her finding of child neglect. Parents quarrel with that characterization because both their Complaint, App. 13-17, 23-24, R. Dist. 1, at 5-9, 15-16, and the district court's opinion, App. 199-201, R. Dist. 47, at 25-27, detail a course of investigatory conduct over several months that *in itself* would be chilling, even before Spring Cook's initial findings of child abuse and her subsequent affirmation of her own findings upon self-review in her capacity as circuit manager. "Where the use of coercive power is threatened, First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech. The exercise of First Amendment freedoms may be deterred almost as potently by the threat of sanctions as by their actual application." *Aebisher v. Ryan,* 622 F.2d 651, 655 (2d

Cir. 1980) (citations omitted); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The timing is of great significance to the analysis: Spring Cook's investigations occurred just seven weeks *after* Father first spoke out about his Brandon Cook's sexual abuse and made claims to County officials, but *before* those claims were resolved. *Cf. Littrell v. City of Kansas City*, 459 F.3d 918 (8th Cir. 2006) (finding alleged retaliation over six months from date of speech to be speculative absent other evidence). A reasonable inference is that Spring Cook retaliated because of Father's allegations against a police officer and a sheriff's department with whom she worked hand-in-glove, in order to pressure him to stop speaking and to abandon his claims for redress of his grievances.

Again, Spring Cook's cases are distinguishable. In *Naucke*, this Court found that City officials' "offensive, unprofessional and inappropriate" comments would not deter a person of ordinary firmness from continuing to speak out—which indeed the citizen continued to do, 284 F.3d at 927-28. By contrast, the citizen's husband and brother, who were fired from their City jobs, *did* have a cause of action, *id.* at 929-30.

Spring Cook's conduct would chill a person of ordinary firmness from continuing to demand redress. As Judge Posner has observed in his oft-quoted opinion in *Bart v. Telford*, "since there is no justification for harassing people for

exercising their constitutional rights [the effect on freedom of speech] need not be great in order to be actionable." 677 F.2d 622, 625 (7th Cir. 1982); *accord. Garcia*, 348 F.3d at 729 (jury question whether $35 in parking tickets was sufficiently retaliatory to inhibit merchant's ongoing complaints to city about its failure to cite sidewalk cyclists).

Parents respectfully disagree with Spring Cook's characterization that they are advocating the proposition "any child abuse or neglect investigation by itself would chill a person of ordinary firmness from speaking." Rather, Parents' allegations are made under the totality of the circumstances here, where on inference Spring Cook was motivated at least in part to chill Father from continuing his complaint as to their mutual law enforcement colleague.

iii. Since this is not a seizure case, then But-For causation (or lack of Probable Cause) is not an element of the First Amendment claim

The Supreme Court has recently clarified the logic of *Hartman* to hold that Fourth Amendment claims (not present here) may lie where there is probable cause for arrest, but "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727 (2019) (citing 547 U.S. at 259. That is a tougher standard than need be pled here, in that it requires the seizure (typically, an arrest) to have the retaliatory motive to be the but-for cause of the seizure. The Supreme Court gave the hypothetical of a rarely-enforced jaywalking law being enforced to arrest only police misconduct protestors

to illustrate an example of where there can be a causal connection between the retaliatory animus and the injury, *id.*

Spring Cook made findings of child neglect under a preponderance of the evidence standard, but did not seize the minor. The district court accordingly applied Supreme Court and this Court's precedents in finding that for First Amendment retaliation that Parents need only plead that Spring Cook's "adverse action was motivated *at least in part* by … Father's protected activity." App. 27, R. Dist. 47, at 27.

That is in accord with other First Amendment holdings. This Court has repeatedly required a plaintiff alleging a causal connection to show only that he was "singled out" because of his speech, *Quraishi*, 986 F.3d at 837 (quoting *Baribeau*, 596 F.3d at 481). Retaliation need not have been the sole motive, but it must have been a "substantial factor" in those decisions. *Wishnatsky*, 433 F.3d at 613. Where there is a well-pled complaint, it is not until summary judgment that a plaintiff must present "affirmative evidence from which a jury could find" that his constitutionally protected conduct informed the defendants' decisions and caused them to place and retain his name on the Register. *Kilpatrick*, 499 F.3d at 767 (8th Cir. 2007) (citing *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); *Osborne v. Grussing*, 477 F.3d 1002, 1005 (8th Cir. 2007)). Hence the district court's statement in *dicta* that causation may be further proved based on materials outside

the scope of the pleadings was not error, but rather a commonsensical observation of a difference between pleading and proof. App. 28, R. Dist. 47, at 28.

Nevertheless, in the alternative, the district court correctly observed that Parents plausibly pled a lack of probable cause—even if that is not an element of their First Amendment claim absent a seizure. Parents were not the abusers. Brandon Cook and the Tae Kwan Do instructor were. The former was arrested (and has since been convicted by a jury). As to the latter, Father swiftly stopped further contact. Parents routinely allow teenage boys to have an iPhone with internet access and to drive a family car. Parents routinely allow teenagers to go on benign, age-appropriate dates to a shopping mall. The CANRB overturned Spring Cook's findings of neglect. The Juvenile Officer found "no evidence" of parental neglect. The FBI closed its investigation for lack of probable cause, as did the Highway Patrol. In sum, at the pleading stage, a reasonable official in Spring Cook's position would not objectively find child neglect, and indeed there is ample extrinsic evidence that she lacked probable cause.

Upon appeal, for the first time, Spring Cook argues for the lower "reasonable suspicion" standard based on *Stanley,* No. 20-1822. But as discussed above, *Stanley* is a Fourth Amendment case involving exigent circumstances for a seizure after a home search pursuant to a warrant, *id.* Indeed, Spring Cook herself has also argued in the district court below that her findings must as a matter of

state law be made under a "preponderance of the evidence" standard, which is more demanding than probable cause. App. 60, R. Dist. 12, at 18. *Jamison v. State*, 218 S.W.3d 399, 411 (Mo. 2007).[11] By contrast, the other investigators found either "no evidence" or no probable cause. App. 18, 25, R. Dist. 1, at 10, 17. While not required to do to state a claim, Parents have plausibly alleged a lack of probable cause.

iv. Spring Cook objectively lacked sufficient non-retaliatory grounds for her findings

Spring Cook correctly observes that in some contexts the Supreme Court has refused to find liability where sufficient nonretaliatory grounds exist. But these contexts are distinguishable to situations where there are balancing tests between government interests: *e.g.*, government employment where the burden shifts to the employer to show by a preponderance of evidence that it would take the same decision in the absence of protected speech, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284, 287 (1977); or, retaliatory criminal prosecutions where there was no probable cause, *Hartman*, 547 U.S. at 265-66, *overruled in part*, *Nieves*, 139 S.Ct. at 1727 (creating exception for circumstances

[11] *Compare* RSMo. 210.110(13) ("Preponderance of the evidence" is "the degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it or evidence which as a whole shows the fact to be proved to be more probable than not.") with RSMo. 210.110(10) ("Probable cause" exists when the available facts "would cause a reasonable person to believe a child was abused or neglected" when viewed in light of the surrounding circumstances.).

where officers have probable cause to make arrests, but typically exercise their discretion not to do so). Spring Cook then argues (a) that she had either probable cause or the heightened standard of a preponderance of the evidence, and (b) this Court should extend the Supreme Court's reasoning in other contexts to the context here.

Neither employment nor criminal justice concerns were implicated in Spring Cook's decision to investigate and make child neglect findings. That alone undermines the rationales for extending the logic of *Mt. Healthy* or *Nieves* to the context of investigating child abuse and neglect. *Compare Mt. Healthy*, 429 U.S. at 284 (balancing a teacher's protected speech rights as citizen with the State's employment interest in an efficient public service), with *Nieves*, 139 S.Ct. at 1727 (discussing risk that some police officers may exploit the arrest power for "even a very minor criminal offense" as a means of suppressing speech).

Nor was Spring Cook faced with the decision of whether or not to remove the child from the home on an emergent basis. *Cf. Mitchell v. Dakota Cnty. Soc. Servs.*, 959 F.3d 887, 900 (8th Cir. 2020) (finding no conscience-shocking conduct where abuse suspicion and removal was supported by babysitter hotline call; bruising on child's body; child's statements that he was repeatedly beaten with a belt; sibling's statement that he feared for child's safety is returned to parent; mother's report of history of abuse). There was no intervening court order or

judicial process that took the investigation out of Spring Cook's control. *Id.* at 901. There were no exigent circumstances.

Good faith or non-retaliatory grounds are not dispositive of her liability. Indeed, to the extent this argument extends to Spring Cook's subjective good faith, that is generally irrelevant. *Swint v. City of Wadley, Ala.*, 5 F.3d 1435, 1441 (11th Cir. 1993); *accord. Caudill v. Hollan*, 431 F.3d 900, 912 (6th Cir. 2005); *see also Williams v. Herron*, 687 F.3d 971, 977 (8th Cir. 2021) (subjective knowledge not determinative in government employment context). By contrast, her bad faith or improper retaliatory motive is relevant, as the district court correctly held. App. 201, R. Dist. 47, at 27. Every circuit has held that motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation, as here in the First Amendment retaliation context. *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994). It is also problematic that Spring Cook was a supervisor in charge of the Scott County CD office. *See, e.g., Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1257 (10th Cir. 2005) ("Defendants in this case were not mere minions obeying commands, but rather were directors and supervisors.").

As discussed above, there was no probable cause. In that respect, *Nieves* actually supports Parents' claim, in that Missouri parents routinely permit their

teenage offspring to engage in such conduct, but are neither investigated nor found to be neglectful of their children under such facts.

No doubt any parent has a challenge in supervising the conduct of a 16-year-old boy, developmentally old enough to engage in sexual behaviors. The Supreme Court has noted as much in overturning regulation of speech depicting teenage sexuality. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002) (noting that 16 is the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations). But Spring Cook's relentless pursuit of Parents undermines her arguments that she was objectively focused on child abuse and neglect, rather than retaliating for speech against a Brandon Cook, a law enforcement colleague with whom she worked "hand-in-glove."

II. No precedent supports Spring Cook's assertion of absolute immunity for her functions opening an administrative investigation into Parents, and then making preliminary findings of parental neglect—as those are not prosecutorial functions where there was no judicial process or sworn testimony.

Spring Cook asserts she is entitled to absolute immunity for her decision to open an administrative investigation into Parents, and then making administrative findings of child neglect against them—all without judicial process or sworn testimony. She analogizes her function here to that of a prosecutor bringing charges in court, and making emergency removal and custody decisions. Parents

agree with her that absolute immunity analysis turns on functionality. *Forrester v. White*, 484 U.S. 219, 229 (1987).

Social workers did not exist in 1871 when the § 1983 statute was enacted. Circuits are split on their immunity for false or misleading statements in court documents or proceedings. *Compare B.S. v. Somerset County*, 704 F.3d 250 (3d Cir. 2013); *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2016), with *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008); *Hardwick v. County of Orange*, 844 F.3d 1112 (9th Cir. 2017).

Spring Cook does not argue with particularity how any of her acts were functionally prosecutorial. She opened an administrative investigation, and she made findings of child neglect. She then administratively reviewed her own work after Parents requested administrative review, and then she appeared by telephone at the CANRB review in Jefferson City. Perhaps the latter is the closest to the function of testifying in court, but it was not sworn testimony in a judicial or quasi-judicial adversarial proceeding. *Kalina*, 522 U.S. at 131 (1997); *Rivera*, 359 F.3d at 1355. It was a mere informal presentation before a layperson review board pursuant to RSMo. 210.153 and 13 CSR 35-31.025.

None of Spring Cook's investigatory and declarative functions here were an "integral part of the judicial process." *Cf. Imber v. Pachtman*, 424 U.S. 408, 413-14, 424 (1976) (prosecutor immune from claims he knowingly used false

testimony and suppressed material evidence at trial); *Van Kamp v. Goldstein,* 555 U.S. 335, 347-48 (2009) (prosecutor immune for failure to maintain adequate filing system of impeachment material about jailhouse informants). This Court has similarly limited prosecutorial immunity to acts within the proper scope of their prosecutorial capacity, not their investigative capacity. *Barnes v. Dorsey*, 480 F.2d 1057, 1060 (8th Cir. 1973) (immunity for suppressing potentially exculpatory police report at trial). Spring Cook argues that executive agency officials can claim absolute immunity with respect to prosecutorial-like functions, citing *Butz v. Economous,* 438 U.S. 478, 515 (1978). But *Butz* is limited by the Supreme Court to those situations where an agency official functions like a prosecutor before an agency Commission with quasi-judicial aspects in which the respondent may elect to present evidence in a trial of his case before an impartial trier of fact, *id.* at 516-17. Here, by contrast, there was no agency adjudication of Spring Cook's investigation through a quasi-judicial process. Nor is the question presented here whether Spring Cook's testimony in state court merits absolute immunity. Parents did not exercise their right to Missouri circuit court review under RSMo. §§ 210.118; 210.155.2. Immunity questions as to testimony by Spring Cook in that sort of proceeding are not presented here.

This Court has held that absolute immunity applies to social workers only where judicial proceedings have commenced. *See Thomason v. SCAN Volunteer*

Servs., Inc., 85 F.3d 1365, 1373 (8th Cir. 1996) ("To the extent [a state authorized child welfare agency and its worker] are sued for initiating judicial proceedings, [the worker's] role was functionally comparable to that of a prosecutor"). Spring Cook cites to an old California district court opinion, *Mazor v. Shelton*, but that concerned a social worker who removed a child from his mother's custody and filed court proceedings. 637 F. Supp. 330, 332, (N.D. Cal. 1986). "By filing proceedings, the social worker initiates the judicial process and therefore performs a function similar to a prosecutor. In addition, social workers must make decisions about the temporary or protective custody of minors." *Id.* at 334. On the two facts alone of starting a court proceeding and seizing the child, *Mazor* is distinguishable.

As to this Court's recent opinion in *Stanley v. Hutchinson*, this Court only recognized the social worker's absolute immunity insofar as it concerned her testimony first at a probable cause judicial hearing one week after she removed a child, and later during quasi-judicial administrative proceedings before an administrative law judge. No. 22-1822 at *13-14. This Court did not tread novel ground, but rather cited to *Thomason*, 85 F.3d at 1373. Nor does Spring Cook's conduct or function resemble that of the prosecutor in other child sex abuse cases where prosecutorial misconduct occurred. *See, e.g., Myers v. Morris*, 810 F.2d 1437, 1445 (8th Cir. 1987) (granting absolute immunity to prosecutor for functions other than for destruction of exculpatory evidence).

The district court correctly observed the general maxim that absolute immunity is limited only to actions within the scope of the immunity, citing *Sample v. City of Woodbury*, 836 F.3d 913, 916 (8th Cir. 2016). This Court has repeatedly rejected claims to absolute immunity for administrative or investigative functions that do not relate to the initiation of a prosecution or judicial proceedings. *See, e.g., Winslow v. Smith,* 696 F.3d 716, 739 (8th Cir. 2012) (no absolute immunity for investigators who fabricated evidence). Spring Cook was functionally more like a detective in search for evidence to recommend an arrest than an advocate preparing for trial. *Buckley v. Fitzsimmons,* 509 U.S 259, 273 (1973). Absent her participation in judicial proceedings in state court, as here, Spring Cook lacks absolute immunity for her acts in opening an administrative investigation and participating in an administrative review.

III. This Court need consider Spring Cook's argument against Mother's standing, as she did not raise that issue in the district court, and standing is not closely related to the legal question of her immunities from suit. In the alternative, since Mother suffered her own injury caused by Spring Cook's retaliation, since Spring Cook infringed Mother's First Amendment right of intimate familial association, and since Mother lies within the "zone of interests" that the § 1983 statute and the First Amendment are designed to protect, then Mother has standing.

Since Spring Cook did not dispute Mother's standing to assert a First Amendment claim for retaliation in her motion to dismiss, then this Court need not extend its pendent jurisdiction to this issue for the reasons stated above in the

Jurisdictional Statement. If the Court will review merits, however, then Mother has standing because she was directly injured by Spring Cook's conduct in finding her neglectful of her child. Further, this Court has repeatedly recognized a parent's standing to represent a child's interest, and Mother falls within the zone of persons protected against government retaliation for First Amendment speech.

"[T]he irreducible constitutional minimum of standing" requires: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that a favorable decision will redress the injury. *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020), citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Although Spring Cook characterizes Mother as asserting third-party standing, Cook brief at 20, the question is better framed as whether Mother has prudential standing in her own right. *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004). The Supreme Court has also held that within the context of the First Amendment, there is a justification to lessen the prudential limitations on standing. *See Federal Election Com'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

While the Supreme Court has greatly narrowed the doctrine of prudential standing, where constitutional standing is present, refusing to hear a case based on prudential standing "is in some tension with ... the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."

Lexmark, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (cleaned up). And while the Supreme Court recognized the concept of third-party standing may still fit within the prudential standing analysis, *id.* at 127 n.3, Mother is asserting her own injury as a result of Spring Cook's actions that can be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. That is, Mother was investigated and found to be neglectful by Spring Cook.

Permanent placement on the Child Abuse & Neglect Registry would have been a civil death sentence to Mother's occupation as a schoolteacher, where she had worked in the past and wished to return once her children left the nest. Thus, Mother's plausibly pleaded economic injury under settled Missouri law as to the "stigma plus" test. *Jamison*, 218 S.W.3d at 407. Thus, Mother has prudential standing to vindicate her own rights under federal law. *Carson*, 978 F.3d at 1058-59.

This Court has found that a wife had standing to assert such a claim where she feared retaliation against her husband, a City employee, if she ran for office or criticized the current administration. *Intern. Ass'n of Firefighters v. City*, 283 F.3d 969, 973-75 (8th Cir. 2002) (finding wife's standing not duplicative of husband's). A husband and a brother, each City employees, had standing to assert First Amendment retaliation claims based on their wife/sister's protected speech criticizing municipal fire department policy changes. *See Naucke*, 284 F.3d at 929

(affirming punitive damages for husband and brother for wife/sister's speech). The retaliation carried out against Father resulted in an "actual or potential inhibitory effect" on Mother's own speech. *Thompson v. Adams*, 268 F.3d 609, 614 (8th Cir. 2001) (emphasis added); *see also Hodak v. St. Peters*, 535 F.3d 899, 906 n.4 (8th Cir. 2008). Mother thus has prudential standing in her own right.

A Connecticut district court recently held that a First Amendment claim was plausibly pled by parents in the factually similar context of intentionally false and retaliatory findings of child neglect. *Abubakari v. Schenker*, No. 3:19-cv-00510, 2021 WL 1617159 at *7-10 (D. Conn. Apr. 26, 2021). It is of persuasive value here because it follows the Supreme Court's First Amendment jurisprudence recognizing an intimate associational right. *See City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *see also Adler v. Pataki*, 185 F.3d 35, 44 (2d Cir. 1999) ("we think a spouse's claim that adverse action was taken solely against that spouse in retaliation for conduct of the other spouse should be analyzed as a claimed violation of a First Amendment right of intimate association."); *Adkins v. Bd. of Education*, 982 F.2d 952, 955–56 (6th Cir. 1993); *Lewis v. Eufaula City Bd. of Education*, 922 F.Supp.2d 1291, 1302–03 (M.D. Ala. 2012). This Court has not yet considered these arguments only because a party failed to properly raise them. *Thompson*, 268 F.3d at 614; *see*

also Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000); *Cox v. Warwick Valley Central School District*, 654 F.3d 267, 272 (2d Cir. 2011).

Courts also look to whether a plaintiff falls within the zone of interests protected by the law invoked. *Bank of America Corp. v. City of Miami, Fla.*, ___U.S. ___, 137 S. Ct. 1296, 1307 (2017) (Thomas, J. concurring in part and dissenting in part) (internal quotation omitted); *Lexmark*, 572 U.S. at 127-29. Zone-of-interests cases typically involve antidiscrimination statutes such as Title VII, or the Administrative Procedure Act. *See, e.g., Clayton v. White Hall School Dist.*, 875 F.2d 676, 679 (8th Cir. 1989). In the Title VII context, the Supreme Court held that firing a "close family member" would "obvious[ly]" constitute an unlawful reprisal. *Thompson v. N. Am. Stainless*, 562 U.S. 170, 174 (2011).

Here, in the alternative, Mother's injury falls within the zone of interests that the § 1983 statute and the First Amendment are designed to protect. Although this Court has not wrestled with the question of whether zone-of-interests standing in the context of First Amendment retaliation and § 1983, other circuits have done so persuasively. *See, e.g, Montine v. City of Jersey City*, 709 F.3d 181, 196 (3d Cir. 2013) (finding standing to assert First Amendment relation under § 1983 for retaliation directed toward another individual); *see also Cook v. Billington*, 737 F.3d 767, 771 n.3 (D.C. Cir. 2013) (holding zone of interests standing to be a "low bar").

Mother also suggests, however, that under this Court's own opinions in *Int'l Assn. of Firefighters*, *Naucke*, *Thompson,* and *Hodak,* it can find that Mother has standing without reaching the zone of interests issue.

Conclusion

Spring Cook lacks qualified immunity and lacks absolute immunity. Mother has standing to assert her own First Amendment retaliation claim.

Plaintiff-Appellee Parents J.T.H. and H.D.H. pray this Court AFFIRM the district court's order denying Defendant-Appellant Spring Cook qualified and absolute immunity, and AWARD them their reasonable attorney's fees and costs incurred in the appeal under 42 U.S.C. § 1988.

Respectfully Submitted,

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Certificate of Compliance

The undersigned certifies that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 28 and 32, in that it is written in Times New Roman 14 point font, and contains 12,851 words as counted by Microsoft Word. The electronic copy of this brief has been scanned for viruses, and found to be free therefrom.

/s/ Hugh A. Eastwood

Certificate of Service

The undersigned certifies that (s)he e-filed this brief on November 10, 2021 with the Clerk of this Court using the Eighth Circuit's CM/ECF system, with e-service on all appellate counsel of record.

/s/ Hugh A. Eastwood