IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY AND GEORGINA STUART

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,

Respondent.

and

STEVE EGGLESTON, an individual,

Real Party-In-Interest.

CASE NO. 87906

DISTRICT COURT CASE NO.

A-16-748919-C

REPLY TO REAL PARTY IN INTEREST'S/PLAINTIFF'S ANSWER TO DEFENDANTS' EMERGENCY PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Plaintiff's Answer fails to refute the fundamental fact his children were not removed from his home by Defendants. Absent removal, the law does not support the argument that a Constitutional right to parent was violated. A decision that removal needs to occur does not equate to removal. Plaintiff cites no law supporting the assertion that his parental rights were violated when Defendants advised that removal would occur if an alternative protective option was not selected, nor any law supporting the argument that Plaintiff was constitutionally entitled to prior notice of the option. It is largely based on: (1) waived arguments; (2) incorrect facts; (3) First Amended Complaint (FAC) and this Court's 2021 12(b)(5) Order; (4) inapplicable and nonbinding case law; and (5) inapplicable Safety Plan criteria, which cannot be considered.

II. FACTUAL AND PROCEDURAL BACKGROUND

The material undisputed facts are:

1. **Plaintiff's attorney conceded during oral argument below that Defendants did not remove the children from the home.** (**Ms. Armeni: Did an actual removal take place? No.)** TR11:8-9.

2. **Plaintiff's parental rights were not terminated**. Eggleston v. Stuart, 137 Nev. 506, 508 (2021).

3. Upholding the Substantiation of "Physical Injury (Abuse)–Physical Risk" against Plaintiff, the First Judicial District Court (FJDC) reviewed all of the same evidence at issue here and found **Defendants' decision substantiating abuse by Plaintiff was <u>not</u>: (1) in violation of a constitutional right or statutory provision; (2) in excess of agency statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable probative and substantial evidence on the records; or (6) arbitrary, capricious or characterized by abuse of discretion.** The decision has not been overturned**.** WRIT176,186-87,189-90,211-12;EXH780-83.

4. Stuart had substantial contact with Plaintiff between 12/23/14 and 1/6/15 and worked to get the family resources. EXH027-42,104,153-63,214-57. It was not until 1/6/15 at 2:45 p.m. that Stuart's Manager determined in home services were not an option going forward because the protective Illinois family members were leaving on 1/7/15. Plaintiff had not demonstrated sufficient protective capacity alone and, therefore, the children needed to be removed unless he agreed to Temporary Guardianships with the protective family. EXH37,40;171-73;75-77,80-84,136-46.

5. On 1/7/15, after Stuart and police were in the home, Plaintiff, who was an attorney, left the room and went into his home office to talk to his attorney Emily McFarling and received her independent advice to and voluntarily signed the

Guardianships. Plaintiff left the home, went to a UPS store, signed the Guardianships, had them notarized and returned home. EXH 136-37,139-40,181-82. Thus, Defendants did not "force"/"coerce" him to sign them. WRIT9:1-3,EXH177-78,183-84;199:5-7;209-10.

6. Defaults were entered against Lisa and Brian Callahan as to the Intentional Infliction of Emotional Distress Claims (IIED) and Defamation claims. Thus, it is a fact that Lisa "abducted and removed" the children out of Nevada without Plaintiff's consent and thereby engaged in extreme and outrageous behavior, denying Plaintiff his right to parent causing emotional distress. WRIT09:27-28;21:11-18;29:17-18;166:21-22.

7. The record contains no evidence of "misrepresentation" to support the district court's conclusion that Stuart misrepresented her authority to provide services to the family. Her related efforts were overridden by Management's determination that the children would not be safe in Plaintiff's home absent the protective family members, and services (rent and daycare subsidies) would not correct that concern. The children were at risk from Laura's physical abuse (i.e., they locked themselves in a room to be safe from her until she passes out on a weekly basis, Laura "got wasted on Vodka and pills" and threatened to kill herself in the children's presence and Plaintiff was unaware of it), and long, ongoing and untreated substances abuse and mental health issues including suicidal ideation and admitted alcohol use that

Plaintiff was aware of but busy working and not able or willing to control her drug and alcohol use while on the PDP – which is corroborated by Plaintiff's own Timeline of events. WRIT92-96, 196:23-197:7, 204:11-206:16, 208:15-209:18, EXH06-9,35,48-53,55-56,94-96,107-09,113:2-11,153-63,784,see, pp.19-20, pp. 18-19, infra.

8. This Court's prior NRCP 12(b)(5) Order in this case properly assumed Plaintiff's allegations were true, but the assumptions and related conclusions do not avoid summary judgment. The Court must look at undisputed facts material to the claims and immunities. Eggleston, 137 Nev. at 512-13, 495 P.3d at 489-90.

9. Plaintiff's Safety Plan Determination (SPD) argument fails because after Guardianships were signed, the children were no longer in the unsafe environment and the case closed ("safe. Case closed.") An SPD is only required when "**Impending Danger Threats exist for…children in the home**" and is conducted relative to removal. ("Case will be open (for Permanency Services or SAFE FC). **Conduct the Safety Plan Determination immediately** unless a Present Danger Plan is in place". Ans. 6;EXH153-63.

III. STANDARD FOR A WRIT OF MANDAMUS

This court "**review[s] a district court's denial of summary judgment *de novo*, without deference to the findings of the lower court**." PetSmart, Inc. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark, 137 Nev. 726, 729–30, 499 P.3d

1182, 1186 (2021). (emphasis added) Mandamus is required because the district court did not apply controlling federal law to determine whether a constitutional right was violated by Defendants, and Defendants are entitled to qualified and statutory immunity. Appeal is not an adequate and speedy legal remedy because qualified immunity will be lost forever if a case is erroneously permitted to go to trial; establishing a clear answer to qualified immunity promotes judicial economy and avoids an unnecessary jury trial. White v. Pauly, 580 U.S. 73, 79, 137 S. Ct. 548, 551–52 (2017) citing Pearson v. Callahan, 555 U.S. 223, 231 (2009) Cheung v. Eighth Judicial Dist. Court, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). Other important issues of law impacting DFS/CPS' primary mandate to protect children are at issue.

> It is necessary to protect social workers in their vital work from the harassment of civil suits and to prevent any dilution of the protection afforded minors by the dependency provisions of the Welfare and Institutions Code. **Therefore, social workers must be absolutely immune from suits alleging the improper investigation of child abuse, removal of a minor from the parental home based upon suspicion of abuse and the instigation of dependency proceedings.**

Foster v. Washoe Cnty., 114 Nev. 936, 943, 964 P.2d 788, 792–93 (1998) (emphasis added).

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IV. ARGUMENT

A. Plaintiff Waived And/Or Conceded Various Arguments

Plaintiff's new arguments and case law, first asserted in Answer to the Petition, are waived and cannot be considered. Specifically: (1) qualified immunity argument (pp. 14-15); (2) reliance on Eggleston 12(b)(5) Order assuming all allegations were true; (3) offensive remarks about Judge Wilson raising RPC 8.2(a) issues (p. 15, n. 3); (4) Plaintiff did not request supplemental briefing re: *res judicata* and chose to rely on oral argument – he cannot now supplement; (5) Plaintiff waived any procedural due process claim (PDP) because the district court did not find any such violation and Plaintiff has not sought any related relief; and this Court found the complaint does not present that claim. Eggleston, 137 Nev. at 511, 495 P.3d at 489.

B. Defendants Are Entitled To Summary Judgment On §1983 Claim

1. No Constitutional Violation Occurred

> "[P]arental rights…are not absolute**…[T]he state…has an interest in the welfare of children and may limit parental authority…**[and] **where justified, that parents can be totally deprived of their children forever…If the state can completely eliminate all parental rights, it can certainly limit some parental rights when the competing rights of the child are implicated.**

Kirkpatrick v. Dist. Ct., 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003) (citations omitted).

The record and federal law establishes Plaintiff's Constitutional right to parent his children was not violated. Plaintiff's counsel conceded the children were not removed. TR11:8-9. Thus, whether Plaintiff's claim is a substantive or procedural due process violation, absent removal the claim fails under federal law. Plaintiff cites inapposite cases where the state removed a child from the home – Garver v. Washoe Cnty., 2011 WL 6002969, at *6 (D. Nev.) (removal of a child then placed in protective custody); Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1107 (9th Cir.2001) (removal and placement of a child in foster care); Romero v. Washoe Cnty., 2013 WL 5592269, at *3 (D. Nev.) (County removal of child from home); Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101, 1115, n. 14 (9th Cir. 2010) (removal of children from foster home and revocation of foster license.) Without removal, the Constitutional right to parent is not violated and the Court's inquiry ends in Defendants' favor.

Croft v. Westmoreland Cnty. Child. & Youth Servs., 103 F.3d 1123, 1125-27 (3d Cir. 1997) cannot be considered because it was not cited in Opposition to the MSJ and decisions outside of this circuit cannot guide interpretation of what amounts to a Constitutional violation and what is "clearly established" federal law in this Circuit, and is inapposite. Loftus v. Clark-Moore, 690 F.3d 1200, 1207 (11th Cir. 2012). The Croft court denied qualified immunity because the

caseworker had a **hearsay report** that involved anonymous tips that were not substantiated and had no indicia of reliability so the case does not apply.

Here, DFS' reasonable cause was based on three CPS Reports from first-hand witnesses interviewed by Stuart, and bolstered by information from family sources, aware of the family history and dynamics (Lisa, Alexis and Selena) who were present in person and regularly communicated with Stuart throughout the investigation that the children were at risk from Laura's long, ongoing and untreated substances abuse and mental health issues including suicidal ideation; and an independent unbiased source – **Sunrise Hospital Social worker, a mandatory reporter** – who called CPS on 12/29/15 about H.E.'s hospitalization, previous near drowning, Laura's suicidal ideation and admitted alcohol use, sibling's concern re home safety, father often busy working, and H.E.'s primary sibling caregiver returning to Chicago. Supporting information included that on 12/30/14, Laura bought and drank Vodka; and siblings found 15-20 empty Vodka bottles stashed in Plaintiff's/Laura's master bedroom closet. Plaintiff's own Timeline corroborates these events. WRIT094, EXH06-9, 35, 48-53, 55-56, 107-09, 113:2-11,153-63. EXH784. Plaintiff could not control Laura as she continued to abuse drugs and alcohol while on the PDP. EXH094-96.

With the protective family leaving, offering removal as one option did not violate Plaintiff's §1983 rights. Even construing the record in the light most

favorable to Plaintiff, a reasonable trier of fact could not conclude Plaintiff's Constitutional right was violated and/or that DFS should have left the children in the home. Ansara v. Maldonado, 647 F. Supp. 3d 958, 972 (D. Nev. 2022), appeal dismissed, 2023 WL 3221749 (9th Cir. May 1, 2023) (granting §1983 summary judgment where child was removed without a warrant due to reasonable cause to believe mother posed an imminent threat due to "**a close relative's tip" that a child is at risk justifying a seizure without prior judicial authorization**. Wallis v. Spencer, 202 F.3d 1126, 1140 (9th Cir. 2000); Momox-Caselis v. Clark County, 2018 WL 6795556, at *2 (D. Nev.) (§1983 summary judgment and qualified immunity granted where child was removed without a warrant because mother left all the aged 2-12-year old children unsupervised), aff'd sub nom. Momox-Caselis v. Donohue, 987 F.3d 835 (9th Cir. 2021).

CPS Report Sources are confidential by Statute. NRS 432B.290(3)(b) states "A written summary of the allegations…in the report…must not identify the person responsible for reporting the alleged abuse or neglect." They are not anonymous. The Source was known by DFS and Stuart spoke with the Source. EXH154-55,159,161. Also, "an anonymous tip may justify investigation" and DFS has absolute discretion as to what it will investigate. Wallis at 1126. An Investigation into alleged child abuse "involves 'personal deliberation, decision and judgment' and cannot be construed as ministerial," granting NRS 41.032

immunity. Johnson v. Clayton, 2009 WL 10693589, at *4 (D.Nev.) The record clearly establishes DFS had independent, undisputed, sufficient, corroborated and articulable criteria of reliability from a Social Worker and the family about the ongoing threats to children posed by Laura, by Plaintiff being unaware of what was going on and/or refusing to take any action; H.E. twice being hospitalized; Laura twice being hospitalized for suicidal ideation within a 7-day period; Laura abusing drugs and alcohol while being supervised by Plaintiff on the PDP; and the family was leaving and feared leaving the children with parents alone.

The FJDC determined Stuart's investigation was appropriate based on her live and unrebutted testimony and documents upholding the Substantiation – the very same evidence here. There is more than enough independent, articulable and/or sufficient indicia of reliability supporting DFS' concerns and decision. Plaintiff argues his right to parent was violated when he was given a choice to avoid removal by signing Guardianships but offers no law indicating such choice violated this right. Thus, his right was not violated and Defendants are entitled to qualified immunity.

2. Plaintiff Has No Procedural Or Substantive Due Process (SDP) Right To Prior Notice Of Possible Removal

Removal requires Supervisor/Manager approval. WRIT100,220. Management determined in home services were not an option and removal was one option. DFS has discretion to remove and the law does not require advance notice

to a parent. NRS 432B.340 and 432B.330;WRIT100,220. **Since the State decisionmaker has discretion, there is no Constitutionally protected interest.** Morimoto v. Whitley, 2018 WL 5621855, at *5–6 (D. Nev.) citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Town of Castle Rock, Colo., 545 U.S. 748, 756 (**a plaintiff does not have a Constitutionally protected interest in a benefit "if government officials may grant or deny it in their discretion**"). NRS 432B.340 and 432B.330 provide that DFS "may" remove the child from the home and, thus, has clear discretion to do so. There is no Statute or law requiring prior notice of removal and providing such notice presents other risks to children, i.e., a flight risk and/or could cause injury to the minors. WRIT100,220-21. Supervisor Mary Atteberry recommended Stuart take police because there were safety concerns with going to the home advising of Management's decision, and removing 4 children with Laura's out-of-control behaviors, mental health concerns, substance abuse, and Plaintiff's very oppositional stance to Stuart (he did not agree with the concerns and DFS' involvement with his family). Plaintiff's attorney McFarling confirmed: (1) Stuart told her Plaintiff was in the home not protecting the children, that was the reason she brought police on 1/7/15; (2) they "[c]an't leave four kids with mom, and dad [not] willing to recognize what's going on." EXH194-95; and (3) if Plaintiff signed, DFS would not file an abuse and neglect petition, close the case and there would be no more DFS oversight of the family,

which is exactly what happened and Plaintiff wanted. EXH192:23-193:18,199:5-7,12-15, 200:1-201:24,203:22-204:8. Also, it is protocol to request and DFS Policy requires police assistance where there is reason to believe there's a threat of bodily harm and/or the parents will flee with the child. WRIT 98,100,231,235-36;EXH194-95.

3. **Plaintiff's SDP Rights Were Not Violated By Police Presence And That Does Not Constitute Coercion**

Plaintiff's coercion argument fails. On 12/24/14, at Plaintiff's and Stuart's face-to-face contact, Stuart read the Report allegations and gave him a CPS Brochure advising him of his rights on removal, visitation stating:

> Can parents visit while they child is in protective custody? We encourage parents to visit their children while they are in protective custody. It is helpful for both children and parents to stay connected. Visitation hours are available. Phone contact is also encouraged. Every attempt will be made to accommodate parents who are unable to visit during regular visitation hours.

WRIT230:5-11;EXH097. Also, McFarling advised Plaintiff to sign the Guardianships. The FJDC's Order supports issue preclusion here. Section D. Plaintiff's Petition for Judicial Review (PJR) alleges Constitutional rights violations but the FJDC determined Plaintiff was not forced or coerced to sign the Guardianships and "it is clear he himself made the decision to forgo pursuing any further parenting of the children, and instead elected to sign a temporary guardianship" and "the parents both believed that allowing the children to go live with the maternal aunt and uncle is what was needed until they could figure some

things out. The mother and Mr. Eggleston signed temporary guardianship[s]…to the maternal aunt and uncle. Mr. Eggleston did so with the advice of his counsel, McFarling, as described in her July 11, 2015 email. Police did not threaten, spit or draw their weapons on Mr. Eggleston to force him to sign the temporary guardianship." WRIT190-91,203-206,284:7-26. Plaintiff's decision was based on McFarling's experience and advice that "one reason to have a guardianship…was to get DFS out of a family's life," which Plaintiff wanted and got; and Plaintiff was an attorney and did not believe the Guardianships were valid ("there is no way in the world this is ever going to be valid, so don't worry, it is not valid.") EXH177-78,183-84,199:5-7. Plaintiff left home, could have kept on going but instead signed the Guardianships at UPS and returned home.

Even if this Court assumes there was coercion, it fails because the Guardianships were "temporary" and revocable. Plaintiff and McFarling knew on 1/13/15 the children were in Illinois and Plaintiff did not revoke the Guardianships until 2/18/15 or send revocations to Lisa until 3/30/15, and filed a Paternity Action in which he did not seek to revoke the guardianships, reverse the Illinois Court Order granting Lisa temporary custody and/or bring her into the Paternity Action, which Judge Wiliam Potter of the Family Court told them on 6/24/15 that they needed to do if they wanted any related relief. WRIT224-26; EXH724:23-725:2 and 16-17. McFarling spoke to Stuart on 1/21/15 to confirm DFS was closing the

case and said nothing about any miscommunication, misrepresentation, duress, coercion, lies or fraud as to the children remaining in State. Thus, Plaintiff, with the continued advice of his attorney, knowingly chose not to do anything and Defendants did not cause his injury/damages.

Plaintiff not seeing his children for years was caused by his, McFarling's and/or Lisa's actions, not by DFS because it was off the case. Lisa gave Plaintiff access to the children for the first year from the date they left Las Vegas on 1/9/15. EXH138. In 4/2016, Plaintiff moved to England (over 3,900 miles away from the children) rather than to Illinois to be with his children, apparently preferring to sue for $70 million rather than see them. WRIT024;EXH417. Lisa "abducted" and removed the children out of State, not DFS. WRIT09:27-28,262-71.

C. Defendants Are Entitled To Qualified Immunity

Defendants are entitled to qualified immunity because: (1) they did not violate Plaintiff's Constitutional rights; (2) the alleged Constitutional rights were not clearly established; and/or their decisions/actions, even if mistaken, were not wholly unreasonable under the circumstances. The U.S. Supreme Court has "repeatedly...stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Mueller v. Auker, 576 F.3d 979, 992–93 (9th Cir. 2009) citing Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534 (1991).

1. Plaintiff Cannot Establish A Constitutional Violation

See Section B, supra.

2. Plaintiff Cannot Establish His Rights Were Clearly Established

Even if Defendants violated Plaintiff's Constitutional right, there is no clearly established legal precedent, and Plaintiff has not identified any, that would place any reasonable official/Defendants on notice that offering two options – either removal or signing Guardianships – violates a Constitutional right. The district court erred when it failed to engage in this analysis. **The "clearly established law" test is an "exacting standard"** (City & Cnty. Of San Francisco v. Sheehan, 575 U.S. 600, 611 (2015)) **and "requires that the legal principle clearly prohibit the officer's conduct in the circumstances before him."** D.C. v. Wesby, 138 S.Ct. 577, 590 (2018). **This standard requires a plaintiff to identify a case "where an officer acting under similar circumstances as [the defendant] was held to have violated the…[particular] Amendment**." White, 580 U.S. at 80, 137 S.Ct. at 552. **"[E]xisting precedent must have placed the statutory or Constitutional question beyond debate**." Id. at 79, 551 (citation omitted).

> **Once a defendant raises a qualified-immunity defense, the burden shifts to the plaintiff to demonstrate both that the challenged conduct violated a constitutional or statutory right, and that the right was so clearly established at the time of the conduct "that every reasonable official would have understood that what he [was] doing violate[d] that right."**

Ashcroft v. al–Kidd, 563 U.S. 731, 740, 131 S.Ct. 2074, 2083 (2011) (emphasis added). If the plaintiff fails to establish either element, the defendant is immune from suit.

In order for a right to be clearly established, Supreme Court or 9th Circuit precedents must have "placed the...constitutional question beyond debate." Id. at 741, 2074. Cases "cast at a high level of generality" do not create clearly established law outside of an obvious case. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right…and in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987).

> **The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."** Saucier v. Katz, 533 U.S. 194, 202, 121 S.Ct. 2151…(2001). **This requires a high "degree of specificity."** Mullenix v. Luna,…136 S.Ct. 305, 309…(2015)…**We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."** Plumhoff [v. Rickard, 134 S.Ct. 2012, 2023 (2014)].

Wesby, 583 U.S. at 64, 138 S. Ct. at 590.

> **An official "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his or her] shoes would have understood that he [or she] was violating it."** Plumhoff …"**This exacting standard gives government**

> **officials breathing room to make reasonable but mistaken judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the law."** City and County of San Francisco v. Sheehan,…135 S.Ct. 1765, 1774…(2015)…(quoting…al–Kidd, 563 U.S. 731, 743, 131 S.Ct. 2074…)

Hardwick v. Cnty. of Orange, 844 F.3d 1112, 1117 (9th Cir. 2017). "[**T]he 'salient question'… [this Court] must answer is "whether the state of the law…[as of 1/7/15], when the conduct at issue allegedly occurred…gave…the…social workers…fair warning" that offering options of removal or Guardianship was unconstitutional.** Id. **The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson, supra.** "The qualified immunity standard **'gives ample room for mistaken judgments'** by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter, 502 U.S. at 229. "**Arguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry[,]**" i.e., if a reasonable social worker, knowing what Stuart, Atteberry and DFS Management knew, could have believed there was probable cause for offering the two options. Jones v. Cannon, 174 F.3d 1271, 1283 n. 3 (11th Cir. 1999) citing Gold v. City of Miami, 121 F.3d 1442, 1445, 1446 (11th Cir.1997), *cert. denied*, 525 U.S. 870, 119 S.Ct. 165 (1998). Qualified immunity will apply "'if [officials]

of reasonable competence could disagree on the issue.'" Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

The decision to remove as one option, made by Management, not Stuart, in and of itself, is not conduct supporting a Constitutional violation since there was no actual DFS removal because Plaintiff made a Guardianship choice eliminating that option. WRIT100;EXH40. **DFS has discretion to remove children with or without a warrant.** See 432B.340 and 432B.330(1)(b) ("**A child is in need of protection if…(b) The child has been subjected to abuse or neglect by a person responsible for the welfare of the child**"); 432B.330(2)(c) ("**A child may be in need of …protection if the person responsible for the welfare of the child…[h]as been responsible for the neglect of a child who has resided with that person**"); NRS 432B.390(1)(b) ("An agent or officer of a law enforcement agency, an officer of the local juvenile probation department or the local department of juvenile services, or a designee of an agency which provides child welfare services **may place a child in protective custody**…(b) If the agent, officer or designee has reasonable cause to believe that immediate action is necessary to protect the child from injury, abuse or neglect.") Although obtaining a warrant is one option (subsection (c)) it is not required and DFS has discretion to remove, which does not establish a constitutional violation.

Here, CPS/DFS had substantial information from family and others that the investigation supported their reasonable cause to believe that the children would not be safe with Plaintiff and Laura alone, even if this Court assumes they were mistaken. In 8 months, three CPS Reports were made regarding the children, "Laura gets very violent and hits the children", is abusing drugs and alcohol and placing them at risk; the children locked themselves in a room to be safe from her until she passes out on a weekly basis, Laura "got wasted on Vodka and pills" and threatened to kill herself in the children's presence and Plaintiff was unaware of it until police arrived, and Laura's involuntary (12/22/14 to 12/25/14) and voluntary (12/27/14 to 12/29/14) committals. Stuart had various contacts with Plaintiff, Laura, children, Lisa, Alexis and Selena between 12/23/14 to 1/6/15. WRIT95 (12/20-21 Note). The protective family was leaving Las Vegas. The FJDC Order supports Defendants' decision that removal was appropriate: "DFS put on more than sufficient evidence to establish Petitioner failed to intervene on the children's behalf, he knew Laura was an inappropriate care provider due to her mental health and drug use and that constant supervision of the children was necessary. Yet Plaintiff carried on as if DFS never became involved, thus placing his children at risk." EXH 197:16-18,211:19-20. Plaintiff failed to maintain 24-hour supervision resulting in Laura's abuse of Vodka and Xanax, during the PDP, thus placing the children at risk and demonstrated an inability, unwillingness and/or fundamental

failure to act in a protective capacity and adequately care for the children. WRIT196:27-197:7,202:20-27,204:13-205:18, 208:15-24,209:1-18;211:4-20;EXH27-42,153-63. Plaintiff engaged in negligent treatment/maltreatment which indicated a plausible risk to the children and failure to protect. EXH206:12-16,210:2-9. He didn't even get daycare, which he needed to work and keep the kids, until 5/27/15. WRIT111-13,226,EXH724:20-22. Plaintiff was working 16 hours a day, 7 days a week, aware of the threat's posed by Laura abusing drugs and alcohol, failed to parent the children or intervene to protect them and left most of that to K.R., a minor sibling, even when he was home. WRIT94-95,204:23-206:16.

Thus, Defendants' investigation and Management's decision was supported by their reasonable belief and objectively reasonable grounds that threats existed, the children needed protection and would not be safe with Plaintiff and Laura alone justifying removal. However, Defendants elected to allow the parents to make an alternative decision, by offering a protective temporary guardianship option. Plaintiff chose Guardianships based on his attorney's advice and own beliefs. EXH019,WRIT111-13. Wallis, supra. There is no case law establishing Defendants violated Plaintiffs' rights by offering him options. **The parents had the right to sign the Guardianships and did so on 1/7/15, thereby ending the**

DFS/CPS case. WRIT217:8-17. Defendants are not responsible for what happened after 1/7/15 when Plaintiff made the protective family guardianship choice.

Taking into consideration the nature of the allegations, the time expended on investigating, and the avenues of investigation pursued, Stuart made a thorough investigation, attempted to set up in home services, staffed the case with her supervisors and Managers, and ultimately Defendants exercised reasonable judgment under the circumstances, including based on their documentation and the Substantiation that was affirmed. Thus, Defendants are entitled to qualified immunity under both prongs of the qualified immunity test. There is no evidence showing Defendants violated Plaintiff's Constitutional right(s) and/or that the specific conduct at issue violated clearly established law. **Even if Stuart and/or her Supervisor(s)/Mangers were mistaken in their belief that the conduct was lawful, they are entitled to qualified immunity because the belief was reasonable based on the undisputed facts and FJDC Order.**

D. ***RES JUDICATA*/ISSUE PRECLUSION**

The FJDC Order upholding Plaintiff's abuse/neglect Substantiation, was issued on 10/13/2023, after the MSJ was filed in the district court, but before the Opposition was filed on 10/17/2023. Plaintiff chose not to address the Order and did not seek and/or file any supplemental briefing after the FJDC Order was cited in Defendants' Reply, relying on oral argument alone. Defendants' Reply cited issue preclusion authority and orally asserted both issue and claim preclusion. WRIT156-

58,170,TR4:20-5:22 The district court did not ask for any further briefing and ultimately ruled that *res judicata*/issue preclusion bars Plaintiff's defamation claim. WRIT247-48. The appeal does not change the finality of the FJDC Order.

De novo review requires an issue preclusion finding as to the IIED claim. Issue preclusion requires that (1) an issue be identical, (2) the initial ruling was final and on the merits, (3) "the party against whom the judgment is asserted" was a party or in privity with a party in the prior case, and (4) "the issue was actually and necessarily litigated." Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). Issue preclusion "is based upon the sound public policy of limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy." Thompson v. City of North Las Vegas, 108 Nev. 435, 439–40, 833 P.2d 1132, 1134–35 (1992). "An agency decision can result in issue or claim preclusion as to a subsequent decision made by another court or a different agency." Redrock Valley Ranch, LLC v. Washoe Cnty., 127 Nev. 451, 459–60, 254 P.3d 641, 646–47 (2011).

Plaintiff argued "[t]**hey are not identical, these decisions are not identical**." TR10:3-4. It is not the "decisions" – but the **issues** – that have to be identical.

> **[I]issue preclusion may be appropriate, even when the causes of action asserted in the second proceeding are substantially different from those addressed in the initial proceeding, as long as the court in the prior action addressed and decided the same underlying factual issues.**

Kahn v. Morse & Mowbray, 121 Nev. 464, 474–75, 117 P.3d 227, 235 (2005) (emphasis added); Clark v. Clark, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964). "[I]ssue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc., 130 Nev. 252, 259, 321 P.3d 912, 916-17 (14).

The administrative hearing record was not limited. TR10:9-10. It involved the same documents/records at issue in this case, and live testimony of Investigators Stuart and Hensel. Plaintiff cannot argue there was "no cross examination…or confrontation" when he "refused to participate," threatened a lawsuit ("we're in the process of filing and everybody will be served with a complaint for civil rights violations and racketeering. All-both of you are defendants in that lawsuit…there's absolutely no way in the world that you can proceed with the hearing since you're a defendant in a federal lawsuit that I'm bringing against you"), chose to leave the hearing ("I've got to go pick up my daughter in 30 minutes") and claimed not to hear but made opposing arguments. WRIT184:25-186:4.

The facts, issues, documents and claims in this Action and the PJR are identical, as to events spanning 12/14/15 to 1/2016. WRIT176-187;211-12 . The claims and issues asserted in both cases implicate Defendants' actions concerning

Plaintiff – investigation of the CPS Report(s), contacts with the family, documents, findings, and decisions. These facts and issues were placed into evidence and reviewed by the FJDC based on the PJR, and the same issues and allegations – constitutional, procedural and other violations – were raised in both matters. WRIT2176, 178, 187-192, 204-209,284:6-26. Pet'n Loo v. Deets, 132 Nev. 1001, 2016 WL 1567037 at *1 (2016) (affirming issue preclusion where the asserted claims **implicated** the issue of how the marital assets should be allocated litigated in the divorce based on settlement agreement language in the decree). Thus, the identical issues were actually and necessarily litigated. The argument that the only PJR issue "substantiation of…allegations of Physical Injury/Physical Risk" is a distinction without a difference. The factual and legal issues and evidence central to Plaintiff's claims herein are identical to those litigated in the PJR Althaus v. Hall, 534 P.3d 137, 2023 WL 5364143 at *2 (Nev. 2023) (affirming issue preclusion where claims differed but the issues central to the claim were identical to those litigated in bankruptcy court discharging the debt owed after finding Althaus **failed to establish misrepresentation, fraudulent action, or fraudulent omission**). The same is true here. Plaintiff failed to establish Constitutional violations, coercion, etc.

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Plaintiff's own outline of issues in his PJR Appeal Docketing Statement confirms the review was not narrow and encompassed the issues presented in the case at bar:

> 1. Appellant appealed an alleged Substantiation of child abuse/neglect…
>
> 5. On 15 October 2020, HO Michelle O. Tobler, Esq., …denied all the requested relief and entered false, erroneous, fraudulent, defamatory, and perjurious findings…in an effort to aid Respondent in unlawfully, **unconstitutionally,** and perversely **defeating Appellant's civil rights claims** currently pending before the Nevada Supreme Court...
>
> 6. The **Agency/HO decisions and findings** entered thereby **were and are** erroneous; not supported by substantial evidence; **in violation of state and federal constitutional, statutory, and regulatory provisions; in excess of the Agency's statutory, constitutional, and regulatory authority**…
>
> 7. **In addition to the foregoing, the Agency Respondent and individuals acting on its behalf, including the HO, lacked any constitutional, statutory, regulatory, or subject matter jurisdiction over the cause, were and are barred by res judicata and collateral estoppel and other judicial doctrines of estoppel and waiver from making the orders and findings, and lacked subject matter jurisdiction to act as they did.**
>
> 8. **Further, the entire Agency proceeding constitutes and is subject to** federal claims of racketeering, abuse of process, and **civil rights violations, of which the Agency, its officers and the HO have been made aware and served, thereby making the entire proceeding a travesty of justice** designed to fraudulently evade accountability and responsibility, cover up crimes committed (including kidnapping, trespass, assault, obstruction of justice, and perjury), not only as to Appellant but other members of his family and other families in Nevada.
>
> **WHEREFORE, Appellant requests that all decisions entered below be set aside/overturned/rescinded/expunged**,…**that the actions taken**…**be declared** unlawful, corrupt and **unconstitutional,** and for such other and further relief as shall be deemed by the Court as just, equitable and proper.

Plaintiff relied on the pending PJR to challenge the accuracy of the abuse Substantiation in Opposition to the MSJ, and is bound by that reliance. WRIT145:11-17. Now that Plaintiff's PJR has failed, he falsely, and hypocritically claims it has nothing to do with this case. Plaintiff's reliance on language in the 12(b)(5) Order – Plaintiff was "seeking different remedies for different wrongs" – fails because the 12(b)(5) issue was exhaustion of administrative remedies, not summary judgment and issue preclusion based on a factual record. TR08-9.

E. Defendants Are Entitled To Summary Judgment And Discretionary-Act Immunity On IIED Claim

IIED requires intent to cause emotional distress or reckless disregard for causing emotional distress, which the undisputed facts do not establish. Plaintiff argues Stuart coerced him into signing the guardianships through misrepresentations without any Opposition case citation to establish that. There was no coercion. Stuart obtained authority for rent and in home services, but Management determined they were no longer an option with the Illinois family leaving. McFarling confirmed the Supervisor had overridden, vetoed, or nixed that. WRIT08:7-13,98;192:8-10,197:11-24,724:10. Stuart did not learn of Management's decision until the **1/6/15,-2:45 p.m.**, staffing. EXH40. Her last contact with Plaintiff was on **1/5/15 at 3 p.m.** EXH37. Thus, Stuart could not misrepresent or miscommunicate what she did not know until later. Finally, DFS has discretion to remove and is not required to

provide any advance notice thereof. Thus, the above does not support any intentional act/reckless disregard and discretionary immunity applies. Defendants are entitled to discretionary act immunity as to the investigation, decision regarding removal or Guardianships, and Substantiation regardless of Plaintiff also alleging a §1983 claim. Momox-Caselis, 2018 WL 6795556, at *9-10 (CPS Investigator's investigation and "[d]ecisions about how to investigate a report of child abuse and whether to recommend a child be removed from an allegedly abusive home involve individual judgment or choice and are based on considerations of social, economic, or political policy related to the care and protection of foster children" granting summary judgment) citing Gonzalez v. Las Vegas Metro. Police Dep't, No. 61120, 2013 WL 7158415, at *2 (Nev. Nov. 21, 2013)), aff'd sub nom. Momox-Caselis v. Donohue, 987 F.3d at 47; Henry A., 2014 WL 1809634 at *12-14; Henry A. v. Willden, 2013 WL 759479, at *15 (D. Nev.); Nelson v. Willden, 2015 WL 4937939, at *6 (D. Nev.) and Johnson v. Clayton, 2009 WL 10693589, at *4 (D.Nev.) establishing decisions regarding removal clearly involve personal deliberation and judgment, and defendants' choices are grounded on public policy concerns expressed in the NRS and an investigation into alleged child abuse involves personal deliberation, decision and judgment and cannot be construed as ministerial. The FJDC Order also establishes this claim fails. Plaintiff's and the district court's reliance on the FAC allegations that "the…Boys would be returned…in several

days" if he signed fails. WRIT09:5-7, 138:17,147:21-22,245:9-11,250:18-20. On 1/21/15, after the children were in Illinois, McFarling raised no issue regarding any misrepresentation, etc., and only confirmed Stuart was closing the case.

Also, the district court failed to consider and/or rule on Defendants': (1) causation arguments that Plaintiff, McFarling and/or Lisa caused his injury, emotional distress and/or damages; and (2) they were superseding intervening causes of the injury and damages cutting off any liability. DFS was off the case as of 1/7/15 and Lisa took the children to Illinois on 1/9/15, which Plaintiff knew on 1/11/15. He did not move to Illinois and waited until 2/18/15 to revoke the Guardianships, sent them to Lisa on 3/31/15, and did not bring the Callahans into the Nevada case, seek the return of his children through that case or have Illinois relinquish jurisdiction, even after Judge Willaim Potter of the Family Court told her what she had to do. WRIT072,49-50,92,165:4-11-167,224-26, 239,262-71;EXH768.

Finally, the district court Order erroneously found:

> a jury could find they did coerce…EGGLESTON into signing the temporary guardianship papers by…providing him misinformation and that removal of the children from the EGGLESTON home fell outside the bounds of decency and violated MR. EGGLESTON'S right to parent…The jury could find such action to be so extreme and outrageous and that in itself is enough to show these Defendants at the least acted in reckless disregard or intended Plaintiff to suffer severe emotional distress.

WRIT252:5-12. It is unclear what the district court means by "misinformation", not alleged in the FAC or Opposition. Plaintiff argued he was given an ultimatum and no forewarning after being told services and rental assistance were available, which fails. Neither violates his rights, can be so extreme and outrageous and/or establishes coercion on the undisputed case facts and law stated above, including the timing of Stuart learning of the only two options. Plaintiff misrepresented to the district court that Stuart admitted she concealed from Plaintiff the fact that Defendants were going to deny previously discussed services and recommend foster care or guardianship with the Callahans. WRIT148:1-5. Stuart testified **she did not tell Plaintiff** Management's decision was the children couldn't remain in the home prior to going to the home, not that she concealed it because she did not have contact with him after Management's decision on 1/6/15 at 2:45 p.m. until 1/7/15. EXH524-25. This does not establish she intentionally concealed, misrepresented, miscommunicated, made a false statement and/or engaged in fraud, which requires clear and convincing evidence that is absent here. Lubbe v. Barba, 91 Nev. 596, 598, 540 P.2d 115, 117 (1975). There is no constitutional or legal requirement to provide advance notice to or forewarn parents of removal as an option for good reason and Plaintiff does not cite any. To do so would jeopardize the safety of the children, others and pose a flight risk. The right to family integrity could not have been violated merely by Stuart/Defendants misrepresenting the content of the investigations or the

conclusions DFS drew as those actions did not interfere with the parent-child relationship because the children were never removed even temporarily.

Based on the foregoing, Defendants respectfully request this Court issue a Writ of Mandamus compelling the district court to enter an order granting Defendants summary judgment on the §1983 and IIED claims, qualified immunity on the §1983 claim and discretionary immunity on the IIED.

RESPECTFULLY SUBMITTED this 15th day of March, 2024.

OLSON CANNON & GORMLEY

/s/ *Felicia Galati, Esq.*

_____

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STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

Felicia Galati, being first duly sworn, deposes and says:

That she is an attorney at law duly licensed in the State of Nevada and the attorney for Defendants Clark County and Georgina Stuart in the above-entitled matter; that she makes this Verification pursuant to NRS 15.010 and NRAP 21(a)(5) for the reason that the facts are within the knowledge of affiant; that she has read the above and foregoing **REPLY TO REAL PARTY IN INTEREST'S/ PLAINTIFF'S ANSWER TO DEFENDANTS' EMERGENCY PETITION FOR WRIT OF MANDAMUS**, knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes them to be true; and she further states that the exhibits contained in the required Appendix accompanying this Petition are true, correct and accurate copies of those papers filed with the Eighth Judicial District Court in Case A-16-748919-C.

Felicia Galati

FELICIA GALATI

SUBSCRIBED and SWORN to before me on this 15th day of March, 2024.

Lisa Rico

Notary Public

NOTARY PUBLIC
LISA RICO
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. NOV. 2, 2027
No: 00-61297-1

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and the caption form requirements of NRAP 32(c). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 font.

2. I further certify that this Emergency Petition complies with the page- or type-volume limitations of NRAP 21(d), and NRAP 32(a)(4)-(6) and (7)(A)&(C) because although it is 31 pages, it is 6,869 words under the 7,000 word limit.

3. Finally, I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of March, 2024.

OLSON CANNON GORMLEY & STOBERSKI

/s/ *Felicia Galati, Esq.*

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2024, I sent via e-mail a true and correct copy of the above and foregoing **REPLY TO REAL PARTY IN INTEREST'S/PLAINTIFF'S ANSWER TO DEFENDANTS' EMERGENCY PETITION FOR WRIT OF MANDAMUS** by electronic service through the Nevada Supreme Court's website, (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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