UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NICOLE K. and ROMAN S., by next friend Linda R.; et al, Plaintiffs, v. TERRY J. STIGDON, Director of the Indiana Department of Child Services, in her official capacity, et al. Defendants.	)	Case No.: 3:19-cv-00025-RLY-MPB

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The plaintiffs demand that this Court provide the extraordinary relief of creating a brand new, one-size-fits-all right. The plaintiffs ask this Court to hold that in all Termination of Parental Rights (TPR) and Child in Need of Services (CHINS) cases, an attorney must be appointed for the children, no matter the age of the children, no matter the particular circumstances of the case, no matter if more attorneys might actually be counterproductive in a particular case, to list a few examples. No federal court has ever held that the United States Constitution makes such a Procrustean demand on states. No federal court has so held because a requirement like that is clearly foreclosed by United States Supreme Court case law.

The Due Process Clause of the Fourteenth Amendment establishes minimum requirements necessary "to ensure that judicial proceedings are fundamentally

fair." *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.,* 452 U.S. 18, 33 (1981). The Constitution gives states discretion in adopting laws to best fit their needs—this includes laws providing judges discretion in the courtroom. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"). The Department of Child Services (DCS) may bring TPR and CHINS proceedings on behalf of the children involved. While the assertion that adding attorneys to every TPR and CHINS case will fix the societal harms detailed by the plaintiffs may be flattering to an attorney's sense of self-worth, it is not an assertion that imposes a constitutional remedy. Instead, "[d]ecisions concerning the allocation of resources to individual programs…such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128–29 (1992).

The Constitution does not, despite the plaintiffs' notions, strip states of all discretion, but instead provides flexibility to address problems at a local level, within certain broad requirements. Indiana's system granting judges discretion to appoint counsel for children as appropriate is, as a matter of law, well within the Constitutional requirements. For these reasons, and the other reasons set forth below, including insurmountable procedural hurdles for the plaintiffs, the Court should dismiss their complaint.

I. The standard of review for a motion to dismiss should result in dismissal of this case.

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defense to a pleading for "failure to state a claim upon which relief can be granted." To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The 'short and plain statement' must be enough 'to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and noting that the Supreme Court in *Twombly*, 550 U.S. at 563, retired the old formulation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

For purposes of a motion to dismiss under Rule 12(b)(6), a court accepts the complaint's factual allegations as true and tests the legal sufficiency of the complaint. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). "[T]he factual allegations in the complaint 'must be enough to raise a right to relief above the speculative level.'" *Killingsworth*, 507 F.3d at 618 (quoting *Twombly*, 550 U.S. at 555) (other citations omitted).

Rule 12(b)(1) of the Federal Rules of Civil Procedure requires dismissal if the Court lacks subject matter jurisdiction. "When considering a motion to dismiss under Rule 12(b)(1), the district court may properly look beyond the jurisdictional

allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Eiteljorg*, 813 F.Supp.2d at 1074 (quoting *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993).

II. Child protection proceedings in Indiana.

Under Indiana law, a trial court is given discretion whether to appoint counsel for children in CHINS or TPR proceedings. Ind. Code § 31-32-4-2. While not required by the Constitution, parents are provided counsel in TPR proceedings, and parents have a right to be represented by counsel in CHINS proceedings. *See* Ind. Code §§ Ind. Code 31-32-4-3 (TPR); 31-34-4-6(a)(2) (CHINS).

Indiana law requires counsel for parents in TPR cases, and not children, due, at least in part, to the adversarial nature of those proceedings. More broadly, when the State files a CHINS or TPR petition, it does so on the belief that it is in the child's best interest. In fact, the State must prove that terminating parental rights is in the child's best interest. *See* Ind. Code §§ 31-35-2-4(b)(2)(C). In turn, parents are appointed counsel so that they have the opportunity to argue that they can properly care for their children. This provides the trial court the opportunity to hear both perspectives, allowing the case to be fully litigated by the parties.

With both sides represented by counsel, a child may not also need state-appointed counsel in a CHINS or TPR proceeding. While the plaintiffs assert that children in these instances have no representation, the child's interests are represented by the Guardian Ad Litem (GAL) and/or the Court Appointed Special

Advocate (CASA). Indeed, the Supreme Court noted that it is the State (acting through DCS), that is acting as counsel for the child. *Lassiter,* 452 U.S. at 28.

In addition, the trial court has the option at all times to appoint an attorney to the child in a CHINS or TPR proceeding under Indiana Code § 31-32-4-2(b) ("The court may appoint counsel to represent any child in any other proceeding.").

When a CHINS petition is filed, the trial court is required to appoint a GAL, a CASA, or both, to represent the child. Ind. Code § 31-34-10-3. And if parents challenge the termination of their parental rights, the trial court is again required to appoint a GAL, a CASA, or both, to represent the child. Ind. Code § 31-35-2-7. A CASA or GAL is required to "protect the best interests of the child," (Ind. Code § 31-32-3-6), is required to advocate on behalf of the child, (Ind. Code §§ 31-9-2-50, 31-17-6-3), and has the authority to subpoena witnesses, present evidence, and cross-examine witnesses (Ind. Code § 31-15-6-7). CASAs and GALs are also authorized to file TPR petitions for the child. Ind. Code § 31-35-2-4. A prosecuting attorney has authority to file CHINS actions. Ind. Code § 31-34-9-1. In any given case, the prosecutor, CASA, and GAL have significant authority to represent the child's interest in a CHINS or TPR proceeding. And in those situations where a lawyer may be needed, the prosecutor, GAL, or CASA may request the appointment of counsel; further, the court may, *sua sponte*, appoint counsel for the child. While the plaintiffs "on information and belief" argue that "such appointment is almost never made." (Plaintiffs Amended Complaint, ¶6), the Constitution does not require the appointment of counsel in every CHINS and TPR action.

III. Argument

Plaintiffs' lawsuit should be dismissed in its entirety because it fails both substantively and procedurally. At the substantive level, the Constitution does not require a State to provide children with counsel in every case regarding the termination of parental rights or the declaration that a child is in need of services. Given the nature of the plaintiffs' claims, that is sufficient reason to dismiss this lawsuit. Further, the plaintiffs fail to meet the standing requirements to bring a federal lawsuit, brought a lawsuit on an issue that must be litigated through an individual CHINS or TPR case, and request relief explicitly foreclosed by statute. For these reasons, the case should be dismissed.

A. The challenged law does not violate the Due Process Clause of the Fourteenth Amendment.

Indiana Code § 31-32-4-2(b) does not violate the Due Process Clause either facially or as applied.[1] The statute gives a trial court judge discretion when or whether to appoint a child an attorney in a CHINS or TPR proceeding, something that, in these types of cases, meets constitutional standards. The Supreme Court has held that, under the Due Process Clause, an "indigent's right to appointed counsel … exist[s] only where the litigant may lose his physical liberty if he loses the litigation." *Lassiter*, 452 U.S. at 25. The U.S. Supreme Court "has refused to extend the right to appointed counsel to include prosecutions which … do not result

[1] Although Plaintiffs assert that their challenge is both facial and as-applied [Dkt. 40 at 34], they ask for sweeping, injunctive relief, which would suggest that their challenge is actually a facial one. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016).

in the defendant's loss of personal liberty." *Id.* at 26. This Court should follow the Supreme Court's guidance and dismiss the plaintiffs' due process claims.

A child is required to have counsel appointed in delinquency proceedings under the Due Process Clause, *id.* at 25–26, because a child subject to a delinquency proceeding is at risk of losing his physical liberty through detention with the Indiana Department of Correction. *See, e.g.,* Ind. Code Ch. 31-37-6, -7; Ind. Code §§ 31-27-19-7, -8, -9, -10. In contrast, children subject to a CHINS or TPR proceeding are not in danger of losing their physical liberty. Instead, the issue in a CHINS or TPR proceeding is whether the parents of the child are able to care properly for the child. *See* Ind. Code §§ 31-34-1-1; 31-35-2-4(b); 31-35-2-8.

In *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.,* the Supreme Court held that there is a presumption that a litigant who is not facing a loss of physical liberty is *not* entitled to counsel, and the litigant must present sufficient evidence to overcome this presumption. *Id.* at 26–27. While *Lassiter* addressed a parent's right to counsel, this principle is equally applicable to a child's Due Process right to counsel. *Lassiter* held that a court must apply the *Eldridge* factors—the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions—to determine whether the Due Process Clause requires the appointment of counsel for a parent in a TPR proceeding. *See Lassiter*, 452 U.S. at 27–32.

The Court acknowledged that there may be instances in which the *Eldridge* factors may overcome the presumption against the appointment of counsel if the

"parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak." *Id.* at 31. But the Court noted that the "*Eldridge* factors will not always be so distributed" and rejected the conclusion that "the Constitution requires the appointment of counsel in every parental termination proceeding." *Id.* at 31. Likewise, such a broad, undifferentiated requirement is not required for children in CHINS or TPR cases.

Contrary to the Plaintiff's Amended Complaint, Indiana Code § 31-32-4-2(b) accords with the Due Process Clause by giving the trial court discretion when or whether to appoint a lawyer for a child. The Supreme Court has rejected the plaintiffs' broad reading of the Due Process Clause to require appointed counsel in such a sweeping fashion, such "that counsel are appointed for [all] children in CHINS and TPR proceedings" [Dkt. 40 at 34]. *Id.* at 31 ("neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding").

There is no authority, either precedential or persuasive, to support the plaintiffs' request for relief. Plaintiffs in their complaint incorrectly assert that a federal court "has held that foster children have a constitutional right to adequate legal representation." [Dkt. 40 at 10, *citing Kenny A. v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005)]. Plaintiffs fail to note that the court in *Kenny A.* addressed only the *Georgia* constitution, and that's the critical distinction that makes it clear that, as a matter of law, the plaintiffs' claims fail. First, the court in *Kenny A.* analyzed the question of whether there exists any constitutional right to counsel under the

Eldridge factors because Georgia courts, in interpreting due process requirements under the Georgia Constitution, use those factors. *Id.* at 1360. And that court, holding that the factors all went in the children's favor, found that a Georgia constitutional right existed. *Id.* at 1362.

But that federal district court in Georgia stopped at the *Eldridge* analysis. And any analysis under federal law requires an additional step, as the Supreme Court explained in *Lassiter*. There, the Supreme Court observed that, in general, all the factors may weigh in favor of counsel being appointed to *all* parents in termination proceedings, but, even then, there is no blanket constitutional requirement for the appointment of counsel. *Lassiter*, 452 U.S. at 31. And that's because it is a person's "interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel…" *Id.* at 25.

Instead, the Court chose to adopt, for purposes of the United States Constitution, "the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 31–32 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973). *Gagnon,* in addressing parole revocation hearings, held that "the decision as to the need for counsel must be made on a case-by-case basis" because the "facts and circumstances" in each case "are susceptible of

almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision." *Gagnon*, 411 U.S. at 790.

Thus, the Plaintiffs' claim regarding a Due Process right to counsel could have been or can be raised in each of their underlying CHINS or TPR actions. And this would be the appropriate route because only the state trial court can properly apply the *Eldridge* elements to the unique facts of each case to determine whether a child should be appointed counsel. *See Lassiter*, 452 U.S. at 27–32. The *Eldridge* factors cannot be applied in a class action in any practical or meaningful manner, given the unique facts of each case. Contrary to plaintiffs' allegations, the discretion that Indiana Code § 31-32-4-2(b) affords to trial court judges protects the children's rights established under the Due Process Clause. *See Lassiter*, 452 U.S. at 27–32.

The plaintiffs' claim regarding a violation of the Due Process Clause should be dismissed because they have failed to state a claim for relief.

B. The challenged law does not violate the Equal Protection Clause of the Fourteenth Amendment.

While the precise contours are imprecise, the plaintiffs assert that Indiana Code § 31-32-4-2(b) violates the Equal Protection Clause of the Fourteenth Amendment. (*See* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). This claim, so the argument seems to go, rests on the defendant judges' power to appoint legal counsel in some CHINS and TPR proceedings, but to "withhold the appointment of legal counsel for all other children…who are similarly situated." [Dkt. 40 at 35]. The

plaintiffs also complain that, because parents are afforded the appointment of legal counsel in CHINS and TPR proceedings, but the courts have discretion over whether to appoint legal counsel for children, the children are denied equal protection. [Dkt. 40 at 35]. As a preliminary point, the plaintiffs are wrong about what Indiana law provides parents. Parents are afforded the right to counsel in CHINS cases; they are not guaranteed appointed counsel in those cases. Ind. Code § 31-34-4-6(a)(2).

Indiana law does afford judges discretion in the appointment of attorneys to children (already represented by a GAL or CASA) in TPR and CHINS proceedings. The plaintiffs' equal protection challenge to this provision of discretion is subject to rational basis scrutiny. The challenged law easily meets that low burden. Also, the plaintiffs fail to show how liberty interests are at stake. For these reasons, the plaintiffs' challenge under the Equal Protection Clause fails as well.

Unless state action "provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson* Pub. Sch., 487 U.S. 450, 457–58 (1988). "A suspect class either 'possesses an immutable characteristic determined solely by the accident of birth,' … or is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *St. John's United*

Church of Christ v. City of Chicago, 502 F.3d 616, 638 (7th Cir. 2007) (citations omitted). The allegations by the plaintiffs do not rise to the level of strict scrutiny because age is not a protected class provoking elevated scrutiny. *See Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (noting that age difference is subject to rational basis review). The judges' discretion provided by Indiana Code § 31-32-4-2(b) would be analyzed using rational basis review.

Any legislative classification that does not involve a suspect class "is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). For these classifications, the challenger must show that there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320. Manifestly, "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Id.* at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320 (quoting *Beach Communications*, 508 U.S. at 313).

The plaintiffs ask this Court to make a blanket determination involving all Indiana children subject to TPR and CHINS proceedings which would have an overwhelming impact on the entire Indiana court system. The current law allows judges, on a case by case basis, to make a determination whether legal counsel is necessary, in addition to GAL or CASA representatives who may be provided in a case. Indiana Code § 31-32-4-2(b) allows the judge in the courtroom, the officer

hearing the evidence who has an up-close perspective of the situation, to make a decision, instead of requiring the blanket appointment of thousands of attorneys, something that would result in enormous costs increases or delays to CHINS and TPR proceedings where time and efficiency may be of paramount importance. This determination is subject only to rational basis scrutiny. When applying the Equal Protection Clause under rational basis review, courts "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe,* 457 U.S. 202, 216 (1982).

The plaintiffs provide, in their Amended Complaint, examples of children who have been involved in TPR and CHINS proceedings. But the circumstances, as tragic as they may be, are not remedied simply by the appointment of legal counsel in lieu of the GAL, CASA, or the DCS social workers assigned to the cases. For example, the Amended Complaint relates the circumstances of children being shuttled from foster home to foster home [dkt. 40 at 13-14]; a grandmother who abandoned the adoption process and children experiencing emotional trauma [dkt. 40 at 16]; and a rocky adoption process by a close family member [dkt. 40 at 19-20]. There is no assurance that these harms, which can be a common and devastating part of some children's lives, could be fixed by simply adding more attorneys.

To suggest that the State take more time and resources to appoint an attorney or attorneys in every case, even where the judge could identify no problem which could be solved by adding another attorney, does not, as a matter of law, establish that the law is unconstitutional. "[T]he Equal Protection Clause does not

require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970). Indiana Code § 31-32-4-2(b) rationally relates to the legitimate governmental interest of affording the judges discretion whether to appoint legal counsel on a case-by-case basis. *Racine Charter One, Inc. v. Racine Unified Sch. Dist.,* 424 F.3d 677, 687 (7th Cir. 2005) (noting that although certain costs could not be quantified, the Court inferred that they were "substantial enough to provide a rational basis for RUSD's refusal to extend the busing benefit to Charter One students.").

Even if this Court believes that harm to children would be ameliorated by an attorney for every child in every TPR and CHIS case,[2] the existence of current harms does not make the challenged statute (giving the judges discretion to determine when an attorney appointment is necessary) unconstitutional. That is, "a disparate impact does not constitute disparate treatment." *See Columbus Bd. Of Educ. v. Penick*, 443 U.S. 449, 464 (1979) ("[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation.").

There is nothing constitutionally problematic about Indiana's system that treats parents differently than children in these cases. As noted above, the adversarial posture of the case counsels toward differentiating the differently situated individuals involved. Further, as the plaintiffs themselves acknowledge through this very lawsuit, children in lawsuits are situated differently than most

[2] Notably, in some situations involving the named plaintiffs in this case, it could result three more attorneys being appointed to a case to represent the three children. [Dkt. 40 at 15].

adults. The children are of course not calling all the shots in this case, but are instead represented by their "next friends" who, the plaintiffs assert, are "sufficiently familiar with the facts and circumstances surrounding the children's situation to represent the children's interests in this litigation fairly and adequately." [Dkt. 40 at 15, 18, 22]. Even here, the children act through intermediaries.

Plaintiffs attack the idea of discretion itself. But courts have held where the government has applied the use of programs with discretion, even when harms may still exist, it does not make the enacted programs unconstitutional. *See McDonald v. Bd. of Elec. Comm'rs of Chicago*, 394 U.S. 802, (1969) (acknowledging that government "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked"); *see also City of New Orleans v. Duke,* 427 U.S. 297, 305 (1976) (recognizing that a "gradual approach to [a governmental] problem is not constitutionally impermissible"); *Greater Chicago Combine & Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir.2005) (acknowledging that "a city's decision to address a problem gradually is rational").

The plaintiffs' Equal Protection challenge, imprecise as it may be, does not state a claim for which relief can be granted. That is, the plaintiffs have recognized no fundamental right and no protected class. Instead, they challenge the very idea of individualized discretion by judges in the courtroom. There is no legal support for

such an approach. Consequently, the plaintiffs' Equal Protection challenge should be dismissed.

C. Plaintiffs face insurmountable procedural hurdles, including the lack of Article III standing.

Even if the plaintiffs had set forth a right not foreclosed by law, the complaint would still be subject to dismissal because of the procedural problems facing the plaintiffs' claims. First, they do not establish standing, failing to show traceability or redressability. Next, the DCS Director does not have authority to appoint counsel in cases, so could not redress the plaintiffs' alleged injuries. Finally, section 1983 clearly forecloses injunctive relief in this case against the judges.

1. Plaintiffs do not have standing to bring this lawsuit against these defendants.

Standing in a federal case is a threshold issue that "determin[es] the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Article III's injury-in-fact, traceability, and redressability requirements must be met to remain in federal court. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547. Specifically, plaintiffs, to meet standing requirements, must establish that they suffered an injury in fact, the injury is traceable to the defendants, and the injury would be redressed by a decision in favor of the plaintiffs. *Id.*

In order to demonstrate Article III standing, a plaintiff seeking injunctive relief must establish causation between the remedy sought and the alleged injury, and also establish redressability: that it is "likely" and not "merely speculative" that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit.

Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 27, (2008) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, (1992). *See also Linda R.S. v. Richard D.,* 410 U.S. 614 (1973) (mother of illegitimate child lacked standing to contest prosecutorial policy of using child support laws to coerce support of legitimate children only, as it was "only speculative" that prosecution of father would result in support rather than jailing). The Supreme Court held in *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, (1976) "[I]ndirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III: To establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." TPR and CHINS proceedings certainly involve a complex amount of turmoil surrounding a child, which an appointed attorney will not necessarily fix, and the plaintiffs' sweeping request for an injunction or a declaratory judgment is not the way to do it.

Here, any link between the asserted injury and the relief requested is based on pure speculation. It is important to emphasize that the plaintiffs argue that counsel must be provided in all cases, to provide, for example, "information about their legal rights," "legal counsel," and a "voice in the adjudication of where or with whom they live." [Dkt. 40 at 17]. The plaintiffs leap to the conclusion that "the instability and emotional trauma that the girls have experienced would have been lessened or prevented altogether," if counsel were appointed. [Dkt. 40 at 18]. But one child, for example, was two months old when DCS removed her. [Dkt. 40 at 15].

There is simply no way to square the asserted problems that the plaintiffs present with the solution they propose. And that failure to link the two means that they have not met the minimum standards for standing.

2. The DCS Director, Terry J. Stigdon, cannot provide the remedy the plaintiffs seek.

While the plaintiffs name Terry J. Stigdon, the Director of DCS, as a defendant, it is unclear how she could provide redress in this case. The plaintiffs asserted that "DCS, which is under the direction of Defendant Stigdon, failed to ensure that legal counsel was appointed to represent" the plaintiffs "in their CHINS proceedings," but this supposed legal obligation is made up. And, while "factual allegations are accepted as true at the pleading stage, allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion." *McReynolds v. Merrill Lynch & Co.,* 694 F.3d 873, 885 (7th Cir. 2012). There is simply no legal duty or capability for the DCS director to appoint counsel for children, and any claim against Director Stigdon should be dismissed on that basis.

3. The application of the *Younger* abstention doctrine means this case should be dismissed.

As noted above, the plaintiffs' claim regarding a Due Process right to counsel should have been raised and could still be raised in the underlying CHINS or TPR actions. This is critical because only the state trial court can properly apply the *Eldridge* elements to the unique facts of each case to determine whether a child should be appointed counsel. *See Lassiter*, 452 U.S. at 27–32.

The plaintiffs have asserted that their claims are ongoing. [Dkt. 40 at 14 ("Nicole and Roman have been and *continue to be* denied any legal representation in their CHINS proceedings"), 17 (Abigail, Lily, and Rachel have been and *continue to be* denied any legal representation in their CHINS and TPR proceedings"), and 21 ("Anna, Brian, Amelia, Alexa, and Zachary have been and *continue to be* denied any legal representation in their CHINS proceedings"). Emphasis added]. The ongoing nature of their state court proceedings bring them up against the *Younger* doctrine, whose application should result in the dismissal of this case.

The *Younger* doctrine stems from the 1971 case *Younger v. Harris*, where the Supreme Court held that a federal court may not enjoin pending state court criminal proceedings. 401 U.S. 37 (1971). The doctrine has since been extended to include the prohibition of federal courts from enjoining civil state court proceedings. *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1 (1987). The proper result of a federal court's abstention while a state court proceeding is pending may be dismissal. *Majors v. Engelbrecht*, 149 F.3d 709, 714 (7th Cir. 1998). That's clearly the proper result here. Given the nature of the sweeping relief that plaintiffs request, a stay would be pointless. Instead, the plaintiffs' complaint should be dismissed because the plaintiffs are seeking an equitable relief when they have an adequate remedy at law: the CHINS or TPR proceeding when an attorney may be requested. The plaintiffs have simply chosen the wrong mechanism for bringing this claim.[3] The

[3] After all, Gideon did not bring an action for injunctive relief. He brought a petition of habeas corpus. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

application of the *Younger* abstention doctrine, which would be properly applied in this case, should result in the dismissal of this lawsuit.

4. Section 1983 explicitly bars injunctive relief against judges whose official acts are being challenged.

Finally, and in a manner that can be almost mechanically applied in this case, the plaintiffs ask for injunctive relief against the judges because they did not appoint attorneys for the children defendants who had cases before them. But 42 U.S.C. § 1983 says this: "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Plaintiffs concede that declarative relief is, at least in theory, available in this case because they're asking for a declaratory judgment against all the defendants. Next, the plaintiffs also concede that the judges' omission (here, purportedly not appointing children counsel) was done in their judicial capacity (the judges are sued in their official capacity only). [Dkt. 40 at 22-23]. Finally, plaintiffs know there was no declaratory decree was violated. Accordingly, the plaintiffs may not maintain their request for injunctive relief against the judges, and all claims against them for such relief should be dismissed. *Smith v. City of Hammond, Indiana*, 388 F.3d 304, 307 (7th Cir. 2004).

IV. CONCLUSION

The plaintiffs' Amended Complaint suffers great defects in the application of case law relating to their arguments regarding equal protection and due process, in addition to the procedural problems with their lawsuit. At bottom, their lawsuit is a

demand for a policy change. A lawsuit in federal court is not the place to make that demand. For all the foregoing reasons, the Court should dismiss this action under the Federal Rules of Civil Procedure and Article III of the United States Constitution.

Respectfully submitted,

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