UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.03-RB-0743 (MJW)

SUZANNE SHELL
APRIL FIELDS, by and through her agent, Suzanne Shell
Plaintiffs

v.

ROCCO F. MECONI, Individually and Officially
FREMONT COUNTY DEPARTMENT OF HUMAN SERVICES, Officially
STEVE CLIFTON, Individually and Officially
DAWN RIVAS , Individually and Officially
TODD HANENBERG, Individually and Officially
DAN C. KENDER, Individually
ANNA HALL OWEN, Individually and Officially
DISTRICT COURT, FREMONT COUNTY, Officially
Defendants

PLAINTIFF SHELL'S RESPONSE TO DEFENDANTS ROCCO F. MECONI, FREMONT COUNTY DEPARTMENT OF HUMAN SERVICES, STEVE CLIFTON, DAWN RIVAS, and TODD HANENBURG'S MOTION TO DISMISS

COMES NOW, **Plaintiff Suzanne Shell,** *pro se*, requesting this Honorable Court to **deny** the defendants, ROCCO F. MECONI, FREMONT COUNTY DEPARTMENT OF HUMAN SERVICES, STEVE CLIFTON, DAWN RIVAS, and TODD HANENBURG'S Motion to Dismiss and in support thereof states as follows:

1. Fed.R.Civ.P 8(1) instructs that pleadings shall contain *"a short and plain statement of the grounds upon which the court's jurisdiction depends . . ."* and *". . .a short and plain statement of the claim showing that the pleader is entitled to relief. . ."* Defendants' counsel, in his motion to dismiss, has appeared to infer that the plaintiff is required to

argue her entire case and present the supporting evidence in her initial pleadings, in direct contradiction to this rule. ***Conley v. Gibson***, 355 U.S. 41 (1957). Plaintiff Shell asserts the form and content of her original pleading and supplement pleading substantially conform to the rule. However, in the event there is a mere technical defect, the plaintiff respectfully reminds this Honorable Court that she appears *pro se*. The court shall construe the pleadings and papers of a pro se litigant liberally. See ***Haines v. Kerner,*** 404 U.S. 519, 520-21 (1972) (per curiam). ***Joseph v. United States Federal Bureau of Prisons***, 232 F.3d 901, 232 F.3d 901 (10th Cir. 10/16/2000) .

2. Plaintiff has met the requirements to state claim for relief under §1983, wherein a complainant need allege only (1) that some person deprived complainant of a right, privilege or immunity secured by the federal constitution and U. S. laws; and (2) that such person acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" meaning "under the color of law." ***Gomez v. Toledo,*** 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); ***Espinoza v. O'Dell,*** 633 P.2d 455 (Colo. 1981). ***Adickes v. S.H. Kress & Co.,*** 398 U.S. 144, 150 (1970).

3. Accepting as true the factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff, the district court may appropriately dismiss a complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See ***Yoder v. Honeywell, Inc***., 104 F.3d 1215, 1224 (10th Cir. 1997). See ***Bauchman v. West High Sch***., 132 F.3d 542, 550 (10th Cir. 1997). ***Livingston v. Garcia***, 211 F.3d 1278, 211 F.3d 1278 (10th Cir. 04/26/2000).

ABSTENTION

4. The U. S. Supreme Court has stated, "abstention from the exercise of federal jurisdiction is the exception, not the rule." ***Colorado River Water Conservation District v. United States***, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). Absent "an important countervailing interest," ***County of Allegheny v. Frank Mashuda Co.***, 360 U.S. 185, 189, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1959), federal courts have "the virtually unflagging obligation ... to exercise the jurisdiction given them," ***Colorado River***, 424 U.S. at 817. The Supreme Court has confined the circumstances appropriate for abstention to three general categories of cases: (1) those that present a federal constitutional issue that might be affected by a state court determination of pertinent state law, see ***Railroad Commission of Texas v. Pullman Co.***, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); (2) those that present important questions of state policy transcending the result in the case at bar, see ***Burford v. Sun Oil Co.***, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); and (3) those in which federal jurisdiction has been invoked to restrain pending state criminal proceedings, see ***Younger v. Harris***, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). ***Colorado River***, 424 U.S. at 814-17 (addressing these three categories). The plaintiff's case does not fit within any of these categories.

5. In authorizing jurisdiction, the Colorado Children's Code C.R.S. 19-1-104 does not grant the Juvenile Court jurisdiction to hear cases that present a federal constitutional issue associated with any pertinent state law. The Juvenile Court does not provide a valid forum to hear the constitutional issues raised by the plaintiffs. Consequently, an appeal to the Colorado Appellate court is without merit.

6. There is no question of official state policy involved in this complaint.

7. The defendants erroneously assert that this is an attempt to relitigate an ongoing Dependency & Neglect case in the State District Court. Plaintiff Shell has correctly characterized this action as a tort claim. Plaintiff's claims are not related to any judicial decisions or actions consistent with the court's or Department of Human Services' (DHS) lawful jurisdiction over the subject child, and does not state any claims pertaining to nor seek any remedy involving the child, therefore, defendants' claim that "any judgement in this case would affect and interfere with the 'underlying' D&N action" are without merit.

8. There is no '***underlying*** dependency and neglect action.' The relevant D&N case in state District Court merely represents state action under §1983 which was the mechanism used to deprive the plaintiffs of their constitutionally protected rights to freedom of association, freedom of the press, right to contract, due process and viewpoint discrimination.

9. §1983 affords the plaintiffs protection of a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth amendment might be denied by state agencies, as has occurred in this case. ***Monroe v. Pape***, 365 U.S. 167 (1961).

10. There are no other remedies available to the plaintiffs for the deprivations of their aforementioned rights. The purpose of §1983 is also to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. By virtue of the aforementioned arguments and

authorities, defendants' claim of abstention is without merit.

PLAINTIFFS' CLAIMS BARRED BY THE RATIONALE IN *DISTRICT OF COLUMBIA CT. OF APP. v. FELDMAN,* 460 U.S. 462 (1983)

11. Defendant's demand to dismiss the entirety of the Plainiffs' claims for relief is without merit and unsupported by the court's decision in ***District of Columbia Ct. of App. v. Feldman***, 460 U.S. 462 (1983). It is clear from a reading of this case that the inability of this court to review a final judgement of the state court does not mandate that other claims properly before this court must also be also be dismissed.

12. Plaintiff Shell's demand for injunctive relief does not constitute appellate review of the state court's order inasmuch as she is not requesting the court to rule as to errors of law relevant to the subject hearing, nor to review the hearing or the subject D&N case, nor to overturn the order. The request for injunctive relief relates solely to protecting plaintiff Shell's exercise of her constitutionally protected rights unmolested by the defendants. Even if the subject D&N case were closed today, the claims for deprivations of rights and the demand for injunctive relief would remain relevant and not be rendered moot because this complaint is <u>not</u> about a D&N case. It is about plaintiff Shell's right to associate and to have others associate with her without fear or recrimination, retaliation or retribution by the defendants; to contract and to gather news and to be afforded full due process before the deprivation of any rights. The injury suffered by plaintiff Shell as a result of the defendants' actions to deprive her of her rights is unrecoverable and the defendants must be restrained from repeating those violations in the future as well as being held financially liable for those violations. These are issues which were not considered or

ruled on by the Juvenile Court and which lie outside the jurisdiction of the Juvenile Court, rendering the defendant's claim irrelevant and without merit.

CLAIMS AGAINST FREMONT COUNTY DEPARTMENT OF HUMAN SERVICES (DHS)

13. Plaintiffs are not to be held to a heightened standard of pleading in civil rights cases alleging municipal liability. ***Leatherman v. Tarrant County Narcotics Unit***, 113 S.Ct. 1160 (1993). Plaintiff Shell has clearly stated the violations and respectfully requests this Honorable Court deny the defendants' motion.

14. DHS is a person under §1983 because it is not an arm of the state. "Historically, the most important consideration is whether a judgment against the entity would be paid from the state treasury." ***Elam Construction Inc. v. Regional Transportation District***, 127 F.3D 1109 (10th Cir. 10/17/1997) ***Robertson v. Morgan County***, 166 F.3d 1222 (10th Cir. 01/06/1999). A judgement against DHS would be paid from county monies.

15. Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. ***Monell v. Department of Social Services,*** 436 U.S. 658

(1978).

16. As stated in the complaint, Fremont County DHS has a well established informal policy and practice of discrimination, harassment, defamation, and retaliation against plaintiff Shell. This policy is not official due to its overtly unconstitutional nature but it is also not a very well-kept secret. It is so permanent and well settled as to constitute a 'custom or usage' with the force of law and is designed to prevent DHS's client parents from associating with or speaking to plaintiff Shell or contracting with plaintiff Shell; and to deprive Shell of the ability to obtain legally available information from parents about their DHS cases for analysis, publication and broadcast implicating freedom of the press; and to eliminate all DHS client association for the purposes of issue advocacy with Plaintiff Shell; and to retaliate against DHS clients who exercises their rights to freedom of association and right to contract with plaintiff Shell - thereby defaming Shell by characterizing association with her as harmful. This custom first appeared in 1997, under the directorship of defendant Clifton, and began with intimidation and threats issued by DHS employees against parents who associated with plaintiff Shell. Defendant Meconi would also advise respondent parent attorneys to make their clients stop associating with plaintiff Shell. If respondent parents refused to cease association with Shell, some attorneys would threaten or act to withdraw leaving the parent without representation, some would compromise their representation of their client. When one husband and wife refused to yield to the threats, plaintiff Shell was joined to their D&N case under circumstances which were in violation of the Colorado Children's Code. Defendant Meconi represented DHS in this action. It soon became obvious that where parents were

allowed to have friends accompany them to meetings, staffings, etc., parents who wanted plaintiff Shell to accompany them were denied. Parents have been routinely told by DHS employees that association with plaintiff Shell would "hurt their case." If a parent failed to heed that warning, DHS would take retaliatory action which compromised their reunification with their children, up to and including termination of parental rights, and DHS employees and Meconi would then blame plaintiff Shell as the reason the parents lost their children. In spite of the fact that C.R.S. 19-1-307(e) provides records access to "A parent, guardian, legal custodian, or other person responsible for the health or welfare of a child named in a report, *or the assigned designee of any such person acting by and through a validly executed power of attorney*, . . ." DHS adamantly refuses to honor the agency of plaintiff Shell under any power of attorney, illegally interfering with her right to contract and her legal news gathering activities - as they refused to honor that agency from plaintiff Fields, and acted to impair that agency under the force of law. In the face of these obstacles, plaintiff Shell became compelled to keep her activities and associations secret from Fremont County DHS. She advised parents who contacted her that if DHS were to learn of their association with Shell, DHS would retaliate against them. As long as DHS had no knowledge that Shell was observing or documenting a case, the parents were not subjected to intimidation, threats or retaliation. If DHS discovered the parent's association with Shell, as Defendant Rivas did with plaintiff Fields, retaliation would commence, (i.e.caseworker reports would instantly become negative, reunification jeopardized, etc.) and the parent would be intimidated and threatened by caseworkers unless they ceased their association with plaintiff Shell. Plaintiff Shell's mere appearance

in a court room incited DHS threats and retaliation against respondent parents. DHS harassment and retaliation against Shell escalated to the point where it became necessary for the plaintiffs to seek the protection of the Federal Court, when DHS once again violated plaintiff Shell's due process rights and the law to join her to the Fields' D&N case and using the force of law, imposed unconstitutional prior restraints and censorship on Shell's media activities and deprived both plaintiffs of their freedom of association and right to contract; and when defendant Meconi maliciously, wilfully and wantonly filed a complaint with the Colorado Attorney Regulation Counsel against plaintiff Shell for the Unauthorized Practice of Law, having full knowledge that the documents he accused Shell of drafting were published on her website and freely available to the public (which practice was explicitly permitted by the Supreme Court). The conduct of diverse DHS caseworkers toward parents who associated with Shell, and the conduct of DHS employees and the defendants directly against plaintiff Shell has been so consistent since 1997 that it is clearly the unofficial policy and custom within Fremont County DHS and of Meconi, devised and sanctioned by the Director, defendant Clifton, with the advice and endorsement of defendant Meconi, and implemented by all DHS employees against Shell; and by defendant Rivas specifically with regard to plaintiff Fields' association with plaintiff Shell. Defendant Rivas made it clear to plaintiff Fields that her 'lack of cooperation' would delay the return of her child, referring to Fields' association with plaintiff Shell. Defendant Rivas also enforced DHS 'policy' pertaining to plaintiff Shell by entering false reports into the DHS case file about plaintiff Fields in retaliation for plaintiff Fields' continued association with plaintiff Shell and her refusal to rescind the

power of attorney delegated to Shell. Defendants Clifton and Meconi have taken their campaign against plaintiff Shell outside of Fremont county by acting in concert with other county DHS agencies and county attorneys to share information on preventing plaintiff Shell's freedom of association with their DHS clients, impairing her freedom of the press, and impairing her right to contract by advocating and instituting a campaign of retaliation, harassment, defamation, threats and intimidation in the same manner as is practiced by the defendants in Fremont County. No other advocate or media representative has been subjected to the same pervasive and shocking violations of rights by the defendants.

FREEDOM OF ASSOCIATION

17. Association for the purposes of issue advocacy is a well established constitutionally protected right, including the right to associate or refuse to associate with whomever one chooses. ***Abood v.Detroit Board of Education***, 431 U.S. 209, 97 S.Ct. 1782, 52 L. Ed. 2d 261 (1977). The actions taken by the defendants effectively curtailed the plaintiffs' rights to freedom of association free from harassment, defamation, retaliation, recrimination, reprisal or sanctions. The fact that the defendants' actions in this case are unrelated to the plaintiff's protected liberties does not preclude the fact that the result of their actions curtailed the plaintiffs' protected liberties and were taken in retaliation for the plaintiffs exercise of their right. In ***National Association for Advancement Colored People V. Alabama ex Rel. Patterson*** 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (06/30/58) the U. S. Supreme Court said:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. The Supreme

> Court has more than once recognized this by remarking upon the close nexus between the freedoms of speech and assembly. ***De Jonge v. Oregon***, 299 U.S. 353, 364; ***Thomas v. Collins***, 323 U.S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. ***See Gitlow v. New York***, 268 U.S. 652, 666; ***Palko v. Connecticut***, 302 U.S. 319, 324; ***Cantwell v. Connecticut***, 310 U.S. 296, 303; ***Staub v. City of Baxley***, 355 U.S. 313, 321. It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.
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> . . .In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . .
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> . . .Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. ***United States v. Rumely***, 345 U.S. 41, 46-47; ***United States v. Harriss,*** 347 U.S. 612, 625-626. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. ***Grosjean v. American Press Co.***, 297 U.S. 233; ***Murdock v. Pennsylvania,*** 319 U.S. 105. . .”

The issue of freedom of association was clearly established in the middle of the 20th century during the Civil Rights movement. There, government agencies who forwarded a policy of racial segregation deemed it necessary to attack civil rights

advocates like the National Association for Colored Persons (NAACP) because their association with and advocacy on behalf of blacks jeopardized the status quo and threatened the entire institution of racial segregation. State agencies actually instituted UPL complaints, investigations and prosecution against NAACP lawyers in order to prevent their association with civil rights activists. In a series of cases, the Supreme Court consistently ruled that such conduct, in all forms, on the part of state agencies or actors, violated the first amendment rights of the activists and advocates. The rights of advocacy and to petition the government for redress of grievances are protected by the First Amendment. ***NAACP v. Button***, 37 U.S. 415, 429; ***Edwards v. South Carolina***, 372 U.S. 229, 235; and "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." ***NAACP v. Alabama ex rel. Patterson*** 357 U.S. 449 at 460. The fact that the facts in this case so closely parallel the facts in these historic decisions, coupled with the fact that this clearly established law was held in such contempt by the defendants that it didn't even enter into their consideration before they conspired and acted to violate those explicitly protected rights belonging to the plaintiffs, is both shocking and frightening.

18. The rights of the plaintiffs are intertwined through their mutual desire for their lawful association. Plaintiff Fields has the same right to have her story of governmental abuse published/broadcast as plaintiff Shell has to engage in news gathering regarding Fields'

story and to publish/broadcast it, therefore, they are jointly engaged in a common endeavor. Freedom of association is necessary for the advancement of other First Amendment freedoms. The First Amendment protects the right to associate with others in pursuit of a wide variety of political, advocacy, social, economic, educational, religious and cultural ends. When the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association is implicated. ***Boy Scouts of Am. v. Dale,*** 530 U. S. 640, 678 (2000). It only takes an infringement against one person to implicate the rights of other persons who wish to associate with the aggrieved person where the desire to associate is mutual.

19. It has long been established that First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States***. Gitlow v. New York***, 268 U.S. 652; ***Whitney v. California***, 274 U.S. 357; ***Stromberg v. California***, 283 U.S. 359; ***De Jonge v. Oregon***, 299 U.S. 353; ***Cantwell v. Connecticut***, 310 U.S. 296.

VIEWPOINT DISCRIMINATION

20. Paragraph 19 is hereby incorporated by reference. Plaintiff Shell espouses and publishes a viewpoint which is critical of the defendants, a viewpoint which they wanted silenced. Viewpoint discrimination is an egregious form of content discrimination. Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment. ***Mesa v. White,*** 197 F.3d 1041 (10th Cir. 11/23/1999). The defendants' actions have silenced both plaintiffs, prohibited the plaintiffs' assembling together, and prevented plaintiff Shell's legal and peaceful news gathering by force of law. ***Boy Scouts of Am. v. Dale,*** 530 U. S. 640, 678 (2000) expands this principle to

unpopular issues:

> "And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.
>
> "In speaking of the Founders of this Nation, Justice Brandeis emphasized that they 'believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.' ***Whitney v. California***, 274 U. S. 357, 375 (concurring opinion). He continued: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." Id., at 375-376."

21. DHS and the defendants have wantonly and willfully discriminated against plaintiff Shell based on her viewpoint. She has been targeted by the defendants for harassment, defamation, false prosecutions and retaliation in a concerted effort to prevent her from having any association with DHS client parents. Parents who choose to associate with her suffer similar retaliation. No other advocate or media representative has been subjected to this treatment by DHS. The fact that a state agency and its employees would act as if it were not bound by constitutional restraints and has the absolute right to deprive anyone of freedom of association, freedom of the press, due process and the right to contract through the force of law, with a complete disregard for clearly established law to the contrary, is shocking to the conscience.

> "The courts have consistently struck down state regulations and actions which in purpose and effect seek to impose discrimination. ***Yick Wo v. Hopkins,*** 118 U.S. 356; ***Oyama v. California***, 332 U.S. 633; ***Takahashi v. Fish & Game Commission***, 334 U.S. 410." ***NAACP v. Alabama***

1964.SCT.1052 , 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325

> "The Fourteenth Amendment does not permit a State to make criminal or culpable the peaceful expression of unpopular views, the gathering together for discourse or education on government practices and requirements related issues of public interest, or the proactive advocacy on behalf of persons suffering unfair deprivations due to government activities." ***Edwards et al. v. South Carolina*** 963 SCT. 343, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. ***Schneider v. State,*** 308 U.S. 147 (1939); ***Cantwell v. Connecticut,*** 310 U.S. 296 (1940)." ***United Mine Workers of America, District 12 v. Illinois State Bar Association et al.*** 1967.SCT.2844 , 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426

FREEDOM OF THE PRESS

22. Paragraph 19 is hereby incorporated by reference. Neither the court nor any state agency has the authority or jurisdiction to exercise editorial control over the content of plaintiff Shell's publications and broadcasts through state agency intervention or court edicts.

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time," ***Miami Herald Publishing Co. v. Tornillo***, 418 U.S. 241 (1974) .

23. The U. S. Supreme Court has upheld, without exception, the press's right to publish. In ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469 (1975), the court found unconstitutional

a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records. In ***Oklahoma Publishing Co. v. Oklahoma County District Court***, 430 U.S. 308 (1977), the court found unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended. Finally, in ***Smith v. Daily Mail Publishing Co.***, 443 U.S. 97 (1979), the court found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender.

24. ***Ex parte Jackson***, 96 U.S. 727 , 733 clearly defines that the freedom of the press extends to all activities surrounding the dissemination of ideas: 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Correspondingly, without association with a willing and accessible subject who has a story, or if the access to that subject is prevented by force of law, there is no story to publish, implicating freedom of the press, prior restraint and censorship.

25. Court hearings in Dependency and Neglect proceedings are open to the public pursuant to C.R.S. 19-1-106. What transpires in the court room is public property. Those who see and hear what transpired can report it, analyze it and editorialize on it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire

in proceedings before it. ***Craig v. Harney,*** 331 U.S. 367, 374 (1947), ***Cox Broadcasting Corp. et al. v. Cohn*** 1975.SCT.714, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328. See also ***Sheppard v. Maxwell***, 384 U.S. 333, 350 (1966) at 362-363; ***Estes v. Texas***, 381 U.S. 532, 541-542 (1965); ***Pennekamp v. Florida***, 328 U.S. 331 (1946); ***Bridges v. California,*** 314 U.S. 252 (1941). Plaintiff Shell relied on this authority to support and protect her legal news gathering activities.

26. DHS and the defendants have wantonly and willfully exceeded their lawful authority and jurisdiction by instigating and prosecuting a false and defamatory claim against plaintiff Shell for the unauthorized practice of law, in Juvenile Court, with the express intent to deprive her of her freedom of association with plaintiff Fields and to deprive her of the ability to gather news with the subject of her documentary video project. The fact that a state agency and its employees would act as if it were not bound by constitutional or statutory restraints and espouses the absolute right to interfere with freedom of the press by imposing censorship and prior restraint through the force of law, with a complete disregard for clearly established law to the contrary, is shocking to the conscience.

27. Prior restraints have been accorded the most exacting scrutiny in by the Supreme Court. See ***Nebraska Press Assn. v. Stuart,*** 427 U.S. 539 (1976) at 561; ***Organization for a Better Austin v. Keefe***, 402 U.S. 415 (1971), 419; ***Near v. Minnesota ex rel. Olson***, 283 U.S. 697 (1931), at 716. See also ***Southeastern Promotions, Ltd. v. Conrad***, 420 U.S. 546 (1975). ***Smith v. Daily***, 1979.SCT.2381, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399.

> In ***Louisiana ex rel. Gremillion v. NAACP***, 366 U.S. 293, 297, the court reaffirmed this principle: ‘ . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle,

penalize, or curb the exercise of First Amendment rights.'

RIGHT TO CONTRACT

28. Fields assigned a limited power of attorney to Shell on February 2, 2003, on her own initiative and without any influence whatsoever by Shell. The plaintiffs did not e-mail or speak by telephone prior to the assignment of Fields' power of attorney. The first contact between the plaintiffs occurred in person on April 26, 2003. DHS falsely claimed plaintiff Shell had exerted undue influence over plaintiff Fields in order to obtain the power of attorney, over the objections of plaintiff Fields. The power of attorney was a condition of the contract in which plaintiff Shell would video document Fields' case for inclusion in her proposed broadcast. The power of attorney legally permitted her to access the DHS case file (indeed, plaintiff Shell used to obtain a simple release of confidentiality signed by a parent until DHS refused them, accusing Shell of forging the signatures. Shell then obtained powers of attorney and required the parent to have them notarized so that she could not be falsely accused of forgery and her right to access the file could not be similarly denied). DHS has no statutory authority or jurisdiction to interfere with the contracts or contractual obligations between a respondent parent and a third party. Indeed, a court does not have the power to alter the terms of contracts, even through court order, ***Parrish Chiropractic Center v. Progressive Case. Inc.***, 874 P.2d 1049 (Colo. 1994). There is no case law in Colorado, or the 10th Circuit or the Supreme Court which permits any court to invalidate a power of attorney, nor any state or municipal agency to seek invalidation through any court, when neither the agent nor the principle are seeking invalidation - indeed are resisting such invalidation. The defendants exercised a false

authority and jurisdiction to impair the plaintiffs' rights to contract with wilful and wanton disregard for the law and the rights of the plaintiffs for the express purpose of preventing plaintiff Shell's news gathering activities and depriving the plaintiffs' of their rights to freedom of association. The fact that a state agency and it's employees would act with such contempt for constitutional restraints and the law, acting as if it has the absolute right to act outside its legal authority to interfere with and impair the plaintiffs' rights to contract through the force of law, with a complete disregard for clearly established law to the contrary, is both shocking and frightening.

DUE PROCESS

29. Procedural Due Process demands a fair procedure. ***Zinermon v. Burch***, 494 U.S. 113 (1990). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. ***Armstrong v. Manzo***, 380 U.S. 545. The hearing to join plaintiff Shell as a party to the Fields' D&N case did not afford the plaintiffs the opportunity to be heard. Plaintiff Shell was not allowed to participate in the hearing nor afforded an attorney as mandated by statute. Plaintiff Fields' attorney, defendant Kender, refused to represent her legal interests or her wishes. This hearing was initiated by defendant Meconi as attorney for DHS.

30. The record of this hearing substantiates the plaintiff's claim that this was a sham legal proceeding, wherein there was no legitimate fact finding, no evidence presented that Shell had attempted to contact the child or was in any was a threat to the child, no evidence presented by DHS that Shell had engaged in the unauthorized practice of law as alleged by DHS (which was the straw man set up by DHS and the defendants), no evidence

presented that even indicated that this joinder had anything to do with the best interests of the child, and no evidence allowed to be presented by plaintiff Shell. This action was solely instituted to serve the interests of DHS and the state, exclusive of the best interests of the child, as is reflected in the court's findings, and was performed with a willful and wanton disregard for the limits of DHS authority and jurisdiction as defined in the law. An act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act (in this case the prosecution and complaint of UPL and joinder to Fields' D&N case), when taken for a different reason, would have been proper. This is especially true where First Amendment rights are involved. see ***Mt. Healthy v. Doyle,*** 429 U.S. 274 (1977).

31. The defendants conspired to initiate the sham proceeding and participated fully in that proceeding with full knowledge that Plaintiff Shell would not be permitted to be heard, demonstrating a wilful and wanton disregard for the due process rights of the plaintiffs. .***Johnson v. People in Interest of W. J.***, 170 Colo. 137, 459 P.2d 579. As officers of the court, and possessing knowledge of the law, they are ethically bound to insure the integrity of the judicial process.

32. Plaintiff Shell has never been advised by the court of any orders issued pertaining to her. She has never received a copy of any court orders, either from the court, from Defendant Meconi, or from DHS. She is prohibited from accessing the court file to obtain a copy of any court orders upon which she can base an appeal. It appears that Shell's status exists in a deliberately contrived legal limbo somewhere between being a party to the case subject to court orders and not being a party to the case. Furthermore, Shell was not permitted to

present evidence on her behalf and could not preserve appealable issues for the record. Consequently, an appeal is not an available remedy for plaintiff Shell.

33. Jurisdiction for UPL is vested exclusively in the Colorado Supreme Court. ***Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guar. Co.***, 847 p.2d 170 (Colo. App. 1992) ***citing Denver Bar Ass'n v. Public Utilities Commission***, 391 P.2d 467 (Colo. 1964). DHS and the defendants wilfully and wantonly disregarded this jurisdictional mandate in their zeal to prosecute Shell for UPL in Juvenile Court without legal authority or jurisdiction to do so in order to achieve the deprivation of her constitutionally protected rights as enumerated in the original and supplemental complaints.

34. The only way a lawyer may prosecute a claim for UPL is through the initiation of a separate suit permitting only injunction against engaging in UPL but not restricting freedom of association, or through contempt proceedings with the burden of proof being 'beyond a reasonable doubt,' C.R.S. 12-5-112. ***Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n***. 135 Colo. 398. 312 P.2d 998. The DHS motion to join plaintiff Shell as a Special Respondent, and the ensuing proceedings under the caption of a D&N case in Juvenile court, does not conform to these clearly established mandates.

35. The Colorado Children's Code C.R.S. 19-1-104 does not grant DHS jurisdiction or authority to investigate or prosecute issues about parties or non-parties who are alleged to engage in the unauthorized practice of law, nor to seek or exercise jurisdiction over persons who have no involvement in the child's life, nor to seek or exercise jurisdiction over persons who present no risk to a parent's therapeutic progress in a court ordered treatment plan, ***People V. District Court,*** 731 P.2d 652 (Colo. 1987). The Children's

Code also excludes UPL as a reason for joining a person to a D&N case under C.R.S. 19-3-502(6) which clearly declares the specific limitations on claims in dependency or neglect actions for the joinder of a special respondent to a person who has had some relevant involvement in the child's life. It is undisputed that Plaintiff Shell had never met the subject child.

36. The subject D&N case has not yet been adjudicated, and is, technically and legally, still in the investigative stage. Ashley Fields has not yet been found to be a 'dependent and neglected child' pursuant to the Colorado Children's Code. Consequently, there is no treatment plan. In determining the scope of protective orders to be issued in support of a treatment plan under C.R.S 19-1-114 a court should confine the relief to that reasonably necessary to promote the therapeutic objectives of the treatment plan. ***People v. District Court for Colorado's Seventeenth Judicial District***, 731 P.2d 652 (Colo. 01/21/1987). In the absence of an adjudication and any resultant treatment plan, DHS and the court had no legitimate authority or jurisdiction to join plaintiff Shell to plaintiff Fields' D&N case. A state agency and employees are not immune for actions taken outside of their legitimate authority or jurisdiction . ***Scheuer v. Rhodes***, 416 U.S. 233 (1974). The defendants demonstrated a wilful and wanton disregard for the limits of authority and jurisdiction delegated to them under the law, and for the constitutionally protected rights of the plaintiffs when they abused their power and stepped outside their legal authority and jurisdiction in seeking and obtaining illegal jurisdiction over plaintiff Shell in the furtherance of their own interests to blockade her access to information and thereby infringing on freedom of the press and to prevent her association with plaintiff Fields.

37. The state Juvenile Court and DHS have very limited and constitutionally restrained powers to interfere with the constitutionally protected rights of respondent parents during child abuse and neglect investigations and related proceedings. Various Federal Circuits have ruled that state child protection agencies and their employees are not immune from §1983 claims arising out of their acts which violate the constitutionally protected rights of any family member. For example, it has been the common practice of child protection agencies to assert they needed no court order, no warrant and no exigent circumstances to remove a child from his home, and they were not bound by fourth amendment restraints in order to protect children. The courts have ruled consistently against this practice (see ***Good v. Dauphin County Social Services,*** 891 F.2d 1087 (3rd Cir. 1989) qualified immunity denied due to warrantless search absent exigent circumstances; ***J.B. v. Washington County***, 127 F.3d 919 (10th Cir. 1997) temporary removal of child by DHS implicates child's fourth amendment rights; ***Wallace by Wallace v. Batavia School Dist. 101***, 68 F.3d 1010 (7th Cir. 1995) non-law enforcement government actors come within the purview of fourth amendment; ***Calabretta v. Floyd***, 189 F.3d 808 (9th Cir. 1999) immunity denied due to coerced entry by caseworker without warrant or exigent circumstances; ***Wallis v. Spencer,*** 202 F.3d 1126 (9th Cir. 2000) removal of children from home and body cavity examination of children violated constitutional rights). Fourth amendment rights violations against persons who are the subject of a child abuse or neglect report are very obvious, however, violations of other rights may be more subtle, but no less shocking and offensive to the conscience or the U.S. Constitution. "Freedoms . . . are protected not only against heavy handed frontal attack, but also from being stifled

by more subtle governmental interference." ***Bates v. City of Little Rock***, 361 U.S. 516, 523. Inasmuch as plaintiff Shell is not a person subject to the authority or jurisdiction of DHS by virtue if a child abuse or neglect complaint against her, her protections against constitutional violations by DHS are correspondingly heightened.

38. This case, in truth, involves the freedom of individuals to associate for the collective advocacy of ideas, to scrutinize government activities, to hold public servants accountable, and to speak freely on subjects that include discussions of law and liberties, quoting ***NAACP v. Alabama*** 1964.SCT.1052 , 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325.

> Abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. ***Thomas v. Collins***, 323 U.S. 516, 537; ***Herndon v. Lowry***, 301 U.S. 242, 259-264. ***Cf. Cantwell v. Connecticut***, 310 U.S. 296 ; ***Stromberg v. California***, 283 U.S. 359 , 369 ; ***Terminiello v. Chicago***, 337 U.S. 1, 4

ELEVENTH AMENDMENT IMMUNITY

39. Although this court is generally bound by the prior precedent of this district, there is an exception to this rule when that precedent is superceded by contrary decisions of the Supreme Court. See ***United States v. Bell,*** 154 F.3d 1205, 1209 n.6 (10th Cir. 1998); ***United States v. Erving*** L., 147 F.3d 1240, 1246 (10th Cir. 1998), quoting ***Currier v. Doran***, 242 F.3d 905, 242 F.3d 905 (10th Cir. 03/01/2001).

40. With respect to governmental entities that derive their authority from the State, but are not the State, the Court closely examines state law to determine what the nature of the entity is, whether it is an arm of the State or whether it is to be treated like a municipal

corporation or other political subdivision. An arm of the State has immunity: "Agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." Municipal corporations, though they partake under state law of the State's immunity, do not have immunity in federal court and the States may not confer it. The Supreme Court has consistently refused to construe the Eleventh Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state Power." ***Lake Country Estates v. Tahoe Planning Agcy***., 440 U.S. 391 (1979); ***Lincoln County v. Luning***, 133 U.S. 529 (1890).

41. Fremont County DHS is not an arm of the state. The attorney general is not representing Fremont County DHS or its employees in this action. Service upon Defendant Fremont County DHS was not perfected through the State Attorney General but through the county representative. The Director of DHS is hired by the Fremont County Commissioners. The Board of Directors for the Fremont County Department of Human Services is not manned by Colorado State DHS representatives or appointees, but by Fremont County Commissioners, C.R.S 26-1-116. While Fremont County DHS receives some state and federal funding, it is administered through the Board of County Commissioners, and is proportional to county placement quotas and services delivered; DHS has full authority to seek and obtain money from outside sources, grants, matching grant programs, etc. DHS employees and operating expenses are paid from the county budget. Fremont County DHS recruits and certifies its own foster care providers and DHS contract service

providers are contracted through the County Commissioners and paid out of Fremont County monies. Fremont County DHS and it's Board of Directors have the authority to devise and implement it's own policies consistent with state statute, hire and fire it's own employees, and contract on it's own behalf. Fremont County DHS has full authority to initiate and prosecute civil complaints without state DHS approval or oversight. The state treasury will not liable for a judgement against the defendants. If it looks like a duck and walks like a duck and quacks like a duck, the state cannot obtain exemptions from duck hunting season simply by making a statutory declaration that it is a dog or by convincing state courts to call it a dog. Clearly, Fremont County DHS is not an arm of the state entitled to eleventh amendment immunity protection, despite local precedence to the contrary. The Supreme Court has ruled otherwise in ***Lake Country Estates v. Tahoe Planning Agcy***., 440 U.S. 391 (1979); ***Lincoln County v. Luning***, 133 U.S. 529 (1890).

42. The Colorado Governmental Immunity Act affords only qualified immunity from liability for claims made against a public official in her individual capacity. See Colo. Rev. Stat. § 24-10-118(2)(a). Specifically, it does not immunize a public employee's "willful and wanton" conduct. The plaintiffs have stated that the defendant's actions were both willful and wanton in their original complaint and in this response. Whether a public employee's acts were willful and wanton is a matter of fact to be decided by a jury. ***City of Lakewood v. Brace***, 919 P.2d 231 (Colo. 1996); ***Scott v. Hern***, 216 F.3d 897, 916 (10th Cir. 2000).

43. The immunity of a State from suit has also long been held <u>not</u> to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws. The reach of the rule is evident in ***Scheuer v. Rhodes***, 416 U.S. 233 (1974), in which the

Court held that plaintiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a State alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. 'The Eleventh Amendment was not intended to afford public agents freedom from liability in any case where, under color of their office, they have injured one of the state's citizens." Public agents must be liable to the law, unless they are to be put above the law. Neither a state nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application, the wrongdoer is treated as a principal, and is individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury. An unconstitutional act is void, a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from Suit. ***Hopkins v. Clemson Agricultural College of South Carolina***, 221 U.S. 636 (1911). ***Johnson v, Lankford*** , 245 U.S. 541 (1918).

44. Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally**.** ***Atchison, T. & S.F. Ry. Co. v. O'Connor,*** 223 U.S. 280, as the plaintiffs are seeking in this case.

OFFICIAL CAPACITY CLAIMS AGAINST INDIVIDUAL DEFENDANTS

45. Plaintiff has describe above (paragraph 16) how the actions committed by the defendants constitute an accepted policy, custom or practice of DHS which is designed to deprive plaintiff Shell of her constitutionally protected right to freedom of association with DHS client family members for the purposes of issue advocacy and news gathering; and that said policy, custom or practice is based on plaintiff Shell's critical viewpoint and of child protection practices and practitioners and her exposure of those practices and practitioners through the media.

46. A state official in his official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State," quoting ***Kentucky v. Graham,*** 473 U.S. 159, 105 S. Ct. 3099. See ***Ex parte Young,*** 209 U.S. 123 (1908). The plaintiffs are seeking injunctive relief from the defendants in their official capacity.

INDIVIDUAL CAPACITY CLAIMS AGAINST DEFENDANTS CLIFTON AND HANNENBURG

47. Paragraphs 43 through 45 are hereby incorporated by reference.

48. Defendant Clifton is properly named in his individual capacity by virtue of his tacit or explicit endorsement and perpetuation of the aforementioned long-term customs and/or practices by DHS employees described in paragraph 16. Furthermore, having knowledge of the fact that certain accepted and perpetuated policies and established practices of DHS constituted violations of rights, Clifton failed and neglected to advise or train employees in his agency so that they would not violate the constitutionally protected rights of clients or other persons who did not come under DHS legitimate jurisdiction or authority. Clifton

was advised of these violations as far back as approximately 1997. Plaintiffs' original complaint cites that Defendant Clifton has actual rather than constructive knowledge of the constitutional deprivations.

49. Defendant Hannenberg also has actual knowledge of the deprivations by virtue of his continued consultations with defendant Rivas regarding the Fields case including but not limited to plaintiff Fields' association with plaintiff Shell. Plaintiffs' original complaint cites that defendant Hannenberg has actual rather than constructive knowledge of the constitutional deprivations.

50. Before defendant Meconi could bring the motion to prosecute plaintiff Shell for UPL in Juvenile Court, outside the statutory jurisdiction and authority of DHS, he had to legally advise and obtain the consent of his client, DHS, by and through a person with the authority to approve that action. Defendants Clifton and Hannenberg posses such authority. Additionally, these defendants were kept apprized of the progress and outcomes of each complaint submitted by plaintiff Fields and of each offending act by a DHS employee or other defendant which constituted deprivations of rights against the plaintiffs and were therefore, actively engaged in the conspiracy to deprive the plaintiffs of their constitutionally protected rights.

51. This complaint was filed before the subject D&N hearing, allowing ample notice and opportunity for all defendants to reconsider and reject proposed actions which would violate the rights of the plaintiffs. In light of this express notice of injury, the defendants exhibited a wilful, wanton and reckless disregard for the rights of the plaintiffs and continued to inflict multiple constitutional injuries upon the plaintiffs with a shocking

disregard for well established law or the effect of the injuries they deliberately inflicted. A reasonably competent public official should know the law governing his conduct. ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982).

52. Defendants Clifton and Hannenberg are liable in their individual capacities because they set in motion a series of acts by others, and/or knowingly refused to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injuries upon the plaintiffs. Respondeat superior liability is not implicated as there are sufficient allegations of individual wilful and wanton conduct which violate the plaintiffs' rights.

DEFENDANT MECONI IS NOT ENTITLED TO ABSOLUTE IMMUNITY

53. Plaintiff Shell has cited herein an ongoing history of injurious conduct by Defendant Meconi dating back to approximately 1997. Defendant Meconi engages in the prosecutorial function of providing legal advice to DHS on a variety of matters. In this advisory capacity, he is a participant in the ongoing discrimination against plaintiff Shell and in the efforts to deprive the plaintiffs of their rights to association, due process, right to contract, and freedom of the press. Additionally, court appointed respondent parent attorneys have been the recipient of defendant Meconi's out-of-court 'suggestions' that their clients be instructed to refrain from any association with plaintiff Shell, and his out-of-court discussions include making false and defamatory references to the nature, character and effect of plaintiff Shell's work and activities (i.e. Shell advises parents not to cooperate with treatment plans, Shell is hurting the parent's case, etc.). He has taken a pro-active position, both in the court and in the community at large, against plaintiff

Shell, and against any DHS client parents exercising their right to association with Shell. Defendant Meconi's conduct which causes the claimed constitutional injuries to plaintiff Shell has been ongoing since approximately 1997. Out-of-court communications, legal advice to DHS , strategy sessions and discussion with other county attorneys and agencies intended to prevent Shell's association with DHS clients, the filing of retaliatory complaints against plaintiff Shell with outside authorities designed to harass, intimidate and defame her and expose her to sanctions because of her exercise of her rights, and out-of-court participation in the injurious actions and conspiracy to inflict constitutional injuries upon the plaintiffs constitute conduct which is not integral to the judicial process, and therefore, defendant Meconi's claim of absolute immunity fails on these grounds. ***Burns v. Reed***, 111 S.Ct. 1934 (1991).

54. The only way a lawyer may prosecute a claim for UPL is through the initiation of a separate suit permitting only injunction against engaging in UPL but not restricting freedom of association, or through contempt proceedings with the burden of proof being 'beyond a reasonable doubt,' C.R.S. 12-5-112. ***Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n***. 135 Colo. 398. 312 P.2d 998. In the aforementioned proceedings, the person alleged to have engaged in UPL would be afforded full due process. The DHS motion to join plaintiff Shell as a Special Respondent does not conform to these clearly established mandates. If the intent of defendant Meconi's motion was to prosecute Shell for alleged UPL as was stated in his motion, then that action can only be brought in the same capacity as any other attorney, not as counsel for DHS, and his claim for prosecutorial immunity fails and full liability attaches. The only other intent would be to

allege UPL, absent of jurisdiction to do so, wilfully, wantonly and knowingly bringing it before a court which lacked jurisdiction to hear it, as a device to inflict constitutional injuries upon the plaintiffs by acting in concert with state agents to use the force of law to deprive the plaintiffs of their aforementioned rights in the furtherance of the defendants' agendas against plaintiff Shell; at which juncture, all conduct which is not integral to the judicial process (integral to the judicial process includes drafting, filing and prosecuting the motion) is subject to qualified immunity.

55. Plaintiff Shell asserts that the defendant's filing of the motion to add her as Special Respondent for the purposes of prosecuting allegations of UPL under the caption of a D&N case lacked any and all jurisdiction, rendering defendant Meconi's claim for prosecutorial immunity without merit. See paragraphs 33-39. Plaintiff Shell relies on the precedents set for judicial immunity under the same circumstances. Judicial immunity is not available in the clear absence of all jurisdiction. ***Bradley v. Fisher***, 80 U.S. 335 (1871). Except where a judge has acted "in the clear absence of all jurisdiction," the doctrine of judicial immunity shields that judge from liability for the judge's official adjudicative acts. ***Stump v. Sparkman,*** 435 U. S. 349, 356-57 (1978). As counsel for DHS, prosecuting juvenile cases on behalf of the People, defendant Meconi had no jurisdiction or authority to prosecute UPL against plaintiff Shell under the caption of a D&N case in Juvenile court.

56. Since defendant Meconi's actions are in violation of clearly established law, which law was clearly established when the violation occurred, qualified immunity also fails. Paragraphs 17- 39 & 44-45 are hereby incorporated by reference.

INDIVIDUAL DEFENDANTS NOT ENTITLED TO ABSOLUTE IMMUNITY

57. Paragraphs 1, 2, & 13-45 are hereby incorporated by reference.

58. DHS & defendants Clifton, Hannenberg, and Rivas lacked official jurisdiction or authority to initiate or prosecute a UPL claim under the caption of a D&N case, therefore the acts conducted by defendants in the furtherance of the motion to add plaintiff Shell as a Special Respondent were performed outside the scope of their lawful authority which severs them from any immunity.

59. Defendants engaged in shocking and offensive conduct against the plaintiffs which is not integral to the judicial process as described in paragraph 16. Such conduct is sufficient to chill or silence a person of ordinary firmness from future First Amendment activities. Plaintiff Shell is a person of extraordinary firmness, and has endured the aforementioned constitutional injuries for years at the hands of the defendants Clifton, DHS and Meconi, suffering grievously as a direct result of those repeated and shocking assaults on her work, her character, her integrity and her constitutionally protected rights.

60. ***Miami Herald Publishing Co. v. Tornillo***, 418 U.S. 241 (1974) states,

> "Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." ***Worrell v. Henry***, 219 F.3d 1197, 1212 (10th Cir. 2000). . .Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." ***Mendocino Envtl. Ctr.,*** 192 F.3d at 1300 (quoting ***Crawford-El v. Britton,*** 93 F.3d 813, 826 (D.C. Cir. 1996), vacated on other grounds, 520 U.S. 1273 (1997) (internal quotation marks

and citation omitted in Mendocino)).

INDIVIDUAL DEFENDANTS NOT ENTITLED TO QUALIFIED IMMUNITY

61. Paragraphs 1, 2, & 13-45 & 49-53 & 59-61 are hereby incorporated by reference.

62. Defendants conduct as described herein and in the original and supplemental complaints violated the law and the plaintiffs' clearly established rights to freedom of association, freedom of the press, right to contract, due process and viewpoint discrimination as to plaintiff Shell .

63. The laws pertaining to freedom of association, freedom of the press, right to contract due process and viewpoint discrimination were clearly established at the time of the violations and have been cited herein.

PLAINTIFFS HAVE SUFFICIENTLY PLED CONDUCT WHICH COULD SERVE TO VIOLATE THEIR CIVIL RIGHTS

64. Paragraphs 1-3 & 13-64 are hereby incorporated by reference.

65. Plaintiff has responded to the immunity claims herein briefly detailing the conduct of the defendants which violate the constitutionally protected rights of the plaintiffs. Plaintiff Shell is unclear as to whether heightened pleading is required, however, she has described specific defendant conduct in the previous paragraphs which violate the plaintiffs' rights claimed.

THE LAW WAS CLEARLY ESTABLISHED

66. Paragraphs 1 - 3 are hereby incorporated by reference.

67. Persuant to the arguments and authority presented in the proceeding paragraphs, plaintiff has come forward with ample authoritative case law and statutes which establishes that

any of the individual defendants should have known that they were violating plaintiffs' civil rights.

CONCLUSION

For the reasons stated herein and in the original and supplemental complaints, and based on the actions of the defendants as detailed herein and in the original and supplemental complaints, and based on the authoritative case law and statutes provided herein, plaintiff respectfully requests this court to deny the defendants' motion to dismiss in its entirety.

Respectfully submitted August 25, 2003

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached document **PLAINTIFF SHELL'S RESPONSE TO DEFENDANTS ROCCO F. MECONI, FREMONT COUNTY DEPARTMENT OF HUMAN SERVICES, STEVE CLIFTON, DAWN RIVAS, and TODD HANENBURG'S MOTION TO DISMISS** were placed in the United States Mail, first class mail, postage prepaid on August 25, 2003

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August 25, 2003
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