IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NICOLE K. and ROMAN S., by next friend Linda R.; ABIGAIL R., LILY R., and RACHEL H., by next friend Nancy B.; and ANNA C., BRIAN P., AMELIA P., ALEXA C., and ZACHARY H., by next friend Jessie R.; for themselves and those similarly situated, Plaintiffs, v. TERRY J. STIGDON, Director of the Indiana Department of Child Services, in her official capacity, HON. MARILYN A. MOORES, Marion Superior Court Judge, in her official capacity, HON. MARK A. JONES, Marion Superior Court Judge, in his official capacity, HON. THOMAS P. STEFANIAK, JR., Lake Superior Court Judge, in his official capacity, HON. MARSHA OWENS HOWSER, Scott Superior Court Judge, in her official capacity, and HON. JASON M. MOUNT, Scott Circuit Court Judge, in his official capacity, Defendants.	Case No.: 1:19-cv-01521-JPH-MJD JURY TRIAL DEMANDED Honorable James Patrick Hanlon

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

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I. INTRODUCTION

This class action lawsuit seeks to secure legal protections for abused and neglected children in juvenile court proceedings. Plaintiffs are a class of children who have no legal representation in those proceedings and who seek the appointment of legal counsel to protect their fundamental liberty interests as the juvenile court decides where the children will live, with whom they will live, and whether they will be subject to State care for the duration of their childhood. In Indiana, a child facing one month in juvenile detention is appointed an attorney, but an abused child facing 18 years of government-directed foster placements, living among countless strangers in dozens of homes, is not. Plaintiffs filed a 36-page complaint setting forth detailed facts and legal theories of relief explaining why Plaintiffs are entitled to appointed counsel in these important proceedings. ("First Amended Complaint" or "FAC" (Dkt. # 40).)

Although Defendants purport to bring a Rule 12(b)(6) motion, Defendants make no challenge to the pleading sufficiency of the First Amended Complaint. Instead, Defendants state their disagreement with Plaintiffs' legal theories and seek a ruling on the merits of Plaintiffs' claims, which is improper on a 12(b)(6) motion. *See Nat'l Found. for Special Needs Integrity, Inc. v. Reese*, No. 1-15-cv-00545-TWP-DKL, 2016 WL 454805, at *2 (S.D. Ind. Feb. 5, 2016) ("The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits.") (quoting *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990)). Defendants also challenge Plaintiffs' factual allegations but "[o]f course, a judge reviewing a motion to dismiss under Rule 12(b)(6) cannot engage in fact-finding." *In re Consol. Indus.*, 360 F.3d 712, 717 (7th Cir. 2004). Plaintiffs have sufficiently alleged facts which, taken as true, plausibly give rise to an entitlement to relief under the due process and equal protection clauses of the Fourteenth Amendment.

Defendants' Rule 12(b)(1) and other "procedural" challenges to the First Amended Complaint also fall short. Plaintiffs have alleged an injury in fact that is both traceable to Defendants' actions and redressable by the requested relief. Plaintiffs therefore have standing to bring this action. Likewise, Plaintiffs have properly named the DCS Director as a Defendant, because Plaintiffs have alleged that DCS has the duty and the ability to ensure that counsel are appointed to children in juvenile court proceedings. Finally, Defendants' are incorrect that *Younger* abstention applies to this case. *Younger v. Harris,* 401 U.S. 37 (1971). The Supreme Court has narrowed the *Younger* doctrine to specific categories not applicable here, and in any event, abstention would be improper given the nature of the claims at issue.

Defendants' motion to dismiss should be denied in its entirety.

II. BACKGROUND

Plaintiffs are a group of children in Indiana's foster care system who have been denied legal representation in their Children in Need of Services (CHINS) and/or Termination of Parent Rights (TPR) proceedings and who challenge as unconstitutional Indiana's discretionary approach to appointing counsel for children in those proceedings. Plaintiffs detail in their First Amended Complaint the severe circumstances Plaintiffs and other foster children in Indiana face during CHINS and TPR proceedings and the life-changing impact decisions made during these proceedings have on the children. (*See* FAC ¶¶ 24-48.)

In Indiana, the Department of Child Services ("DCS") is empowered to remove a child from his or her home, file a petition to initiate CHINS proceedings in the applicable Superior or Circuit Court, and prosecute those proceedings, which may include related TPR proceedings, for as many months or years as it takes until permanency for that child is achieved, *e.g.*, adoption, reunification with family, or another outcome is reached, *e.g.*, aging out of the system or in the

most unfortunate cases, death. *See* Ind. Code Ann. § 31-34-2-3; Ind. Code Ann. § 31-34-9-1. DCS has and does engage in these activities throughout Indiana, including in Marion, Lake, and Scott Counties. Defendant Stigdon administers DCS and is the official ultimately responsible for these activities carried out by DCS.

When the government takes a child from his or her home on the grounds of abuse or neglect, it has an obligation to protect not only the child's safety but also the child's legal rights. Those rights include the right to be represented by an attorney when the child's fundamental liberty interests are at stake, as they are in CHINS and TPR proceedings. Such liberty interests center on whether the child will be placed in State custody through foster care and include where the child will live, with whom the child will live, and whether the integrity of family relationships will be maintained or dissolved — issues at the very core of CHINS and TPR proceedings. Because these physical liberty interests are at stake, protecting the child's due process rights in these proceedings is of paramount importance and cannot occur without the child having representation by an attorney. Without an attorney, a child in a dependency proceeding risks losing his or her liberty interests, as other parties present evidence, offer witnesses, and make decisions about the child's future that the child is not permitted to discredit, challenge, or even address. Such an omission is fundamentally unfair and contrary to the due process and equal protection clauses of the Fourteenth Amendment.

Indiana is one of the few states left in America that does not appoint legal counsel to children in dependency proceedings. (*See* FAC ¶ 2.) Numerous private and public studies and publications have recognized the critical importance of children's counsel in dependency proceedings. (*See* FAC ¶¶ 2, 16-18.) For example, in 2009, the Department of Health and Human Services sponsored a multi-year, multi-million dollar study on legal representation of

children, ultimately recommending that, "[f]ederal leadership should ensure that all court-involved children are represented by an attorney in child protection proceedings." (*See* FAC ¶ 2.)

Although appointment of counsel for indigent parents in CHINS and TPR proceedings in Indiana is mandatory, Indiana does not afford children the same right. Appointment of counsel for non-delinquent children in both CHINS and TPR proceedings is entirely discretionary. Ind. Code Ann. § 31-32-4-2(b) ("The court may appoint counsel to represent any child in any other proceeding."). And although the court may appoint a Guardian Ad Litem (GAL) or Court Appointed Special Advocate (CASA) for the child at any point in the proceedings, Ind. Code Ann. § 31-32-3-1, contrary to Defendants' assertion, neither representative can serve as an acceptable substitute for a licensed attorney. (Mot. at 5.) The fact that Indiana's code contemplates the appointment of an attorney *to represent the GAL* in CHINS proceedings reveals the limitations that GALs have in these proceedings; they are not synonymous with attorneys and have a different role.[1] *See* Ind. Code Ann. § 31-32-3-4. A GAL/CASA is explicitly prohibited from offering legal advice, and instead serves as a "best interest advocate," which is not the same as an attorney. (FAC ¶ 7.) Empirical studies have shown that unrepresented children are routinely, erroneously deprived of their most fundamental protected interests, even when they have an appointed GAL or CASA. (FAC ¶ 17.)

Indiana's discretionary approach to appointing counsel for children in CHINS and TPR proceedings is unconstitutional and unfair, and it is at odds with the majority of the nation, with

[1] Defendants claims that GALs and CASAs have "the authority to subpoena witnesses, present evidence, and cross-examine witnesses," citing Ind. Code § 31-15-6-7 in support. (Mot. at 5.) That code section, however, governs "Dissolution of Marriage and Legal Separation," not CHINS and TPR proceedings. And in any event, the same code section makes clear that these functions are limited to the topic of the supervision, investigation, and reporting of the GAL/CASA.

the long-established body of evidence demonstrating the importance of mandatory counsel, and with the best practices endorsed by countless legal organizations, including the American Bar Association (ABA) and Institute of Judicial Administration (IJA). (FAC ¶ 19.) As the Indiana Court of Appeals recently stated: "[g]iven the fundamental due process rights at issue in termination of parental rights cases, affording litigants these fundamental due process rights is essential, including not only the litigants but also their children." (FAC ¶ 19 (quoting *A.A. v. Ind. Dep't of Child Servs.*, 100 N.E.3d 708, 709 (Ind. Ct. App. 2018)).)

III. LEGAL STANDARD

A complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," sufficient to provide the defendant with "fair notice" of the claim and its basis. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face," with allegations that are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 547, 570. A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (quotation marks omitted). Accordingly, when analyzing a Rule 12(b)(6) motion to dismiss, a court must "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [plaintiff's] favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

A motion to dismiss under Rule 12(b)(1) should be granted "only if the plaintiff cannot

establish any set of facts that would legally entitle him or her to the relief sought." *Vance v. Ball State Univ.*, No. 1:06-cv-1452-SEB-JMS, 2008 WL 474223, at *3 (S.D. Ind. Feb. 15, 2008). In evaluating whether a complaint adequately pleads the elements of standing, courts apply the same analysis used to review whether a complaint adequately states a claim: Courts must accept "as true all material allegations of the complaint and constru[e] the complaint in favor of the complaining party." *Am. Fed'n of Gov't Emps., Local 2119 v. Cohen*, 171 F.3d 460, 465 (7th Cir. 1999). "[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened." *Sierra Club v. U.S. Envtl. Protection Agency*, 774 F.3d 383, 390 (7th Cir. 2014) (quotation marks and citation omitted). "All that a plaintiff need show to establish standing to sue [in the Article III sense] is a reasonable probability—not a certainty—of suffering tangible harm unless he obtains the relief that he is seeking in the suit." *Id.*

In addition, this Court has made clear that motions to dismiss "shall be granted sparingly so parties are not denied the chance to have their substantive claims heard." *Auld v. Ripco, Ltd.,* No. 3:16-cv-00063-RLY-MPB, 2016 WL 3615715, at *2 (S.D. Ind. July 6, 2016) (citing *Kingwood Oil Co. v. Bell*, 204 F.2d 8, 13 (7th Cir. 1953)); *see also GT Performance Grp., LLC v. Koyo USA, Corp.*, No. 4:12-cv-00083-TWP-TAB, 2013 WL 4787329, at *4 (S.D. Ind. Sept. 6, 2013) ("[T]he court must only examine the complaint and not the merits of the lawsuit.").

IV. ARGUMENT

A. Defendants Improperly Seek a Ruling on the Merits and Fail to Identify Any Defect in the Complaint as Pled

Rule 12(b)(6) does not require Plaintiffs to prove their case at the pleading stage. Instead, Rule 12(b)(6) only requires Plaintiffs to establish that their claims are plausible. *Twombly*, 550 U.S. at 570. Plaintiffs have sufficiently alleged facts which, if proved, would

entitle them to relief under the due process and equal protection clauses of the Fourteenth Amendment. *Iqbal*, 556 U.S. at 679. Yet Defendants ignore this standard and seek a ruling on the merits in their motion to dismiss. That is improper. A court's role on a motion to dismiss is to test the adequacy of the complaint, not to consider or weigh the merits of plaintiffs' allegations. *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 328 (7th Cir. 1999) (finding error and reversing because "assessing factual support for a suit is not the office of Rule 12(b)(6)."). In concentrating solely on why their arguments win legally and factually, Defendants do not meaningfully challenge Plaintiffs' pleadings.

The crux of Defendants' 12(b)(6) motion rests on improper arguments regarding the merits of Plaintiffs' claims. For example, Defendants' lead argument is that "Indiana Code § 31-32-4-2(b) does not violate the Due Process Clause either facially or as applied." (Mot. at 6.) That is a core legal issue that is central to Plaintiffs' requested relief on the merits. (*See* FAC at Prayer, ¶ b ("Declare Indiana Code § 31-32-4-2(b) unconstitutional on its face and as applied to Plaintiffs, as violative of Plaintiffs' due process and equal protection rights under the U.S. Constitution").) Courts have repeatedly stressed that such merits issues are not properly decided on a 12(b)(6) motion. *See, e.g.*, *Nat'l Found. for Special Needs Integrity*, 2016 WL 454805, at *2 ("The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits.") (quoting *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990); *GT Performance*, 2013 WL 4787329, at *4 ("[T]he court must only examine the complaint and not the merits of the lawsuit."). Defendants make similar merits-based arguments throughout their motion. (*See, e.g.*, Mot. at 6 ("[T]he 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."); *id.* at 7 ("[C]hildren subject to a CHINS or TPR proceeding are

not in danger of losing their physical liberty."); *id.* at 8 ("[S]uch a broad, undifferentiated requirement [of appointing counsel to every child] is not required for children in CHINS or TPR cases."); *id.* at 10 ("[T]he 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."); *id.* ("The challenged law does not violate the Equal Protection Clause of the Fourteenth Amendment."); *id.* at 14 ("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."); *id.* ("There is nothing constitutionally problematic about Indiana's system that treats parents differently than children in these cases.").) All of these arguments go to the merits of Plaintiffs' claims, and Defendants fail to point to any pleading deficiency in the First Amended Complaint.

Courts in this Circuit routinely deny motions to dismiss when the moving party seeks dismissal based on the merits. In *National Foundation for Special Needs Integrity*, the plaintiff argued that defendant's counterclaim should be dismissed because he failed to plead "sufficient facts to avoid the equitable defense of laches." 2016 WL 454805 at *2. But the court held that "the laches argument [was] inappropriate at [the motion to dismiss] stage of the proceedings," because the argument was based on "factual concerns … better addressed at a later stage in the litigation, following discovery." *Id.* at *3. Attempting to rebut defendant's counterclaim, the plaintiff made "factual arguments to the contrary" in its motion, but the court found such arguments "not properly addressed in a motion to dismiss" which "does not test whether a party will prevail on the merits but instead whether the claimant has properly stated a claim." *Id.* at *4–5; *see also J.F. New & Assocs., Inc. v. Int'l Union of Operating Eng'rs*, No. 3:14-CV-1418 RLM, 2015 WL 1455258, at *4, *7 (N.D. Ind. Mar. 30, 2015) (denying motion to dismiss where defendant relied on factual arguments because "factual disputes aren't properly resolved at [the

motion to dismiss] stage of the proceedings" and because defendant's "disagreement" with plaintiff's allegation "doesn't provide support for a dismissal under Rule 12(b)(6).").

Similarly, in *Ebea v. Black & Decker (U.S.), Inc.*, No. 1:07-cv-1146-DFH-TAB, 2008 WL 1932196 (S.D. Ind. May 1, 2008), the court denied defendant's motion to dismiss where the parties disagreed on facts related to a multi-factor test because "[d]etermining which party is correct in its assessment [of the result of the multi-factor test] is not a question this court can decide on a Rule 12(b)(6) motion to dismiss." *Id.* at *3. The court concluded that the allegations in the complaint "could result in relief" for the plaintiff. *Id.* at *3; *see also GT Performance*, 2013 WL 4787329, at *4–5 (denying motion to dismiss where defendant's "arguments and exhibits all [went] to the merits of [plaintiff's] claim, not the sufficiency of its Complaint."); *Noble Roman's, Inc. v. French Baguette, LLC*, No. 1:07-cv-1176-LJM-JMS, 2008 WL 975078, at *6 (S.D. Ind. Apr. 8, 2008) ("The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the Complaint, not to resolve the case on its merits.").

Defendants are guilty of the same error that doomed the motions in the above cases: seeking to litigate the merits of the complaint and failing to point to any flaws in the sufficiency of the allegations. Defendants' treatment of Plaintiff's equal protection allegations is particularly illustrative. Defendants devote three full pages to a merits-based analysis of whether and how rational basis scrutiny applies to Plaintiffs' claims. (Mot. at 11-14.) Defendants' analysis is based entirely on the conclusory (and erroneous) assertion that "the plaintiffs fail to show how liberty interests are at stake." (*Id.* at 11.) Plaintiffs repeatedly explained in the FAC how fundamental liberty interests are at stake in CHINS and TPR proceedings. (*See, e.g.*, FAC ¶ 1 ("Such liberty interests center on whether the child will be placed in state custody through foster care and include where the child will live, with whom the child will live, and whether the

integrity of family relationships will be maintained or dissolved — issues at the very core of child dependency proceedings that are adjudicated following substantiated allegations of abuse or neglect. The juvenile dependency court is charged with making decisions about these and other aspects of the child's living situation, decisions that will potentially impact the child for the rest of his or her life."); ¶ 17 ("Empirical studies have shown that children who are not represented by counsel are routinely erroneously deprived of their most fundamental protected interests, even when they have an appointed GAL or CASA.").)

Plaintiffs have adequately pled the factual predicate for all requested relief, and Defendants' efforts to challenge the merits of Plaintiffs' claims should be rejected at this stage in the proceedings. *See Ball v. Governor Pataki of N.Y.* No. 1:05-cv-1387-LJM-JMS, 2007 WL 9751981, at *1 (S.D. Ind. May 11, 2007) (denying motion to dismiss because "it [was] not clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

B. Defendants' Merits Arguments Are Wrong

Even if it were proper to address the merits of Plaintiffs' case on a 12(b)(6) motion, Defendants fail to undermine any of Plaintiffs' claims, either on due process or equal protection. While Plaintiffs are not required to prove up their entire case in opposing a 12(b)(6) motion, Plaintiffs highlight below several of the legal and factual errors made by Defendants in their attack on the merits of Plaintiffs' case.

1. Defendants' Due Process Analysis Is Wrong

Regarding Plaintiffs' due process claim, Defendants rely on *Lassiter* to argue that appointment of counsel to children in CHINS and TPR proceedings should not be mandatory. (Mot. at 7-8 (citing *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.,* 452 U.S. 18, 33

(1981)).) But Defendants misunderstand the scope of *Lassiter*, which addressed a parent's right to counsel in termination proceedings. A parent's right to counsel is not the same as a child's right to counsel. While similar in many respects, a child's interests in termination proceedings are even more heightened than a parent's interests. Crucially, a parent's physical liberty is not at stake in a parental termination proceeding whereas decisions made in a TPR or CHINS hearing can, and often do, impact the physical liberty of the child. (*See* FAC ¶ 13 ("No other legal proceeding that pertains to children has such a major effect on their lives. While the outcome of an abuse and neglect case has drastic implications for both the parents and the children involved, **only children's physical liberty is threatened**.") (quoting American Bar Association, Section of Litigation, Report to the House of Delegates (Aug. 2011) at 1 (emphasis added)).) Thus, the "presumption" of *Lassiter* that "a litigant who is not facing a loss of physical liberty is not entitled to counsel" does not apply to this case. (Mot. at 7.)

Next, Defendants mischaracterize the *Kenny A.* case as a decision that concerns "only the Georgia constitution." (Mot. at 8 (citing *Kenny A. ex rel. Winn v. Purdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).) *Kenny A.*, however, held that "[i]t is well settled that children are afforded protection under the Due Process Clauses of *both the United States* and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake." 356 F. Supp. 2d at 1359 (emphasis added). The court specifically held that "children have fundamental liberty interests at stake in deprivation and TPR proceedings," without limiting that holding to Georgia law. *Id*. at 1360. Indeed, the court justified its holding based on federal precedents interpreting the Due Process Clause of the Fourteenth Amendment. *See id.* at 1359 (citing *Goss v. Lopez*, 419 U.S. 565 (1975) for its holding that lack of adequate procedures used in school in suspending students violated due

process and *In Re Gault*, 387 U.S. 1 (1967) for its holding that minors have due process right to counsel in delinquency proceedings). Moreover, the court held that children's *physical* liberty is at stake in these proceedings:

> The Court also rejects County Defendants' argument that deprivation and TPR proceedings present no threat to children's physical liberty. To the contrary, the evidence shows that foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.

Id. at 1360-61; *see also id.* at 1361 ("The Court concludes that only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings.") Defendants are wrong to downplay the significance of *Kenny A.* to the issues in this litigation.

More broadly, Defendants are incorrect on the issues at stake in CHINS and TPR proceedings. As explained above, and as pled in the FAC, children's physical liberty is at stake in these proceedings, and Defendants' assertion that "children subject to a CHINS or TPR proceeding are not in danger of losing their physical liberty" is plainly wrong. (Mot. at 7.) Defendants are incorrect to suggest that the only issue in a CHINS or TPR proceeding is "whether the parents of the child are able to care properly for the child." (*Id.*). All aspects of a child's future are at stake in a CHINS or TPR proceeding, including where the child will live and with whom the child will live, among countless other consequences. (*See generally* FAC at ¶ 1.)

Defendants further miss the mark by equating the State's interest with the child's interest in CHINS and TPR proceedings. (Mot. at 4.) The child's interest is unique and cannot be fully represented by the State. Defendants tacitly recognize this fact by asserting that courts benefit when cases are "fully litigated **by the parties**." (*Id.* (emphasis added).) Under Indiana law, the child is an independent "party" to these proceedings. Ind. Code Ann. § 31-34-9-7. As such, the child is entitled to present his or her perspective, when appropriate, and at minimum is entitled to

present and challenge evidence through an attorney so that the case is "fully litigated." Even accepting "best interest" as the standard, the child's "best interest" cannot be ascertained without a robust legal process that includes legal representation for the child.

Finally, Defendants suggest that CHINS and TPR proceedings should be managed according to *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973), where "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." (Mot. at 9-10.) Defendants' argument rings hollow. *Gagnon* concerned a probation revocation hearing very different from CHINS and TPR proceedings. The probation hearing was not adversarial in nature, and the State was not represented by counsel, both in stark contrast to CHINS and TPR proceedings. *Gagnon*, 411 U.S. at 789. Moreover, the existence of varied "facts and circumstances" cannot override the need for appointed counsel when a child's physical liberty interests are at stake. An endless assortment of facts and circumstances exist in Indiana's juvenile delinquency proceedings, yet children are entitled to appointed counsel in those proceedings. *See* Ind. Code Ann. § 31-32-4-1. Indeed, in Indiana, a child facing one month in juvenile detention is appointed an attorney, but an abused child facing 18 years of government-directed foster placements, living among countless strangers in dozens of homes, is not. That constitutional imbalance cannot be squared with *Gagnon* or any other authority and must be remedied. Defendants' assertion that the discretion afforded to juvenile court judges "protects the children's [due process] rights" is therefore not credible. (Mot. at 10.) As alleged in the FAC, such discretion is rarely, if ever, exercised in favor of children. (*See, e.g.*, FAC ¶ 6.) Plaintiffs expect that discovery will establish that juvenile court judges in Indiana almost never appoint legal counsel to children in CHINS and

TPR proceedings, and if that is correct, Defendants' argument that "discretion protects the children" must fail.

2. Defendants' Equal Protection Analysis Is Wrong

Defendants are also wrong on the merits of Plaintiffs' equal protection claim. First, Defendants claim that Indiana Code § 31-34-4-6(a)(2) does not guarantee parents appointed counsel in CHINS cases. (Mot. at 11.) But an Indiana court has explicitly held that even in CHINS proceedings, indigent parents are entitled to mandatory counsel under this statute. *See G.P. v. Ind. Dep't of Child Servs*., 4 N.E.3d 1158, 1163 (Ind. 2014) (explaining that "to the extent any case law holds that a trial court has discretion to appoint counsel for an indigent parent in a CHINS proceeding, those cases are not correct on that point" and holding that a trial court "does *not* have discretion in a circumstance falling under Section 31-34-4-6") (emphasis in original). As explained above, parents' interests in CHINS and TPR proceedings are similar, though not identical, to children's interests, and children's interests are heightened given the physical liberty at stake. Indeed, Indiana purports to protect both. *See* Ind. Code Ann. § 31-10-2-1(10) (articulating the "the policy of this state" to "provide a judicial procedure that: (A) ensures fair hearings; [and] (B) **recognizes and enforces the legal rights of children and their parents**.") (emphasis added). Thus, because Section 31-34-4-6 affords parents appointment of legal counsel in CHINS and TPR proceedings, but does not afford children the same right, the law denies these children equal protection.

Second, Defendants misstate Plaintiffs' allegations regarding equal protection. Defendants state that "plaintiffs fail to show how liberty interests are at stake" and "have recognized no fundamental right and no protected class," (Mot. at 11, 15), but Plaintiffs have sufficiently so pled. As explained above, the First Amended Complaint sets forth in detail the

"liberty interests at stake" in a CHINS or TPR proceeding. (FAC ¶¶ 1, 17.) Because of this oversight, Defendants mistakenly argue that Plaintiffs' claims are not entitled to strict scrutiny, "because age is not a protected class provoking elevated scrutiny." (Mot. at 12.) Plaintiffs, however, do not assert any discrimination based on age. Instead, Plaintiffs allege that Indiana's failure to appoint counsel to children in CHINS and TPR proceedings has interfered with their fundamental liberty interests, the kind of equal protection challenge that Defendants concede demands strict scrutiny. (*See* Mot. at 11 ("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).").) Thus, strict scrutiny will govern Plaintiffs' equal protection challenge, not rational basis review.

Defendants also claim that the tragic circumstances "are not remedied simply by the appointment of legal counsel" and "[t]here is no assurance that these harms … could be fixed by simply adding more attorneys." (Mot. at 13.) But Plaintiffs do not assert that mandatory appointment of counsel will fix all harms experienced by abused and neglected children in CHINS and TPR proceedings. Plaintiffs allege that legal representation will lessen or eliminate certain instability and trauma that children in CHINS and TPR proceedings are forced to endure as a result of being at the mercy of the system, unrepresented in life-changing court proceedings. (*See, e.g.*, FAC ¶¶ 28 37, 47.)

Third, Defendants exaggerate the potential effects that mandatory appointment of counsel for children in TPR and CHINS proceedings would have. With no support, Defendants claim that Plaintiffs' requested relief would require the "State take more time and resources" and

would "have an overwhelming impact" with "enormous cost increases or delays to CHINS and TPR proceedings." (Mot. at 12, 13.) However, Plaintiffs have alleged facts that support the opposite conclusion, both in terms of what the research shows and in terms of new federal money that is available to States. (FAC ¶¶ 2, 17.) For example, as the U.S. Department of Health and Human Services recently recognized, "[t]here is a growing body of empirical research linking early appointment of counsel (at or prior to a party's initial appearance in court) and effective legal representation in child welfare proceedings to **improved case planning, expedited permanency and cost savings to state government . . .** due to reductions of time children and youth spend in care." (FAC, Ex. 8 at 2, 6 (emphasis added).) And, in January 2019, the Children's Bureau of the U.S. Department of Health and Human Services dramatically reversed its policy on federal financial support for legal representation of children in dependency cases. The new federal policy allows for states to be reimbursed through the Title IV-E entitlement for up to 50% of the cost of providing legal representation to children. This major new commitment of federal funding for attorney representation reflects a profound shift in the landscape on this issue that crosses political lines. (FAC ¶ 2.)

Lastly, Plaintiffs do not "attack the idea of discretion itself." (Mot. at 15.) Plaintiffs challenge judicial discretion as outlined in Indiana Code § 31-32-4-2(b), because it unfairly empowers Defendants to withhold legal counsel for children in CHINS and TPR proceedings in violation of the Fourteenth Amendment. A State's right to exercise discretion has limits. When discretion runs up against constitutionally protected rights, discretion must yield. *See Lafler v. Cooper*, 566 U.S. 156, 168 (2012) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."). None of the cases cited by Defendants are to the contrary, nor do they concern

fundamental physical liberty interests such as those at stake here. (*See* Mot. at 15 (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) (rejecting unsentenced inmates' efforts to secure "a more convenient method of exercising the franchise" and holding that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote"); *City of New Orleans v. Dukes*, 427 U.S. 297, 298 (1976) (concerning an ordinance's prohibition against vendors selling foodstuffs from pushcarts); and *Greater Chi. Combine & Ctr. v. City of Chicago*, 431 F.3d 1065, 1067 (7th Cir. 2005) (concerning an ordinance that prohibited the keeping of pigeons in residential areas)).)

In sum, whether on the sufficiency of the pleading or on the merits, Defendants have failed to carry their burden to show that the First Amended Complaint should be dismissed under Rule 12(b)(6).

C. Plaintiffs Have Established Standing and Face No Other Procedural Hurdles

1. Plaintiffs Have Standing to Bring This Action

Plaintiffs have established all requirements necessary for standing. The allegations in the First Amended Complaint and the exhibits attached thereto provide sufficient support to show an injury in fact, traceability, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). Defendants again ignore the central allegations in the First Amended Complaint and fail to establish that Plaintiffs cannot prove any set of facts in support of their claims. *See Vance*, 2008 WL 474223, at *3 (A motion to dismiss under Rule 12(b)(1) should be granted "only if the plaintiff cannot establish any set of facts that would legally entitle him or her to the relief sought.").

Defendants argue that "any link between the asserted injury and the relief requested is

based on pure speculation" because Plaintiffs allegedly "leap to the conclusion" that the negative effects from dependency proceedings would be lessened or prevented if counsel were appointed. (Mot. at 17.) Defendants are incorrect. Plaintiffs have plainly alleged an injury that is both traceable to Defendants' actions/inactions and redressable by Defendants: the deprivation of legal representation in CHINS and TPR proceedings. (*See generally* FAC ¶¶ 68-113.) Plaintiffs have also alleged injuries flowing from the lack of counsel, namely, the deprivation of fundamental liberty interests that have, in turn, resulted in instability and trauma. (*See, e.g.*, *id.* ¶¶ 28, 37, 47.) Plaintiffs' detailed allegations regarding these injuries are more than sufficient at the pleading stage. *See MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 745 (7th Cir. 2007) ("A case is not dismissed for failure to invoke federal jurisdiction just because the plaintiff fails to prove injury. Ordinarily…the allegation is enough.") Defendants' argument that the link between injury and relief is "pure speculation" overlooks statements in and studies attached to the First Amended Complaint, all of which a court must take as true on a motion to dismiss. *Am. Federation*, 171 F.3d at 465. For example, in addition to the passages cited above, Plaintiffs cite a 2017 study conducted by the Children's Bureau of the U.S. Department of Health and Human Services finding that legal representation for children in dependency proceedings "contributes to or is associated with a variety of benefits, including increases in party perceptions of fairness, increases in party engagement in case planning, services and court hearings, more personally tailored and specific case plans and services, increases in visitation and parenting time, expedited permanency; and cost savings to state government due to reductions of time children and youth spend in care." (FAC ¶ 2.)

Plaintiffs have substantially exceeded the minimum requirements for standing and are entitled to the opportunity to prove their claims. *See Sierra Club*, 774 F.3d at 390 ("All that a

plaintiff need show to establish standing to sue [in the Article III sense] is a reasonable probability—not a certainty—of suffering tangible harm unless he obtains the relief that he is seeking in the suit.") (quotation marks and citation omitted).

2. Director Stigdon Is a Proper Defendant

Defendants take issue with Plaintiffs' allegations that the DCS Director, Terry J. Stigdon, has failed to ensure that legal counsel were appointed to represent Plaintiffs. (Mot. at 18.) Although Defendants find it "unclear how [Stigdon] could provide redress in this case," Plaintiffs have made ample allegations in this regard. (Mot. at 18.) Plaintiffs have alleged that DCS is responsible for removing children from their homes and filing the petitions that initiate CHINS proceedings. (FAC ¶ 68.) Plaintiffs have further alleged that "DCS has undue influence over all issues concerning the fate of the subject child, including temporary and permanent placements" and that "DCS makes recommendations to the judge regarding the child and advocates for specific outcomes, without regard for what the child wants, based on evidence and other information that goes unchallenged by the child, who does not have an attorney." (*Id.* ¶ 69.) Plaintiffs have also alleged that "[d]espite removing children from their homes and placing them in CHINS and TPR proceedings where their constitutionally protected liberty interests are at stake, and where DCS routinely advocates for orders, placements, and outcomes that directly impact those liberty interests, DCS has failed and continues to fail, including under Defendant Stigdon's leadership, to ensure that attorneys are appointed to represent children in those proceedings," despite having "both the ability and the duty, in every CHINS and TPR proceeding, to request and advocate that the court appoint an attorney for the child that is the subject of that proceeding." (*Id.* ¶ 71.) Defendants make no contention that these allegations are not facially plausible, and Plaintiffs are entitled to prove these allegations through discovery.

See Iqbal, 566 U.S. at 679 (A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Thus, Plaintiffs have properly named Director Stigdon as a Defendant.

3. *Younger* Abstention Does Not Apply

Defendants are also incorrect that *Younger* abstention applies to this case. While *Younger* describes a "public policy against federal court interference with state court proceedings," 401 U.S. at 43, the Supreme Court has made clear that the doctrine is to be narrowly applied. *Younge*r "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (unanimously reversing application of *Younger* abstention doctrine). As a general rule, "federal courts are obliged to decide cases within the scope of federal jurisdiction." *Id.* Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Public Serv., Inc.* (*NOPSI*) *v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (citation omitted).

As an initial matter, this case does not address "the same subject matter" as the underlying CHINS and TPR proceedings, *Sprint*, 571 U.S. at 72, and *Younger* abstention is improper for that reason alone. This case addresses a procedural issue—the appointment of counsel—in CHINS and TPR proceedings, not a challenge to the merits or outcome of any individual state court proceeding. Thus, Plaintiffs do not seek to litigate "the same subject matter" in this Court that is at issue in state court proceedings; rather, Plaintiffs bring this action to remedy certain constitutional violations in those proceedings.

Even if this litigation were deemed to cover the same subject matter as the underlying

state court proceedings, *Younger* abstention would still be improper. In *Sprint*, the Supreme Court limited *Younger* abstention to three "exceptional" categories of parallel state court proceedings: (1) "state criminal prosecutions"; (2) "civil enforcement proceedings"; (3) and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 73 (citing *NOPSI*, 491 U.S. at 367-68).[2] None of the *Sprint* exceptions apply to this case, and Defendants do not argue to the contrary (or even cite *Sprint*).

First, CHINS and TPR actions are plainly not "state criminal prosecutions"—they are civil actions. *See In re N.E.*, 919 N.E.2d 102, 105 (Ind. 2010). Second, CHINS and TPR actions are not state civil "enforcement" actions that are "akin" to criminal prosecutions. *Sprint*, 571 U.S. at 72-73 (citing *Huffman v. Pursue, Ltd*., 420 U.S. 592 (1975). "[T]he purpose of a CHINS adjudication is to protect children, not punish parents." *In re N.E*., 919 N.E.2d at 105 ("A CHINS adjudication can also come about through no wrongdoing on the part of either parent."). Parents are not incarcerated, sentenced to probation, or even fined as a result of CHINS or TPR adjudication. Ind. Code Ann. Title 31, arts. 34–35. In *Huffman*, by contrast, the underlying state civil enforcement proceedings were akin to criminal prosecution, and *Younger* abstention was implicated. *Huffman,* 420 U.S. at 604. There, a movie theater tenant sought to disrupt an Ohio county's efforts to enforce a public nuisance statute against the theater, which had displayed

[2] Even under pre-*Sprint* case law, *Younger* abstention would not be appropriate, because the underlying CHINS and TPR proceedings do not provide an "adequate opportunity" to raise constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 432 (1982). This case has been filed precisely because children in those proceedings, without attorney representation, are not empowered even to challenge evidence or make their wishes known, let alone raise constitutional claims on their own behalf. Juvenile dependency proceedings are simply not the appropriate forum for children to demand federal constitutional relief, especially as a class. *See M.D. v. Perry*, 799 F. Supp. 2d 712, 722-23 (S.D. Tex. 2011) (denying *Younger* motion to dismiss and noting that "[e]ven though all foster children in a plaintiff class are involved in ongoing state dependency court proceedings, federal courts recognize that those dependency proceedings do not provide avenues for the kind of systemic, class-wide relief usually sought in federal civil rights actions.") (citation omitted).

obscene films. *Id*. at 598-99. The Ohio state court ultimately ordered the theater to be closed for one year. Rather than appealing that judgment, the tenant filed suit in federal court seeking an order that the public nuisance statute was unconstitutional. The federal case, therefore, "disrupted [Ohio's] efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." *Id.* at 605. Here, not only are there no underlying quasi-criminal "enforcement" proceedings, there is no effort to "disrupt" the State's goals either. To the contrary, the instant federal litigation seeks to promote and enhance Indiana's efforts to protect children, by ensuring that children have attorney representation to facilitate a more fair and robust process.

Third, the underlying CHINS and TPR actions are not "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 73. Such orders may include, for example, a civil contempt order or a requirement for posting bond pending appeal, none of which are at issue here. *Id.* at 79 (citing *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977) and *Pennzoil Co. v. Texaco Inc*., 481 U.S. 1, 13 (1987)).

Because this case presents none of the circumstances the Supreme Court has deemed "exceptional," *Younger* abstention does not apply. *Sprint*, 571 U.S. at 73. Instead, the "general rule" governs: "the pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id.*

4. Plaintiffs Do Not Seek Injunctive Relief Against the Defendant Judges

Plaintiffs seek injunctive relief only as to "Defendant Stigdon, and her agency's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation therewith." (FAC at Prayer, ¶ d.) Plaintiffs do not request injunctive relief against the

Defendant Judges—only declaratory relief. (*Id*. at Prayer, ¶¶ b, c.) Thus, Defendants' argument that "the plaintiffs may not maintain their request for injunctive relief against the judges" is misplaced.

V. CONCLUSION

For the foregoing reasons, Defendants' motion should be denied in its entirety.

Dated: May 30, 2019

By: */s/ Stephen D. Keane*

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CERTIFICATE OF SERVICE

I certify that the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was filed electronically on May 30, 2019, and was simultaneously served on all counsel who have appeared in this matter through the Court's ECF system.

/s/ Stephen D. Keane
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