
No. 18-1896

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAM KANUSZEWSKI and ASHLEY KANUSZEWSKI, as parent-guardians and next friend to their minor children D.W.L., R.F.K., and C.K.K.; SHANNON LAPORTE as parent-guardian and next friend to her minor children, M.T.L. and E.M.O. and LYNNETTE WIEGAND as parent-guardian and next friend to her minor children, L.R.W., C.J.W., H.J.W. and M.L.W.

Plaintiffs – Appellants,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; NICK LYONS, sued in his official and individual capacities; SANDIP SHAH, sued in his official and individual capacities; SARAH LYON-CALLO, sued in her official and individual capacities; MARY KLEYN, sued in her official and individual capacities; MICHIGAN NEONATAL BIOBANK, INCORPORATED, aka Michigan Neonatal Biorepository; ANTONIO YANCEY, sued in his official and individual capacities,

Defendants - Appellees

and

HARRY HAWKINS

Defendant

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

CORRECTED APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellants are not a corporate entity and, as such, have no parent corporation and are not a publicly-held corporation owning 10% or more of stock of a party. Fed.R.App.P. 26.1(a).

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Appellants, by counsel, request oral argument. This is a case of first impression presenting a well-established legal standard to a novel circumstance alleged to be occurring in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The decision by this Circuit Court will affect not only the parties to this litigation, but will have a direct effect upon the Michigan public, especially those under the age of 35 due to their blood being stored since the 1980s. The opportunity to address these constitutional issues in greater detail to this Court, and to respond to inquiries from this Court, will aid in the decision-making process, given the existence of our modern and constitutionally-evolving society.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction to entertain and hear this case pursuant to 28 U.S.C. § 1331 and § 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the District Court's final judgment and all prior orders and decisions as a final judgment was entered on August 8, 2018. **Judgment, RE 51, PageID# 847**. Plaintiffs-Appellants timely appealed to this Court on the same date.

STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW

I. Whether the District Court errored in dismissing this case on the pleadings?

Appellants answer: Yes.

INTRODUCTION

Since the 1980s, Michigan has operated the Newborn Screening Program, a government run program which has resulted in millions of blood samples from newborn infants being extract, seized, used, and sold without the consent of their parents. Those samples are then indefinitely stored by the State through its self-created entity, the Michigan Neonatal Biobank. The law on searching a citizen's body is clear: "a warrantless search of the person is reasonable *only if* it falls within a recognized exception" to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). No exceptions apply. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212-1213 (10th Cir. 2003) *cert. denied*, 540 U.S. 1179 (2004)(the special needs exception does not apply to non-consensual medical and blood tests for minors). The law is also that citizens also have a constitutional right to refuse any medical testing or treatment as a protected liberty interest under due process. *Cruzan v. Director, Missouri*

Dep't. of Health, 497 U.S. 261, 278 (1990). Thusly, Plaintiffs challenge the program's constitutionality under the Fourth and Fourteenth Amendments. In lieu of answering, all Defendants sought dismissal by upselling the greatness of the Newborn Screening Program's *outcomes* to the lower court and the lower trial court missed the illegality of the *process* they are undertaking to get there. The entire Newborn Screening Program ("NSP") forgot to include a major legal and constitutional obligation—*consent*. "Our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." *Cruzan, supra,* at 287 (1990) (O'CONNOR, J., concurring). Defendants have stolen or impinged the right of consent by replacing their judgment for the parents' self-determination—and this is not allowed under our Constitution no matter how great the outcomes of the NSP are. The ends do not justify the unconstitutional means.

STATEMENT OF THE CASE[1]

Since the 1960s, the State of Michigan has operated a newborn screening program (NSP), whereby medical professionals in local hospitals involuntarily take blood samples from newborn babies to test or screen for various diseases without the consent or permission of the parents. **First. Am. Compl., RE 26, PageID# 301, ¶1.** None of the diseases tested for are contagious or can spread by communitive human contact." ***Id.*****, PageID#315, ¶57.** Since the mid-1980s, however, the State demanded that it, and not the birthing doctors, conduct these certain medical tests to extract deeply private medical and genetic

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[1] Because this matter came before the District Court on motions to dismiss, all the allegations in the First Amended Complaint are deemed true and viewed in the light most favorable to Plaintiffs. *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). To support its claims, Plaintiffs relied on and incorporate the detailed facts pled in their First Amended Complaint. **First Am. Compl, RE 26**. A concise summary is as follows.

information/data from the blood spots for the existence of certain non-communitive heredity maladies existing in a small minority of the general Michigan population. ***Id.*, PageID#309, ¶35, PageID#315, ¶57.** The program also demanded certain personal data about Infants and mothers be disclosed without consent. ***Id.*, PageID#314-315, ¶¶50-51.** After testing is completed, the cards containing the dried blood samples, usually five samples in number, are not disposed of but instead transferred to a third-party non-profit, known as the Michigan Neonatal Biobank, and stored indefinitely for monetary sale to researchers. ***Id.*, PageID# 302-303, ¶¶10-11, PageID#309, ¶33.** The parents of the infant children in this case did not give informed consent to the blood draw, its testing, or to the State taking custody of the blood samples. ***Id.*, PageID# 301, ¶¶3-4**. The parents never authorized the transfer of the blood samples to the Michigan Neonatal Biobank either. The state

statutory scheme purports to expressly exempt the blood draws and testing from informed consent requirements. MCL 333.5431(2); see also MCL 333.17520(1). Section 5431(1) of the Public Health Code directs health care professionals to administer the blood draw for the State. Their failure to obey violates the statute, which is an imprisonable misdemeanor. MCL 333.5431(5). Plaintiffs assert this statutory scheme is unconstitutional.[2]

Additionally, Plaintiffs were never extended the option to opt-out of the blood draw or testing *before* any blood draws occurred. ***Id.*, PageID# 312, ¶45.** Plaintiffs "might have been" solely presented with an option to

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[2] Infant and Parent Plaintiffs have sued various state officials involved with the NSP, and two actors which are outside the government but have been pled to be public actors for purposes of this case. **First Am. Compl., RE 26, PageID# 305-308, ¶¶22-29; see also *Id.*, PageID# 328-329, ¶¶114-115**.

opt-out of the post-testing research, but were never presented with sufficient information as to that they were asked/forced to sign, and thus were not given proper informed consent. ***Id.*, PageID# 313, ¶¶46, 48**. In addition to the blood samples, healthcare professionals also submitted identifying information of the infants. ***Id.*, ¶50.** Public documentation promises confidentiality and promises to resist demands for information that could identify the infant. ***Id.*, PageID# 317-318, ¶66.** Yet despite these promises, "[b]lood samples on several occasions were provided pursuant to state court orders . . . and being sold to third party businesses and researchers." ***Id.*, PageID#318, ¶70.** Michigan Neonatal Biobank "actively sells punches of various sizes to universities and businesses at different rates." ***Id.*, PageID# 321, ¶80.** "Since the blood spots contain deeply private medical and genetic information… the Parents are concerned and fear about the misuse of that information and fear the

possibility of discrimination against their Infants and perhaps even relatives through the use of such blood samples and research activity thereon." ***Id.*****, PageID# 320-321, ¶78.** "That [f]ear is well-founded and actual as the sharing of blood spots containing deeply private medical and genetic information has recently resulted in the arrest of an alleged killer but has already resulted in the wrongful arrest of persons who were not guilty of any crime." ***Id.*****, PageID# 321, ¶79.** However, the wrong which occurred in this case is the exercise of governmental action without the consent of the Infants or their parents. This case is, at its base, about *informed* consent and the lack of it from parents before the State acts.

The amended complaint alleges that Defendants violated Plaintiffs' Fourteenth Amendment liberty interest in refusing unwanted medical procedures by conducting the blood test without prior parental consent (count I) or by improper/incomplete/false consent (count II). ***Id.*****,**

PageID# 322-323, ¶¶84-90, PageID# 323-325, ¶¶91-101. The amended complaint also alleges that Defendants violated Plaintiffs' Fourth Amendment rights to be free from unreasonable searches and seizures where the initial extraction and seizure for testing was conducted without parental consent (count III), and then indefinite storage was also conducted without parental consent (count IV and V).

Defendants filed three separate motions to dismiss. **Motions to Dismiss, RE 32, 33, & 34, PageID# 477-644.** Without oral argument, the District Court then dismissed the entire lawsuit pursuant to Fed.R.Civ.P 12(b)(6) without a single answer being filed by any defendant. Many of the Defendants' arguments were simply unaddressed by District Court as the federal judge went right to and ruled straight upon the constitutional standards and merits. This appeal now follows.

SUMMARY OF ARGUMENT

"Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Id.* Plaintiffs have properly pled proper causes of action for violations of their rights under the Fourth and Fourteenth Amendments to the United States Constitution. See **First Am. Compl, RE 26, PageID# 300-453.** In a near analogous case, the Tenth Circuit reversed a similar erroneous decision of an Oklahoma federal district court judge who found no plausible constitutional violations when governmental actors did not obtain consent for medical testing and treatment of young children. *Dubbs, supra*. This Circuit is requested to reverse the Michigan federal district court judge who made essentially the same errors. Reversal is warranted and required.

STANDARD OF REVIEW

The District Court correctly recited, but then improperly applied, the proper standard of review. A pleading fails to state a claim under Rule 12(b)(6) if it does not contain allegations that support recovery under any recognizable legal theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a Rule 12(b)(6) motion, the Court is directed to construe the pleading in the non-movant's favor and accepts the allegations of facts therein as true. See *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). The pleader need not have provided "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "the tenet

that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, *supra*, at 678-79 (quotations and citation omitted). This Court reviews grant of motions to dismiss de novo. *Newberry v. Silverman*, 789 F.3d 636, 640 (6th Cir. 2015).

However, as discussed below, this particular federal court judge continues to set the pleading bar far too high. A complaint only requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "A complaint need not set down in detail all the particularities of a plaintiff's claim." *Decorative Panels v. Intern. Ass'n. of Machinists*, 996 F.Supp.2d 559, 568 (E.D. Mich. 2014) (LUDINGTON, J.). "Complaints initiate the litigation but need not cover everything necessary for the plaintiff to win; factual details and legal arguments come later." *Id.* (quoting *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005)). "The issue in reviewing the sufficiency of the complaint is not

whether the plaintiff[s] will prevail, but whether the plaintiff[s] [are] entitled to offer evidence to support [their] claims." *Ruiz v. McDonnell*, 299 F.3d 1173, 1182 (10th Cir. 2002). "If everything the plaintiffs allege is true, do those allegations establish an injury that the law redresses? If the answer is yes, the case continues, allowing the plaintiffs to gather evidence that *proves* to a jury, beyond a preponderance of the evidence, that the allegations in their complaint are true." *P.J. v. Utah*, 2006 U.S. Dist. LEXIS 40393; 2006 WL 1702585 (Utah 2006) (emphasis in original).

ARGUMENT

I. The District Court errored in dismissing the claims when Defendants violated Plaintiffs' substantive due process rights under the Fourteenth Amendment.

A. The District Court errored in finding no substantive due process violations were plausibly pled.

Counts I and II alleged violations of Plaintiffs' liberty rights under the Fourteenth Amendment's substantive due process. The District Court pulled no punches—"[t]he newborn screening program does not violate Plaintiffs' substantive due process rights under the [F]ourteenth [A]mendment. **Opinion, RE 50, PageID# 859.**[3] However, this

[3] The District Court opinion is hard to parse. The decision presents itself as going right to the merits of the existence (or non-existence) of constitutional rights, but not as to standing. However, "the ultimate merits of the case have no bearing on the threshold question of standing." *Campbell v. Minneapolis Pub. Hous. Auth.*, 168 F.3d 1069, 1074 (8th Cir. 1999). In evaluating standing, on the flip side, "the court must be careful not to decide the question on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be

conclusion was in error as *it does*, as pled. Plaintiffs specifically pled that—

> the Parents were never given the choice to decide whether to accept or reject the medical procedure of the testing as to all or some of the 50+ maladies, disorders, or diseases *prior* to a piercing device breaching the outside skin of the Infants to extract five or six blood drops and seize those blood spots for medical testing and use by the government.

First Am. Compl, RE 26, PageID# 322, ¶87. "Defendants deprived the Infants their liberty interest in their guardians self-making personal and

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successful in their claims." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); see also *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007). Here, the District Court clearly went to the merits, and not standing. As such, the standing question has seemingly gone unanswered in the District Court's opinion made in response to the motions to dismiss. To the extent the District Court did try to answer standing issues under the guise of merits questions, standing was improperly intertwined with the merit which the District Court cannot do under *Cooksey*, *Waukesha*, and *Parker*.

private medical procedure decisions without due process of law" and the "Infants have experienced constitutional harm, including harm to their liberty rights under due process, by the illegal and unlawful processes and procedures undertaken." ***Id.*, PageID# 322-323, ¶¶88-89.**

B. *Cruzan* sets the standard.

The foremost authority for Plaintiffs is *Cruzan*[4], which held that a competent individual has a constitutional right to refuse any medical testing or treatment as a protected liberty interest under due process. *Cruzan*, *supra*, at 278. The District Court concluded however that infants lack these rights because they are *per se* legally incompetent. **Opinion, RE 50, PageID# 830.** This is just simply not true given the unique status of minors in our procedural laws and constitutional protections. When it

[4] 497 U.S. 261 (1990).

comes to medical-based decisions, the law long recognizes that parents speak for their minor child. *E.g. Parham v. J.R.*, 442 U.S. 584 (1979). Competent parents, not governmental officials, speak for and are empowered to make decisions for their minor children in matters of medical treatment. *Id.* at 603; see also *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). The State does not *ipso facto* assume *parens patriae* status over every child in Michigan.[5] The Supreme Court has long (and expressly) rejected that a minor child is "the mere creature of the State." *Parham, supra*, at 602. The right to decide how to bring up a child—which includes medical decisions—is a well-established *fundamental*

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[5] "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Parham, supra*, at 602-603. "[H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.*, at 602.

constitutional right. E.g. *Pierce, supra,* at 534-535; *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Parham, supra*, at 603.

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the *fundamental liberty interests recognized by this Court*... [W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (emphasis added). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* "It is cardinal… that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom includes preparation for obligations the state can neither supply, nor hinder." *H.L. v. Matheson*, 450 U.S. 398, 410 (1991). "Constitutional interpretation has consistently recognized

that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Impingements on fundamental rights must survive heightened strict scrutiny review. *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000).

While the legal standards are well-set, nonconsensual medical treatment and testing violating the Fourteenth Amendment is not a completely first impression matter in this country. In 2003, the Tenth Circuit penned nearly on-point analogous case applying these principles. In *Dubbs*[6], various government and private actors (working as and with state actors) brought inter alia Fourteenth Amendment claims when children in a head start school program were subject to physical exams,

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[6] 336 F.3d 1194 (10th Cir. 2003)

including blood tests, without parental notice or consent. The parents maintain that the exams (including the blood tests) compromised: 1) their children's right to refuse medical treatment; and 2) the parents' own fundamental liberty interest in the care, custody and management of their children. They claim that these rights are protected under the doctrine of "substantive due process" under the Fourteenth Amendment. Like the lower court judge, the district court dismissed the claims concluding the violation did not shock the conscience of the court. The Tenth Circuit reversed. *Dubbs, supra*, at 1198. The appellate panel questioned the district court's rationale for dismissing these claims, for two reasons. *Id.*, at 1202. First, the district court over-depended on the vague consent form in the school files which did not obtain full and complete consent. *Id.* Second, the shock-the-conscience test was the wrong constitutional test in this type of case. *Id.*, at 1203. As to the latter, the panel explained that these types of actions involving the lack of

parental consent fit in the "more categorical protection for 'fundamental rights' as defined by the tradition and experience of the nation." *Id.* It was confirmed that "the right to consent to medical treatment for oneself and one's minor children—may be 'objectively, deeply rooted in this Nation's history and tradition'" and thus "it is not implausible to think that the rights invoked here — the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child — fall within this sphere of [fundamental] protected liberty." *Id.* If the right being impinged is fundamental, its challenge is reviewed under strict scrutiny. E.g. *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). Just as advocated by Plaintiffs in this case, "[t]o survive strict scrutiny, the regulation must serve a compelling state purpose and be narrowly tailored to achieving that purpose." *Id.*

The District Court in this case rejected *Dubbs*. **Opinion, RE 50, PageID# 835**. It held that the parties refer to three constitutionally protected liberty interests under the Fourteenth Amendment that might be implicated in this case—

> First, the parties refer to the right of a child to have its parent make medical decisions on [the child's] behalf. Second, the parties refer to the right of a competent person to refuse unwanted medical procedures. Third, the parties refer to a parent's right to make decisions concerning the care, custody, and control of their children.

***Id.*, PageID# 829**. However, there are actually only two; the first interest and the third fall under the same rubric of the parents' right to make decisions concerning the care, custody, and control of their children. Nevertheless, the District Court then concluded that none of these rights exist in favor of Plaintiffs because "[t]here does not appear to be any legal authority supporting the notion that children have a constitutionally protected liberty interest in their parent or guardian making medical

decisions on their behalf." ***Id.*, PageID# 830.** That is just simply untrue. *Dubbs* is that authority; so is *Parham*, *Pierce*, *Meyers*, *Troxel*, *Ginsberg, Yoder*, and *Matheson*. Yes, the District Court is correct that "Supreme Court precedent, however, has not delineated the parameters of a 'parent's right to parent' in a way that can be neatly applied to new sets of facts," citing *Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003). ***Id.*, PageID# 831.** But that does not mean that this case and its facts precludes federal trial courts from rendering that such a right plausibly exists for Rule 12(b)(6) review, given the clear prior Supreme Court precedence as guideposts. If we follow the confused District Court's logic, no district or circuit court could ever recognize constitutional rights in new contexts unless and until the Supreme Court has a factually alike case. Constitutional protections do exist and are recognized well before the justices in Washington D.C. decree so.

While there is little case law on the same factual circumstances of this case, *Dubbs* is surprisingly not the only case. The current case before this Court was modelled on a similar case from Texas. In *Beleno v. Lackey*, 306 F.Supp.3d 930 (W.D. Tex. 2009), a class action was proposed to challenge the deprivation of liberty and privacy rights under the Fourth and Fourteenth Amendments as to Texas' similar program of newborn screening. Texas was "expropriating an infant's blood sample indefinitely, without their knowledge or consent, effectively making it [Texas'] property for undisclosed non-consensual purposes unrelated to the purposes for which the infants' blood was originally drawn." *Id.* The *Beleno* defendants also filed a Rule 12(b)(6) motion and, in relevant part, it was denied. The district court concluded that "defendants have routinely collected blood samples from all babies in Texas at time of birth and stored this blood or 'spots' indefinitely at the TAMHSC (the Texas A&M University System Health Science Center) for undisclosed research

unrelated to the purposes for which the blood was originally drawn, without the knowledge or consent of the parents, and will continue to do so." Being state actors were alleged to have done this, the district court found these allegations were "enough facts to state a claim for relief under the Fourth Amendment which is plausible on its face" to warrant denial of dismissal.[7,8]

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[7] The same resulted for the Fourteenth Amendment claim in *Beleno*. The district court "decline[d] to find at this early stage in the proceedings that defendants' citations to general protocols show that plaintiffs have failed to state a violation of Fourteenth Amendment liberty and privacy interests for defendants' alleged handling of their infants' blood spots."

[8] In response to the denial to dismiss in this case, Texas voluntarily destroyed the 'stolen' newborn blood samples. Peggy Fikac, *State to Destroy Newborns' Blood Samples*, HOUSTON CHRON., Dec 22, 2009, *available at* https://www.chron.com/news/houston-texas/article/State-to-destroy-newborns-blood-samples-1599212.php.

Plaintiffs cited *Beleno* in their briefing before the lower court. **Response, RE 45, PageID# 739-740.** Yet, the District Court never discussed it; it is unclear why not. At minimum, it serves as authority for plausibility for Plaintiffs' claims to get beyond the pleading stage of the instant case.

C. Liberty substantive due process rights take precedence over police power in this circumstance.

Defendants argue that the Newborn Screening Program is constitutional under the government's policing power per *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Plaintiffs do not dispute that certain extraordinary times results in liberty interests being sidelined by public health disasters. However, this is not that case; it is simply not applicable here. *Jacobson* held that in a public health emergency a local board of health could require vaccinations, over objections, when it was necessary for the public health or the public safety. However, nearly 85 years later,

the Supreme Court explained a competent person (as extended to children per *Parham*, *Pierce*, *Meyer*, *Troxel, Yoder*, *Ginsberg*, and *Matheson*) has a constitutionally protected fundamental liberty interest in refusing unwanted medical treatment. *Cruzan, supra*, at 278.[9] Reading the cases together, a proper distinction emerges. Laws that are intended to prevent a person from harming *others* by disease contagion can be justified as an exercise of police power under *Jacobson*, but laws that are intended to affect only the health and well-being of *an individual* are subject to challenge as unjustified violations of liberty rights under *Cruzan*. This case falls in the latter because "[n]one of the maladies, disorders, or diseases sought to be detected [by NSP blood tests] are

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[9] "The [constitutional] principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan, supra*, at 278.

contagious or can spread by communitive human contact." **First Am. Compl., RE 26, PageID# 56, ¶57.** In other words, diseases being tested for cannot spread to third parties; there is no public health crisis and no threat to third parties. ***Id.*** As a case involving the right to decide about one's *own* body and health (i.e. grant or withhold consent) with no effect on the general health of the remaining populace by contagion, the *Cruzan* framework applies. This is simply not a *Jacobson*-framework case. In other words, "[w]here only the wellbeing of an individual is at stake, Plaintiffs contend that the individual's right to refuse unwanted medical treatment (as recognized by *Cruzan*) takes precedence." **Opinion, RE 50, PageID# 833**.[10]

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[10] The lower court went to hold this argument to be "not persuasive." **Opinion, RE 50, PageID# 833**. The District Court is wrong.

D. This Court should adopt and apply the *Dubbs* framework.

In short, *Dubbs* provides the proper framework—

> the district court misapprehended the legal standard applicable to purported substantive due process rights that—like the right to consent to medical treatment for oneself and one's minor children—may be "objectively, deeply rooted in this Nation's history and tradition." It is not implausible to think that the rights invoked here — the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child — fall within this sphere of protected liberty.

Dubbs, supra, at 1203 (citing *Cruzan* with *Troxel*). In other words, a claim is completely plausible[11] when there is an impingement on the

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[11] Because this appeal follows a Rule 12(b)(6) dismissal, all this Court is looking to see is if the claims are plausible. "The issue in reviewing the sufficiency of the complaint is not whether the plaintiff[s] will prevail, but whether the plaintiff[s] [are] entitled to offer evidence to support [their] claims." *Ruiz, supra*, at 1182.

fundamental right to consent (or not) to medical treatment for oneself and one's minor children is a fundamental right is plausible to claim.[12]

The District Court here, like the trial court in *Dubbs*, applied the wrong standard (i.e. shock-the-conscience in *Dubbs*; rational basis in this case).[13] It is strict scrutiny (or a form thereof) under *Cruzan*. Thusly,

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[12] The District Court applied the holding in *Spiering v. Heineman*, 448 F. Supp. 2d 1129, 1139 (D. Neb. 2006) using a rational basis test. *Dubbs*' analysis is sounder with Supreme Court precedence and the proper test this Court should apply. It is unclear way the plaintiffs in *Spiering* did not appeal that erroneous decision.

[13] It makes absolutely no sense why the District Court applied rational basis review when it expressly concluded that the right to refuse medical treatment is a fundamental right under *Cruzan* and the right of parents to make decisions concerning the care, custody, and control of their children is also fundamental under *Troxel*. **Opinion, RE 50, PageID# 833**. Fundamental rights are protected by strict scrutiny, not rational basis review. "If a statute invades a 'fundamental' right..., it is subject to strict scrutiny." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (MARSHALL, J, dissenting). "If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down." *Id.* (internal citations omitted).

there *is* plausible authority to overcome any Rule 12(b)(6) challenge as to a child having a parent or guardian make medical decisions on his or her behalf given the guideposts provided under the prior precedence of *Cruzan* together with *Parham*, *Pierce*, *Meyer*, *Yoder*, *Ginsberg*, and *Matheson* and as applied in *Dubbs*. Plaintiffs even expressly asserted below that even if District Court concluded contrary to *Dubbs* that such a *fundamental* right has not been found yet, this case is asserting the same and the prior precedence makes the argument easily plausible—which is all that is required at the pleading stage of a case citing *Twombly, supra*, at 555 and Fed.R.Civ.P. 11(b)(2). **Response, RE 45, PageID# 727, fn.20**. The District Court errored in dismissing this case on the pleadings.

II. The District Court errored in dismissing the claims wherein Defendants violated Plaintiffs' Fourth Amendment rights to be free from warrantless, nonconsensual searches of their blood.

The Fourth Amendment to the United States Constitution provides that the government shall not violate "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV (emphasis added). "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment—subject only to a few 'specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971). "[A] warrantless search of a person is reasonable *only if* it falls within a recognized exception." *McNeely*, *supra*, at 148 (emphasis added). The burden of proving a '*specifically* established and *well-delineated*' exception to the warrant requirement rests with the Defendants. *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951) (emphasis added).

A. A search occurred when blood was drawn.

The District Court concluded the extraction of the Infants' blood was a search. **Opinion, RE 50, PageID# 833** (citing *Dubbs, supra*).[14] Plaintiffs are obviously not challenging that determination. The question now becomes is there a "specifically established and well-delineated exception" to render such a search reasonable?

B. The special needs exception does not apply.

Despite finding a search occurred, the District Court explained that it must be "determined whether the search was a reasonable one." ***Id.***

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[14] "[I]t is clear enough from the line of cases cited in *Dubbs* (set forth above) that the conduct at issue here, a government mandated blood test that involves a non-consensual invasion of bodily integrity, constitutes a search even if the information derived from that search is not used for law enforcement purposes." However, this case has the extracted information allegedly being used for law enforcement purposes. **First Am. Compl, RE 26, PageID# 318, ¶70**; see also **Exhibit L, RE 26-13, PageID# 367-372.**

Again, "a warrantless search of the person is reasonable *only if it falls within a recognized exception*." *McNeely*, *supra*, at 148 (emphasis added). One such exception is the special needs doctrine.

> "Special needs" is the label attached to certain cases where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."
>
> In special needs cases, the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest.

Dubbs, supra, at 1212-1213. The Tenth Circuit rejected its viability for medical testing, blood tests, and medical procedures for minor children without parental consent.

> It is plain that, if performed without the necessary consent, the searches were unconstitutional *even if we employ the 'special needs' balancing test*."

Dubbs, supra, at 1214 (emphasis added). Even if conducting across-the-board medical tests on minors is "an effective means of identifying

physical and developmental impediments in children, this supplies no justification for proceeding without parental notice and consent." *Id*. *Dubbs* further explained that parental notice and consent is not impracticable to obtain. *Id.*, at 1215. Given this, "the 'special needs doctrine' would not excuse the failure to obtain parental consent for the examinations." *Id.* As such, the exception is not applicable and consent remains required before conducting the search. Because Defendants offered no other exception, the claim of a Fourth Amendment violation is easily plausible.

C. A difference without any substance.

The District Court also attempted to distinguish the broad holding of *Dubbs* rejection of the special needs doctrine in high similar circumstance because a federal regulation required consent and Michigan's statutory scheme requires no such consent. **Opinion, RE 50, PageID# 842-843.** This is a difference without any distinction. If

parental notice and consent is not impracticable to obtain, then whether or not the underlying rules *require* consent or not (and/or were or were not violated) is irrelevant for Fourth Amendment analysis. In this case, there was no consent at all before the Infants' blood was drawn and seized. **First Am. Compl, RE 26, PageID# 322, ¶87.**

D. With the lack of a warrant, consent, or a special needs exception, the search of the Infants' blood was illegal.

Bottom line—by the blood tests being a search per *Dubbs* (which the District Court has agreed with), it was plausibly unconstitutional where performed without a warrant or parental consent, or fall within the 'special needs' exception to the warrant requirement. *Dubbs, supra*, at 1207. As shown, there is plausibly no available exception and the

search of the Infants' blood for the Newborn Screening Program plausibly (if not absolutely) violates the Fourth Amendment.[15]

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[15] The District Court did not parse the difference between the State Defendants and the Biobank Defendants. Plaintiff did though with the use of civil conspiracy claim. Plaintiffs have also pled a conspiracy theory claim. **First Am. Compl, RE 26, Count V.** A civil conspiracy under § 1983 is "an agreement between two or more persons to injure another by unlawful action." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011). Plaintiffs "ha[ve] successfully pled a § 1983 conspiracy by alleging that (1) a single plan existed, (2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights, and (3) an overt act was committed." *Revis v. Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007). "Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy..." *Bazzi, supra*, at 602. This makes sense because "rarely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire." *Weberg v. Franks*, 229 F.3d 514, 528 (6th Cir. 2000). Thusly, a plaintiff may rely on circumstantial evidence to establish an agreement among the conspirators. *Id.*; see also *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012)(same). Moreover, each conspirator need not have known all of the details of the illegal plan or all of the participants involved to still be part of an illegal conspiracy. *Bazzi, supra*, at 602.

E. The continuing seizure of the Infants' blood is also a Fourth Amendment violation.

Lastly, Plaintiffs asserted that the on-going retention of the Infants' blood is also a Fourth Amendment violation. The District Court concluded that "Plaintiffs have made no effort to explain how the retention and use of the blood samples constitutes an independent violation (i.e. one not predicated on a finding that the blood test was itself unconstitutional) of the parents' substantive due process rights to parent their children." **Opinion, RE 50, PageID# 838.** That is simply not true. Plaintiff were simply responding to the limited arguments raised by the State Defendants. Plaintiffs asserted that "by overpassing the legal obligation to obtain consent, the State Defendants now illegally possess the Infants' blood to then undertake storage, use, and sale of the same." **Response, RE 45, PageID# 715.** Plaintiffs acknowledge there is no direct case decision on-point because such actions by state actors in

creating a dragnet DNA biobank is highly unprecedented. In their response, "Plaintiffs offer this analogy"—

> The State Defendants today seize a vehicle rather than blood without consent or a warrant. They test the car for compliance with emission standards and when finding nothing then sends the car a third-party private nonprofit impound lot (i.e Carbank) where it sits for an indeterminate amount of time until a future date when the government decides to use or sell the car. Arguendo there is a statute confirming no consent is required. Applying the State Defendants' argument [], there is no Fourth Amendment violation because the car is not being *then*-used by the police department or to shuttle an important official, and that the car has not yet been sold. This Court would have no problem finding the actions of the State Defendants to be an illegal search and on-going seizure. How is blood any different? See *Dubb, supra*, at 1207 (the Fourth Amendment would be violated if young children were subjected to intrusive physical examination and blood tests without consent of the parents or without a court order or without a showing of "special needs").

Response, RE 45, PageID# 715, fn.10. To the extent this Court would review the retention of the blood spots and medical data as part-and-parcel of the search, then these claims are arguably redundant to the violative search claim. However, it is Plaintiffs' position that the *separate*

retention of the blood spots after the NSP testing was complete constitutes a *separate* Fourth Amendment violation, one for which the Biobank and its officials are undertaking in a civil conspiratorial manner. ***Id.*, PageID# 715-716.**

III. The use of documents outside the pleadings was improper.

Lastly, the State Defendants supported their motion to dismiss with numerous documents attached which were not attached to or referred to in the pleadings. **Exhibits, RE 32-2 through 32-14, PageID# 534-852.** The District Court authorized this, at least in part. **Opinion, RE 50, PageID# 837, fn.2.** This was in error and this Court should not utilize any of the documents. This highlights a major misunderstanding suffered by trial courts as to the proper standard of review.

A. Rule 56's standards

A motion for summary judgment (which was not filed by any Defendant in this case) is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). No genuine dispute of material fact exists when the court, looking at the record "as a whole," cannot conclude that a rational trier of fact could find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Under a Rule 56 motion, the trial court answers a completely different question than presented under Rule 12(b)(6); the court evaluates "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). Courts must draw all reasonable inferences in favor of the nonmoving party in conducting the motion's review. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th

Cir. 2013). In this case, discovery has not even started and "summary judgment is ordinarily inappropriate before discovery is complete." *McWay v. LaHood*, 269 F.R.D. 35, 36 (D.D.C. 2010). While Rule 56 allows a party to move for summary judgment before discovery is complete, such a motion is successful "only in the rarest of cases" because "the nonmoving party must have had the opportunity to discover information that is essential to its opposition to the motion for summary judgment." *Great Wall De Venezuela C.A. v. Interaudi Bank*, 117 F.Supp.3d 474, 492-493 (S.D.N.Y. 2015).

B. Rule 12(b)(6)'s standards

On the other hand, under a Rule 12(b)(6) motion, the Court must deem all the allegations in the complaint as true and view the facts in the light most favorable to plaintiff. *DirecTV, supra*, at 476. The judge must treat the allegations as true even if "doubtful in fact." *Twombly*, *supra*, at 555. This type of motion does not allow for a challenge to

deemed-true facts, but rather challenges whether relief sought is 'plausible' under allegations pled by the plaintiff. The complaint must state a claim that is merely *plausible* on its face, i.e., the court must be able to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, *supra*, at 678. "The issue in reviewing the sufficiency of the complaint is not whether the plaintiff[s] will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." *Ruiz, supra,* at 1182. The Court then answers that "[i]f everything the plaintiffs allege is true, do those allegations establish an injury that the law redresses? If the answer is yes, the case continues, allowing the plaintiffs to gather evidence that *proves* to [the factfinder], beyond a preponderance of the evidence, that the allegations in their complaint are true." *P.J., supra.*

When reviewing a Rule 12(b)(6), a court may only consider "matters of public record, orders, items appearing in the record of the case, and

exhibits attached to the complaint," as well as "documents that a defendant attaches to a motion to dismiss ... if they are [1.] referred to in the plaintiff's complaint and [2.] are central to her claim." *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001). Obviously, affidavits do not meet the *Amini* standard and are prohibited in a Rule 12(b)(6) challenge. See *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500, 504 (7th Cir. 1998) ("Affidavits are not properly considered in deciding upon a motion under Rule 12(b)(6).").

C. The State Defendants are violating the applicable standards by adding improper exhibits

In recent years, the undersigned has noticed a trend with defense attorneys who decide to file a Rule 12(b)(6) motion in lieu of answer (and by extension, before discovery has even been started). Defendants and their counsel attached numerous documents, affidavits, evidence, or website printouts as exhibits which were not attached to or referred to in

the complaint. **Exhibits, RE 32-2 through 32-14, PageID# 534-852.** The problem becomes whether a federal trial court (or even this Court) can even look to them? And beyond looking, can it even consider them? The answer is almost always no, but defense attorneys do it anyways. This is wrong, unfair, and violates the Rule 12(b)(6) standards, especially when such a motion is filed before Defendants even answer the complaint. It is pure litigation gamesmanship to taint the understanding of a plaintiff's pled (and unanswered) case.

An excellent discussion of the problem was discussed by Judge Guilford from the Federal District Court in the Central District of California via his opinion in *Hsu v. Puma Biotechnology, Inc.*, 213 F.Supp.3d 1275 (C.D. Cal. 2016). *Hsu* was a securities fraud case where investors alleged a pharma-company and its executives (the "Company") were alleged to have made false or misleading statements. The Company filed a motion to dismiss pursuant to Rule 12(b)(6) in lieu of answer, just

as was done in our case. After reciting the same standards outlined above, Judge Guilford asked the right question: beyond the allegations in the complaint, "what else the Court can consider in its analysis of the Motion to Dismiss" vis-à-vis Rule 12(b)(6)? Naturally, the Company attached more than a dozen exhibits not attached or directly referenced in the *Hsu* complaint. Judge Guilford's well-reasoned thoughts point out some problems of district courts not carefully holding defendants to their standards:

> Typically, a court can only consider what's in the complaint when it is deciding a Rule 12(b)(6) motion to dismiss a complaint…. And typically, if a court considers more than what's in the complaint, the motion gets converted into a Federal Rule of Civil Procedure 56 ("Rule 56") motion for summary judgment… This conversion can muddy the analysis for clients, counsel, and courts alike, by implicating rules and requirements that don't otherwise apply to motions to dismiss… Nowadays, it seems more and more common to come across Rule 12(b)(6) motions to dismiss filed with hundreds of pages of attachments, authenticated through attorney declarations.

> [W]ith little to lose, too many defense attorneys are tempted by the puncher's chance offered by such a motion. At worst, they lose a generally inexpensive motion. But at best, they can knock their opponent out cold, right at the beginning of round one. In this way, efforts to expand courts' consideration of extrinsic evidence at the motion to dismiss stage are consistent with other developments in the law that diminish the ability of wronged plaintiffs to get their constitutionally-protected day in court… Such trends are particularly troubling in the common situation of asymmetry, where a defendant starts off with sole possession of the information about the alleged wrongdoing.

See *Hsu, supra*, at 1279-1282.

Here, the exhibits attached by the State Defendants violated *Amini* and *Fredrick* in manner which is unfair and improper as explained by *Hsu*. The District Court errored in not excluding them altogether because the lower District Court's decision is seemingly a Rule 12(b)(6) motion improperly converted into a quasi-Rule 56 motion without the required notice needed to be afforded to Plaintiffs. See Fed.R.Civ.P. 12(d). Rule

12(d) requires that such exhibits be "excluded by the court."[16] *Id.* This Court is requested to exclude the same.[17]

CONCLUSION

For all the reasons and law cited above, especially *Dubbs*, together with the allegations and exhibits attached to the First Amended Complaint, Plaintiffs have met their burden to provide a "short and plain statement of the claim showing that the pleader is entitled to relief,"

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[16] "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to *and not excluded by the court*, the motion must be treated as one for summary judgment under Rule 56."

[17] A party can use a request for judicial notice. However, use of information from such outside sources is limited to only those *facts* subject to judicial notice under FRE 201, not the statements in those documents. *Freeman v. Town of Hudson*, 714 F.3d 29, 37 (1st Cir. 2013). FRE 201 allows courts to take judicial notice of "a fact," not a document, that is not subject to reasonable dispute. FRE 201(b)(1)-(2). In this case, Defendants never requested the District Court to take any judicial notice of any particular *fact*.

Fed.R.Civ.P. 8(a)(2), to make the claims plausible. Reversal and remand is requested.

RELIEF REQUESTED

This Court is requested to reverse the dismissal of this action pursuant to Rule 12(b)(6), and then remand this matter for further proceedings.

Date: October 4, 2018

s/ Philip L. Ellison

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit Rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using TeXGyreSchola 14-point font. The principal brief, including headers and footnotes, contains 7,756 words according to the Word Count feature in the Microsoft Word program, being less than 13,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

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DESIGNATION OF RELEVANT

DISTRICT COURT DOCUMENTS

RE.	PageID Range	Description of the Document
26	#300-453	First Amended Complaint (Exhibits A-R)
26-13	#367-372	Exhibit L
32	#477-532	Motion to Dismiss (State Defendants)
32-2	#534-536	Website FAQ
32-3	#537-539	Brochure
32-4	#540-542	"APF 111"
32-5	#543-544	Post-Lawsuit Initiated Directive Form
32-6	#545-551	"APF 114"
32-7	#552-557	Medical Research Project Designation / Letter
32-8	#558-560	Pamphlet
32-9	#561-563	Website FAQ
32-10	#564-566	Website Printout
32-11	#567-568	Consent Form
32-12	#569-576	Redacted Consent Forms
32-13	#577-579	Stanley Affidavit
32-14	#580-#582	Kleyn Affidavit
33	#583-624	Motion to Dismiss (Biobank)
34	#625-644	Motion to Dismiss (Yancey)
45	#696-741	Response to Motion to Dismiss
50	#825-846	Opinion
51	#847	Judgment