
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

REPLY IN RESPONSE TO
STATE DEFENDANTS' APPELLEE BRIEF

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REPLY

This case involves a blood extraction scheme whereby the State invasively pierces the fledged bare skin to extract personal and deeply-private medical, genetic, and biological information contained inside the blood cells of Infants[1] who are less than 72 hours old. The State Defendants nonconsensually looked for genetic anomalies (where none are known to exist) and then—without further permission or knowledge of parent or infant—provided the leftover samples to a privately-run entity headed by one Dr. Antonio Yancey who then indefinitely stores the blood samples and does further and unrelated nonconsensual medical tests when the samples are sold. This has happened *millions* of times over. All of this is done without any or proper consent of the parents of the newly-arrived Michigan citizen newborn. The State Defendants treat

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[1] Infants and Parents are sometimes capitalized consistent with Paragraph 19 of the First Amended Complaint. **First Am. Compl., RE 26, PageID #305, ¶19.**

this process as being honorable, yet it admittedly only helps, at best, less than one-half of one percent of the Michigan newborn population. However, the method by which the Defendants have gone about operating Michigan's version of the Newborn Screening Program (NSP) violates the constitutional rights of all infants (including the remaining 99.7%) and their parents under the Fourth and Fourteenth Amendments. But that is not the only thing the NSP does. The State and Biobank Defendants are using the remaining blood samples for unrelated nonconsensual third-party medical testing and blatantly open sale to companies and researchers, and thereby exceeding any consent wrongfully or otherwise not obtained from parents. In other words, the seizure of the newborns' genetic material is now also expressly being done to benefit third-party businesses and third-party medical researchers at the expense of individuals' rights to decide whether to *voluntarily* participate or not. This lawsuit does not seek to stop testing altogether; it merely seeks to stop the *unconstitutional* way Defendants are

operating the NSP and third-party blood purveyors. Legally infusing parental consent back into the current statutory scheme—where none is existing—will restore parental control (i.e. choice) once again over the newborns' personal and deeply-private medical, genetic, and biological information being currently taken in the fog of child-birth via legally-sanctioned silence or the vaguest of explanations to new parents, the physically-exhausted mothers and battle-weary fathers. Our Constitution demands better. The District Court errored in dismissing the lawsuit. Reversal is required.

I. The State Defendants misunderstand the wrong they have done and are still doing.

As an initial matter, one thing has to be made clear. The State Defendants assert, *repeatedly*, that they have not committed a constitutional wrong because the Infants' blood spots can today be destroyed if requested. Authorization to destroy samples appears nowhere in the newborn screening law. MCL 333.5431. But more

importantly, this assertion does not fix the operational unconstitutional infirmity. Their institutionalized 'offer' to end the ongoing seizure by destroying the samples at the Biobank does not render their past unconstitutional actions—the nonconsensual extraction, testing, storage, and possible sale of the blood spots—as righteous and proper. The whole point of this case is that consent must be obtained *first*, not forgiveness sought later by offering destruction after the nonconsensual extraction and testing has been secretly and hurriedly completed. Even if the samples were destroyed today, the State Defendants' actions in operating the newborn screening law *without parental consent*, as they have, would still remain unconstitutional. This lawsuit is seeking to both prove and stop that.

II. Plaintiffs have standing.

The State Defendants' briefing reveals they are confused about the status of the parties and the role of constitutional standing. These are addressed in turn.

A. Parents are in this case both as parents-guardian and next friend of each respective minor child.

First off, the State Defendants are confused about the legal status of the parties in this federal action. There are nine minor children. They allege that *their* constitutional rights have been violated. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights"). However, children cannot be parties in federal court—they must appear by a next friend. Fed.R.Civ.P. 17(c). They have done so here by adults who have expressly pled themselves as next friends. However, that is not the *only* role the adult-plaintiffs have undertaken in this case. They have pled themselves as both "parent-guardians *and* next friend." **First. Am. Compl., RE 26, PageID #300.** Their respective rights—in each separate role—is being asserted in this case. Therefore, it is improper and incorrect when the State Defendants boldly assert that "[t]he parents ostensibly have filed this lawsuit on

behalf of their minor children, not on their own behalf as parents." **Appellee Br., Dk #31, PageID #22-23.** In addition to failing to read the caption, the related allegation was wrongfully ignored—"Plaintiffs in this action are the Infants themselves *and* each parent as parents-guardians of one or more children born in the State of Michigan." **First. Am. Compl., RE 26, PageID #305, ¶20** (emphasis added).

B. The Infants and Parents all have standing.

Next, the State Defendants claim Plaintiffs lack standing to challenge the wrongful impingements on their constitutional rights. The argument is incorrect.

i. Standing has nothing to do with the merits.

But before parsing the well-known three elements of standing, it is important to be reminded of what standing is *and is not*. "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752

(1984). 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 other words, standing analysis does not permit consideration of the actual merits of the plaintiffs' claims. "In reviewing the standing question, [courts] must… assume that on the merits the plaintiffs would be successful in their claims." *Parker v. Dist. of Columbia*, 478 F.3d 370, 377 (DC Cir. 2007) (citing *Warth v. Seldin*, 422 U.S. 490, 502 (1975)); see also *Culver v. Paulson & Co.*, 813 F.3d 991, 994 (11th Cir. 2016); *Am. Farm Bureau Fed'n v. U.S. Envtl. Pro. Agency*, 836 F.3d 963, 968 (8th Cir. 2016); *Sierra Club v. E.P.A.*, 774 F.3d 383, 389 (7th Cir. 2014); *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013). In simple terms, "standing in no way depends on the merits of the plaintiff's contention." *Warth, supra*, at 500. This is often lost upon or forgotten by even the most astute litigators. *In re Certification of Questions of Law*, __ F.3d __ (FISCR 2018) (*available at* https://bit.ly/2MQ41nG), slip op at *10-15. Instead, "standing is

generally an inquiry about the plaintiff: is this the right person to bring this claim?" *Davis v. Wells Fargo*, 824 F.3d 333, 348 (3d Cir. 2016). The doctrine of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Thusly, let us not be confused about whether there is judicial cognizability from the question of whether plaintiffs will be ultimately successful with their asserted claims. *In re Certification of Questions of Law, supra*, at *10.

ii. There are three elements to standing which are easily met in this case.

To have standing to sue, a plaintiff must show injury-in-fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). All three are easily present here.

1. Injury-in-fact.

Injury-in-fact requires "a showing of 'an invasion of a legally protected interest.'" *Spokeo, Inc. v. Robins*, 578 U.S. __; 136 S. Ct. 1540, 1548 (2016). Infants and their parents have alleged a legally protected

interest in being free from unreasonable searches and seizures under the Fourth Amendment as to the NSP, as well as a substantive due process liberty interest in the Infants being able to make their own medical decisions vis-à-vis their competent parents, and the parents having the right to make medical decisions for (and care, custody, and control over) their children. The prick of the needle and the seizing and taking of the blood happened to these Infant-Plaintiffs. This is having "a personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The State Defendants are confusing the injury-in-fact element with their conclusion of an alleged lack of economic damages. These are conceptually different. An alleged violation of a constitutional right upon a person is sufficient injury-in-fact to be an invasion of a legally protected interest and thereby provide standing. Whether or not there are damages does not answer the standing question. After all, "a plaintiff whose constitutional rights are violated is entitled to nominal damages even if

he suffered no compensable injury." *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000); see also *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 634 (6th Cir. 2013) (citing *Slicker, supra*); "Where a deprivation of [constitutional] rights has occurred, nominal damages must be awarded." *Midwest Media Property, L.L.C. v. Symmes Twp.*, 503 F.3d 456, 481 (6th Cir. 2007).

Plaintiffs here suffered an invasion of rights under the Fourth Amendment by having searches done to their bodies *without consent*. Additionally, by interfering with that fundamental and natural rights of parentage vis-à-vis invasively piercing the skin of the newborn child and extracting a part of the baby's body, i.e. six blood spots, for medical testing and storage of highly personal medical information *without consent*, the Infants and their Parents have clearly suffered another invasion of a legally protected interest, i.e. substantive due process liberty rights under the Fourteenth Amendment, for standing purposes. Injury-in-fact clearly exists.

2. Causation.

Causation is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co., supra*, at 103. By their appeal brief, the State Defendants do not seem to challenge the causation prong, i.e. that they are responsible for the past and continued operation of the NSP which is causing the injury-in-fact.[2] Nevertheless, that element is easily met because Defendants are the parties alleged to cause the illegal extraction of the blood; alleged to conduct testing without proper consent; and then transfer the excess blood samples to a non-profit and its director for additional testing, storage and sale. Causation is easily fulfilled.

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[2] An indirect attenuated line of causation of the eventual injury is sufficient for standing. *Parsons v. U.S. Dep't. of Justice*, 801 F.3d 701, 713 (6th Cir. 2015).

3. Redressability.

Redressability is "a likelihood that the requested relief will redress the alleged injury." *Steel Co., supra*, at 103. A plaintiff, however, need not show that a favorable decision will relieve his every injury. *Larson v. Valente*, 456 U.S. 228, 244 fn.15 (1982). Rather, it is only that a favorable ruling to Plaintiff against Defendants will or has "a likelihood" to provide injunctive relief and money damages. Nominal damages are awardable here too. E.g. *Midwest Media Property, supra,* at 481. Thusly, the claims are or likely redressable.

C. When combined together, standing is easily met.

The purpose of standing is to avoid federal courts from issuing advisory opinions not involving actual cases and controversies. There is nothing advisory here. The Infants' feet were pricked and blood drawn for medical testing and other uses without a warrant or parental consent. These Parents were expressly denied their right to be parents by these Defendants (through Michigan law, MCL 333.5431(2) and MCL

333.17520(1)) and were personally denied the ability to make key constitutionally-protected medical decisions for their newborns. These particular plaintiffs are clearly entitled to an adjudication of the particular claims asserted because their claims are directly premised on what has unconstitutionally happened *to them* vis-à-vis the NSP. Standing is fulfilled and they are entitled to a merits decision.

III. Plaintiffs have pled plausible claims.

Next, the State Defendants suggest that Plaintiffs have failed to state any plausible § 1983 claims. They are wrong. The Fourth Amendment claims are in two groups: the extraction-and-testing and the storage-and-sale. **First Am. Compl., RE 26, Counts IV and V.** The Fourteenth Amendment claims are premised on the failure to obtain consent from parents before conducting medical tests and procedures, which also caused the denial of the parents' rights to control the custody and care of their newborns. **First Am. Compl., RE 26, Counts I, II, and III.** Plaintiffs have provided plausible theories from a panoply of U.S.

Supreme Court and Circuit Court decisions. However, the State Defendants are still not understanding that the standard at this stage—pre-answer and pre-discovery—is merely 'plausibility.' The threshold is fairly nominal—the allegations "be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). It only needs to be enough to allow a court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Pleading highly "specific facts [is] not necessary." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

A. *Cruzan* is the keystone case for the Fourteenth Amendment claims.

The State Defendants concede *Cruzan* confirms the existence of the constitutional right (or what they call "the principle," see **Appellee Br., Dk #31, PageID #32**) that a competent person has a constitutionally

protected liberty interest in refusing unwanted medical treatment. *Cruzan v. Dir., Missouri Dep't. of Health*, 497 U.S. 261, 278 (1990). However, they then assert that because all minors are legally incompetent, *Cruzan*'s autonomy rights do not exist in any form for Michigan's minors, and the State Defendants—not parents—get to decide which medical testing the newborn, a citizen, will or will not receive as it applies to certain non-contagious diseases. These assertions are deeply flawed; the choice constitutionally belongs to these parent-plaintiffs because competent parents speak for their children in matters of medical decisions. This is well-established. E.g. *Parham v. J.R.*, 442 U.S. 584, 603 (1979); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) and *In re Rosebush*, 195 Mich. App. 675, 682 (1992). It is Plaintiffs' position that when the State Defendants undertook nonconsensual medical treatment and testing—i.e. the NSP processes including the later research utilizations at the Biobank—that Defendants violated the Infants' substantive due process rights under

Cruzan. The Infants' status as minors does not mean they lack constitutional rights, see *Planned Parenthood, supra*, at 74; it just means someone else has to exercise those rights for and by the citizen-infants on their behalf. That mission belongs to parents, not the State Defendants; a minor child is *not* a "mere creature of the State." *Parham, supra*, at 602. The District Court and the State Defendants errored in asserting and concluding otherwise.

However, that was not the only constitutional violation which was concurrently occurring under the NSP. In addition to the Infants' rights being violated under *Cruzan*, the Parents' right to decide how to bring up their Infant—which includes medical decisions—was also wrongfully denied by operation and application of the NSP process. It is well-established that there is a constitutional right of parents in the care, custody, and control of their minor children which "is perhaps the oldest of the *fundamental liberty interests* recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (emphasis added); see also

H.L. v. Matheson, 450 U.S. 398, 410 (1991); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); and *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The Supreme Court has "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel, supra*, at 66. Impingements on *fundamental* rights are subject to strict scrutiny. *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000).[3] The State errors by

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[3] Now the State Defendants take the position here that the government is not "without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." **Appellee Br., Dk #31, PageID #34** (citing *Parham, supra*, at 603). While seemingly true that the government has *possible* overriding control over some parental discretion, the authority the State wants this Court to provide is *carte blanche* authority. This is improper. Any authority the State and its officials could exercise contrary to a fundamental right must be undertaken in manner that passes strict scrutiny, i.e. serve a compelling state purpose and be narrowly tailored to achieving that purpose." *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). It is a heavy, but not impossible, burden. Here, Plaintiffs are asserting that the NSP could possibly survive strict scrutiny *if* having sought and obtained parental consent before conducting the medical treatment and blood testing. The failure to do that fails narrow tailoring.

failing to prove (or even assert) the current NSP process both is a compelling purpose and is narrowly tailored. The State Defendants broadly blunder in simply asserting this fundamental constitutional right does not exist in the face of precedent to the contrary. They and the District Court are wrong.

Lastly, Plaintiffs also assert a corollary or derivative theory of the Parents' rights as to the care, custody, and control of their children. The Infant-Plaintiffs in this case *themselves* have a separate fundamental constitutional right to have their legal guardians and parents, and not the State, make the appropriate decisions as to their care, custody, and control. If parents have the right of care, custody, and control, the children have the derivative right in the other direction. Both the State Defendants and the District Court errored in denying this right plausibly exists to survive a Rule 12(b)(6) motion.

i. Police power and religious-protection cases have no basis in this case.

The State Defendants also suggest that they have power to override the fundamental rights of these Infants and the Parents as to the Infants' care, custody, and control because, according to the State Defendants, the later have "broad discretion" in protecting the health of minors. **Appellee Br., Dk #31, PageID #37.** They cite two vaccine cases to support the overbroadly (and erroneous) contention: *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) and *Nikolao v. Lyon*, 875 F.3d 310 (6th Cir. 2017). Plaintiffs have previously explained how *Jacobson* and *Cruzan* can be read together in proper harmony. **Appellants Br., Dk #25, pp. 38-40.** The State has not shown otherwise; their reading of constitutional jurisprudence renders *Cruzan* a nullity for newborns and their parents and obviously is incorrect. Yet despite the State Defendants' citation to *Nikolao*, that decision does not help resolve the current case either. *Nikolao* is a vaccine case where parents challenged

the mandate for vaccines on First Amendment *religious*, not substantive due process, grounds. However, if a parent decided he or she did not want to accept the vaccine for his or her minor child, the State offered narrowly tailored method to seek an exemption premised on "religious convictions or other objection to immunization." Despite being given the exemption, the *Nikolao* plaintiffs sued for violation of religious rights under the First Amendment and the equivalent under Michigan's state constitution.

Nikolao is just simply not applicable. First, this is not a religious challenge case; a different set of constitutional rights is at play. Second, the State actually provided a clear statutory-based opt-out procedure (i.e. allowing for the exercise of consent) which does not exist for the NSP process. In other words, *Nikolao* was not a liberty rights case, but a religious rights case—a different set of standards apply. The same can be

said for the citation to *Prince v. Massachusetts*, 321 U.S. 158 (1944), another religious rights case.[4]

Here, under a liberty due process rights, parents have fundamental rights as to the care, custody, and control of their children. And while the State does have the ability to mandate certain things from parents, it needs to pass the highest (or at least higher) levels of judicial scrutiny to lawfully impose the same. It is tough mandate but it can be done. With the NSP, they never even tried; they broadly and arbitrarily overrode the Parents' and Infants' liberty rights by obliterating the need to obtain informed consent for NSP testing. See MCL 333.5431(2); MCL 333.17520(1). This cannot pass the scrutiny test obligated in the

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[4] The State Defendants also cite *Schall v. Martin*, 467 U.S. 253 (1984) for the proposition that "especially in the context of minor children, 'the State must play its part as *parens patriae*.'" That was wrongfully misquoted. It actually says minors "are assumed to be subject to the control of their parents, *and if parental control falters*, the State must play its part as *parens patriae." Id.*, at 265 (emphasis added). There is no parental 'faltering' here.

fundamental substantive due process sphere. In short, newborn screening tests can be effectuated by the State but only if it serves a compelling state purpose and is narrowly tailored to achieving that purpose. *Craigmiles, supra*, at 223. In its current form, it does not.[5]

B. Piercing the skin of an infant to extract blood without consent is an unreasonable search under the Fourth Amendment.

The State Defendants now claim—contrary to the District Court's decision—that a Fourth Amendment search did not occur. **Appellee Br., Dk #31, PageID #41.** But even assuming it is a search, they assert the search was reasonable. The problem with those assertions is that both have been rejected in similar circumstances thereby making Plaintiffs'

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[5] For example, *private* newborn screening options are available which would still have all testing completed but then prevent the State's wrongful action of seizing, retaining, and selling the blood samples. See PerkinElmer Genomics, <https://www.perkinelmergenomics.com/healthcare-providers/newborn-screening/>.

case plausible. In other words, they are wrong in seeking and obtaining a Rule 12(b)(6) dismissal.

i. **A search has occurred.**

The First Amended Complaint asserts that the State Defendants caused "a needle or other skin-piercing device to breach the outside skin of the newborn Infants to extract five or six samples of blood, known as blood spots." **First Am. Compl. RE 26, PageID #309, ¶35.** The Supreme Court has been clear—"our cases establish that the taking of a blood sample… is a search." *Birchfield v. North Dakota*, 579 U.S. __; 136 S. Ct. 2160, 2173 (2016). Because it is a search done without a warrant in this case, it is "*per se* unreasonable under the Fourth Amendment" unless a "specifically established and well-delineated exception" applies. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971). The burden of establishing and proving the exception exists in the circumstances to make the search reasonable is on the government. *U.S. v. Jeffers*, 342

U.S. 48, 51 (1951). The only exception raised by the State Defendants was the special needs doctrine.

ii. The special needs doctrine exception plausibly does not apply.

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 v. Head Start, Inc*., 336 F.3d 1194, 1212-1213 (10th Cir. 2003). The exception has lost some legal steam as of late. Claiming a special need in the criminal context for blood draws and BAC testing is now precluded under Supreme Court precedent in *McNeely*[6] and *Birchfield.* The Supreme Court was forthright: "blood tests are a different matter." *Birchfield, supra,* at 2178. A blood test places in the hands of government a bodily (i.e. blood) sample that can be

[6] *McNeely v. Missouri*, 569 U.S. 141 (2013).

preserved and from which it is possible to extract information beyond its original purpose. *Id.* The process itself is a compelled physical intrusion beneath skin after piercing and extracting a part of the subject's body. *Id.* For newborn testing (as an even more extreme use than for blood-alcohol testing), the government takes the blood to its secret[7] facilities where it withdraws, by scientific extraction, highly personal information about a newborn's core genetic makeup, i.e. the essence of their person containing their personal and deeply-private medical, genetic and biological information. The government then makes permanent records and keeps that expropriated information in government files and databases, thereby destroying privacy interests. Defendants' scheme to

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[7] MDHHS has taken the position that the NSP is a "medical research project" pursuant to the Michigan Public Health Code, MCL 333.2631 *et seq*, and is therefore outside any public scrutiny or Michigan's open records (FOIA) law. The Biobank claims it is not a public body and therefore not subject to outside public scrutiny or Michigan's open records law either.

invasively pierce the skin and extract the same without consent or a warrant involves the "most personal and deep-rooted expectations of privacy." *McNeely, supra*, at 148. The excess blood spots not used up in the NSP testing remain seized and then sent on to the nonpublic Biobank (even though no Parent has approved this transfer to such a private third-party non-profit) where the millions of blood spots are then indefinitely stored and/or sold for uses other than newborn disease screening. Our highest court recognized that even if the government "is precluded from testing the blood for any purpose other than [its original purpose], the potential remains and may result in anxiety for the person tested." *Id.* Thus, according to the Supreme Court, a warrant is needed for the government to extract blood when consent is not first obtained for testing.

Even in applying the special needs exemption to children's blood extraction and medical testing contrary to *McNeely*, the most analogous case is *Dubbs*, which still rejects the viability of the special needs

exception. *Dubbs, supra*, at 1214 ("the [nonconsensual] searches were unconstitutional even if we employ the 'special needs' balancing test"). 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" in this context. *Id.*, at 1215. Given this, the special needs doctrine would "not excuse the failure to obtain parental consent..." *Id.* Therefore, the District Court and the State Defendants errored in arguing there is no plausibility that the special needs doctrine does not apply. The Tenth Circuit concluded otherwise; therefore, the Fourth Amendment claims have legal plausibility per *Dubbs*.

iii. ***Dubbs*** **is on-point; the State Defendants offer no actual reason to ignore it.**

This Court was invited on the top side brief to generally adopt and follow the Tenth Circuit's *Dubbs* decision as the standard for this case.

The State Defendants argue that *Dubbs* is factually distinct yet never actually explains *how* it is substantively different. Even if claiming it is slightly different factually, it is distinction without a difference. *Dubbs* involved a head start program. The head start nurse showed up to the classroom and took the minor children to the neighboring classroom to have the health department undertake both physical medical exams and blood tests. The parents were not informed and consent was not obtained beforehand. The parents sued asserting, among other claims, violations of the Fourth and Fourteenth Amendments. The Tenth Circuit, in reversing the local district court's Rule 12(b)(6) dismissal, concluded "the right to consent [or not] to medical treatment for oneself *and one's minor children* may be objectively, deeply rooted in this Nation's history and tradition"—the test for fundamental substantive due process—and "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 (emphasis added). As to the Fourth Amendment, the Tenth Circuit found the examinations and blood tests to be searches and were plausibly unreasonable because the special needs exception to the warrant requirement did not apply. *Id.*, at 1214. This is because obtaining parental notice and consent was not impracticable to obtain in this context. *Id.*, at 1215.

Plaintiffs are hard pressed to see how *Dubbs* is distinguishable in relevant legal terms. While no two cases are exactly alike, *Dubbs* is highly or not directly instructive to the facts of this case where blood tests and medical treatment are conducted on infantile minors without notice to or consent of the parents. The holding and logic of *Dubbs* should be adopted for use in this case as a clear basis for Plaintiffs to meet their plausibility pleading requirements and jumpstart discovery.

IV. The other issues raised by the State Defendants are meritless.

A. The State Defendants do not enjoy, at the current posture, qualified immunity as a matter of law.

The State Defendants asserted qualified immunity in its Rule 12(b)(6) motion. Qualified immunity has two parts. The first step is to determine if the facts alleged make out a violation of a constitutional right; the second is to ask if the right at issue was clearly established when the event occurred such that a reasonable officer would have known that his or her conduct violated it. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). "This is not to say that an official action is protected by qualified immunity unless the *very action* in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be *apparent*." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (emphasis added); see also *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). General statements of law are capable of giving clear and fair warning. *Smith v. Cupp*, 430 F.3d 766,

776-777 (6th Cir. 2012). A case "directly on point" is not required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "An action's lawfulness can be apparent from [1.] direct holdings, [2.] from specific examples described as prohibited, or [3.] from the general reasoning that a court employs." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003). This can be established from decisions in other circuits and even secondary sources. *Barker v. Goodrich*, 649 F.3d 428, 435-436 (6th Cir. 2011).

i. **Qualified immunity is inappropriate at this current litigation posture.**

Qualified immunity is unavailable[8] at this procedural posture of the case. First, it is "generally inappropriate" to seek qualified immunity via a Rule 12(b)(6) motion. *Westley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015); *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017). Only truly

[8] Moreover, qualified immunity does not protect these defendants from claims for declaratory or injunctive relief. *Flagner v. Wilkinson*, 241 F.3d 475, 483 (2001).

"*insubstantial* claims against government officials should be resolved... prior to broad discovery." *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015). Although "qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Wesley, supra*, at 433-434; see also *Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (EASTERBROOK, J., concurring). The fact-intensive nature of the applicable *Martin* test makes it "difficult for a defendant to claim qualified immunity on the pleadings *before discovery*." *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (SUTTON, J., concurring). "[T]he standard for a 12(b)(6) motion is whether the allegations, if taken as true, could state a claim upon which relief may be granted, [and] dismissal of [the state actors] on the basis of qualified immunity is premature." *Grose v. Caruso*, 284 Fed. App'x. 279, 283 (6th Cir. 2008). Despite this jurisprudential standard, the State Defendants tacitly concede this inquiry is "fact-specific, case-by-

case basis," citing *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995). By being concededly *fact* specific, Rule 12(b)(6) is a poor fit to resolve the question.

ii. The State Defendants argue for the wrong standard for qualified immunity.

The State Defendants asserted that "once qualified immunity is asserted, the plaintiff must *allege facts* sufficient to show that: (1) the official's acts violated a federal right; and (2) the right at issue was clearly established at the time of the defendant's alleged misconduct.," citing *Barker v. Goodrich*. **Appellee Br., Dk #31, PageID #47.** That is not the holding of *Barker*, as that case was a review of decision on a Rule 56 motion after discovery had concluded. Plaintiffs acknowledge it does have the burden of proving *at the post-discovery merits stage* that the official's acts violated a federal right and the right at issue was clearly established at the time of the defendant's alleged misconduct. But this is not needed until after discovery; that is the common practice. E.g. *Horn v. City of*

Covington, No. 14-73, 2015 WL 4042154, at *6 (E.D. Ky. July 1, 2015). The request for dismissal due to qualified immunity is here just too premature, especially with a secret, nonpublic scheme like Michigan's current NSP.

iii. The correct standard is apparentness.

It is explicit from binding Supreme Court precedent—a nonconsensual search and seizure of blood requires a warrant, and failure to obtain the same is a Fourth Amendment violation. *Birchfield, supra*; see also *McNeely, supra*. *McNeely* was even clear— "a warrantless search of the person is reasonable *only if* it falls within a recognized exception." *McNeely, supra*, at 148. The only exception tried by the State Defendants is the special needs exception which the Tenth Circuit rejected fifteen years ago. The decade and a half existence of *Dubbs*, even before *McNeely* and *Birchfield*, makes it easily apparent and clear by the direct holding and general reasoning that a search of and seizing of a newborn child's blood without parental consent (or a warrant) is unlawful

and that any claims to the special needs exemption to render the search from per se warrantlessly unreasonable to reasonable is unavailable. The State Defendants cannot take a head-in-the-sand approach to be blanketed by faux qualified immunity.

Same apparentness can also be said of the liberty interests under the Fourteenth Amendment. Legally-competent parents, and not the State, are empowered and have the right to make decisions regarding medical procedures being undertaken on behalf of their Infant children under *Cruzan*, *Parham*, and *Troxel* (with its progeny). To the extent that an official could not have read the multiple cases together, *Dubbs*, a 2003 decision, distills the same into in a well-articulated decision providing clear general reasoning and general principles from which a reasonable official would have known its action for medical and blood testing were and are wrong. And more directly, another federal district court has found that the same Fourth and Fourteenth Amendment claims are plausible as to Texas' similar NSP law because valid claims were made

against those state defendants who "routinely collected blood samples from all babies in Texas at time of birth and stored this blood or 'spots' indefinitely… for undisclosed research unrelated to the purposes for which the blood was originally drawn, without the knowledge or consent of the parents and "the infant blood spots contain deeply private medical and genetic information, and were expropriated without knowledge or consent." *Beleno v. Lakey*, 306 F.Supp.3d 930 (W.D. Tex. 2009).[9] Dismissal under Rule 12(b)(6) was denied. *Id.*[10] Thusly, qualified immunity is not yet available as a matter of law.

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[9] It is believed changes were made by the State Defendants to the NSP system as a result of the *Beleno* decision, i.e. they knew about the legal problems with the program and still acted contrary to the constitutional limitations required of state actors.

[10] Since the *Beleno* decision, 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.

B. Plaintiffs never asked for monetary relief against defendants in their official capacity.

Next, the State Defendants demand Eleventh Amendment immunity for pled money claims against MDHHS and the State Defendants in their official capacity. MDHHS is not a party on this appeal, so it has no standing to seek any relief before this Court.[11] As to the State Defendants (each sued both in their individual and official capacities), each form of sought relief related to money damages expressly conditioned that relief "to the extent not prohibited pursuant to the Eleventh Amendment to the United States Constitution." **First**

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[11] In the lower court, Defendant MDHHS had the option to voluntarily participate in this case by choosing, after initiation of this suit, to waive its immunity. By its filings, it opted not to. As such and respecting that, Plaintiffs declined to further name and join MDHHS in the pending appeal due to their Eleventh Amendment immunity. It is ironic, however, that MDHHS demanded the option of consent to decide whether to waive constitutional rights (under the Eleventh) yet is denying the same opportunity to Plaintiffs to decide whether to waive their constitutional rights (under the Fourth and Fourteenth).

Am. Compl., RE 26, PageID #332, ¶118(j)-(k). In other words, immunized money damages were *never* sought by Plaintiffs against the State Defendants in their official capacities, only in their individual capacities. See *Boler v. Earley*, 865 F.3d 391, 490 (6th Cir. 2017). As such, the claim of error is imaginary and there is no error at all.

C. Stuffing the record is improper.

Plaintiffs also challenged the practice of the State Defendants stuffing the record with exhibits for their motion. On appeal, they assert that the exhibits were for a Rule 12(b)(1) motion, not the Rule 12(b)(6). But there is a problem with that argument—the State Defendants never *actually used* any of the attached evidence to attack or counter any particular specifically-pled fact in the First Amended Complaint. **State Defendants' MTD, RE 32, PageID #505-508.** Thus, the State Defendants' merely mounted nothing more than a facial attack (and claimed otherwise to stuff the record to paint a prettier political picture about the NSP). When the district court is not asked to make findings

contrary to the facts made in the pleadings in deciding it that lacked jurisdiction, it is a 'facial' 12(b)(1) motion and looks only to the pleading. See *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir.1990).

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: November 12, 2018

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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 portion of the reply brief, including headers and footnotes, contains 6,474 words according to the Word Count feature in the Microsoft Word program, being less than 6,500 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.

Date: November 12, 2018

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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)
32	#477-532	State Defendants' Motion to Dismiss
50	#825-846	Opinion
51	#847	Judgment