

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JOSHUA SABEY, SARAH PERKINS, JOSHUA
SABEY and SARAH PERKINS on behalf of
C.S. 1 and C.S. 2, minors,

Plaintiffs,

v.

KATHERYN BUTTERFIELD, AARON
GRIFFIN, CAROLYN KALVINEK, BONNIE
ARRUDA, ANTHONY SCICHILONE,
RICHARD COUTURE, ELIAS MAKRIGIANIS,
STEFANO VISCO, KEVIN O'CONNELL, and
CANDICE GEMSKI,

Defendants.

Civil Action No.
1:23-cv-10957-PBS

CORRECTED BRIEF

**Leave to file 25-page response
granted on 9/25/2025**

**PLAINTIFFS' CORRECTED CONSOLIDATED RESPONSE IN OPPOSITION TO
DEFENDANTS BUTTERFIELD, GEMSKI, ARRUDA, GRIFFIN, AND KALVINEK'S
MOTIONS FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION 1

 STATEMENT OF FACTS 2

 LEGAL STANDARD 5

 ARGUMENT 5

I. Removal Violated the Fourth and Fourteenth Amendments..... 6

 A. There Were No Exigent Circumstances 6

 B. The Warrant Requirement Applied 9

 1. The breezeway was within the curtilage..... 10

 2. DCF’s excuses for being in the curtilage do not overcome the warrant requirement.. 12

 C. A Pre-Deprivation Hearing Was Required..... 13

 D. Plaintiffs Did Not Consent..... 15

II. Qualified Immunity Does Not Apply..... 16

III. Absolute Immunity Does Not Apply 17

IV. Butterfield and Gemski Are Directly Liable..... 18

V. Griffin, Arruda, and Kalvinek All Participated..... 20

VI. Plaintiffs’ State-Law Claims Should Prevail 21

 A. Massachusetts Civil Rights Act 21

 B. Massachusetts Privacy Act..... 22

CONCLUSION..... 22

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Avery v. Hughes</i> , 661 F.3d 690 (1st Cir. 2011).....	5
<i>Bally v. Ne. Univ.</i> , 403 Mass. 713 (1989)	21
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006).....	6–7, 12
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993).....	17
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968).....	15
<i>Doe v. Kearney</i> , 329 F.3d 1286 (11th Cir. 2003)	14, 17
<i>Duarte v. Healy</i> , 405 Mass. 43 (1989)	21
<i>Eldredge v. Town of Falmouth</i> , 662 F.3d 100 (1st Cir. 2011).....	18–21
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013).....	10–11, 13
<i>French v. Merrill</i> , 15 F.4th 116 (1st Cir. 2021).....	11–12
<i>Hatch v. Dep’t for Children, Youth & Their Families</i> , 274 F.3d 12 (1st Cir. 2001).....	<i>passim</i>
<i>Holloway v. Brush</i> , 220 F.3d 767 (6th Cir. 2000)	17
<i>Hurlman v. Rice</i> , 927 F.2d 74 (2d Cir. 1991).....	14, 17
<i>Katz v. v. United States</i> , 389 U.S. 347 (1967).....	10

Kovacic v. Cuyahoga Cnty. Dep’t of Child. & Fam. Servs.,
724 F.3d 687 (6th Cir. 2013)17–18

Millspaugh v. Cnty. Dep’t of Pub. Welfare,
937 F.2d 1172 (7th Cir. 1991)18

Missouri v. McNeely,
569 U.S. 141 (2013).....16

Nelson v. Salem State Coll.,
446 Mass. 525 (2006)22

Oliver v. United States,
466 U.S. 170 (1984).....11

Pagan-Gonzalez v. Moreno,
919 F.3d 582 (1st Cir. 2019).....15

Payton v. New York,
445 U.S. 573 (1980).....9, 16

Pearson v. Callahan,
555 U.S. 223 (2009).....16

Pittman v. Cuyahoga Cnty. Dep’t of Children & Fam. Servs.,
640 F.3d 716 (6th Cir. 2011)17

Schneckloth v. Bustamonte,
412 U.S. 218 (1973).....15

Suboh v. Dist. Att’y’s Off. of Suffolk Dist.,
298 F.3d 81 (1st Cir. 2002)..... *passim*

Tenenbaum v. Williams,
193 F.3d 581 (2d Cir. 1999).....15

Tolan v. Cotton,
572 U.S. 650 (2014).....16

Troxel v. Granville,
530 U.S. 57 (2000).....13

Uncle Henry’s, Inc. v. Plaut Consulting Co.,
399 F.3d 33 (1st Cir. 2005).....5

United States v. Dunn,
480 U.S. 294 (1987).....11–12

United States v. Jones,
565 U.S. 400 (2012).....10

United States v. Twomey,
884 F.2d 46 (1st Cir. 1989).....15

United States v. U.S. Dist. Ct. for the E. Dist. of Mich.,
407 U.S. 297 (1972).....9

United States v. Vazquez,
724 F.3d 15 (1st Cir. 2013).....16

Wilber v. Curtis,
872 F.3d 15 (1st Cir. 2017).....21

Statutes

Mass. Gen. Laws ch. 12, § 11H.....21

Mass. Gen. Laws ch. 12, § 11I.....21

Rules

Fed. R. Civ. P. 56(a)5

INTRODUCTION

The DCF Defendants—Butterfield, Gemski, Griffin, Arruda, and Kalvinek—seek summary judgment for conduct this Court held can amount to a constitutional violation: The warrantless, prehearing removal of children from their parents without some objective emergency. *See* Mem. & Order, Doc. No. 89, at 10–20. At the motion to dismiss stage, this Court found that Plaintiffs plausibly alleged violations of the Fourth and Fourteenth Amendments, the Massachusetts Civil Rights Act, and the Massachusetts Privacy Act, and that qualified immunity does not shield Defendants. *See id.* That decision was based on a correct reading of First Circuit precedent, which Defendants now attempt to recast in their favor. *See Hatch v. Dep’t for Children, Youth & Their Families*, 274 F.3d 12, 21 (1st Cir. 2001) (holding prehearing removal of children requires “an objectively reasonable suspicion of abuse”).

But under *Hatch*, the material facts are not in dispute. There were no exigent circumstances: (1) C.S. 2’s rib injury was at least 10 days old and healing; (2) there were no other signs of abuse to C.S. 2, and none whatsoever to his older brother, C.S. 1; (3) both children were cleared by their doctors and sent home with their parents; (4) the Sabey’s cooperated with doctors and with DCF—they allowed an in-home inspection and helped craft a safety plan; and (5) yet, two days later, DCF management ordered “emergency” removal of the children, without a warrant or judicial hearing. DCF staff then invaded the curtilage of the Sabey home in the middle of the night. Far from absolving Defendants, *Hatch* shows that DCF violated clearly established constitutional law and can (and should) be held liable under § 1983.

Therefore, Defendants’ motions should be denied and Plaintiffs’ cross-motion for summary judgment should be granted.

STATEMENT OF FACTS

The facts of this case are set out in Plaintiffs’ Statement of Material Facts, Doc. No. 210 (“Pls.’ Facts”), and the responses to the DCF Defendants’ two statements of fact, Doc. Nos. 240–41. Those filings are incorporated here by reference. The following statement of facts is based on the DCF Defendants’ submissions.

July 13: Initial Hospital Visit and 51A Report

On July 13, 2022, Sarah Perkins brought her three-month-old son, C.S. 2, to Newton Wellesley Hospital for congestion, fever, and breathing difficulties. Butterfield & Gemski’s Stmt. of Undisputed Material Facts, Doc. No. 209 (“Butterfield Facts”) ¶ 5; Pls.’ Resp. to Defs.’ Butterfield & Gemski’s Stmt. of Material Facts, Doc. No. 240 (“Resp. to Butterfield”) ¶ 5. Diagnostic imaging revealed that C.S. 2 had two healing rib fractures. Butterfield Facts ¶ 6; Resp. to Butterfield ¶ 6. Sarah had no clue that her baby was injured and did not know what causes rib fractures in infants; but she speculated the injury could have happened when he fell off a bed approximately two weeks earlier. *See* Butterfield Facts ¶ 7; Resp. to Butterfield ¶ 7.

Hospital social worker Jill Saks filed a 51A report alleging suspected abuse, citing concerns that the fractures were not consistent with a fall. Butterfield Facts ¶¶ 4, 8. The report noted Perkins’s “flat affect” and an instance where she rolled her eyes during questioning. *Id.* ¶¶ 9, 11. Plaintiffs dispute the significance of these observations. *See* Resp. to Butterfield ¶¶ 9, 11. But everyone agrees Perkins maintained a calm demeanor, and cooperated with the investigation. *See* Butterfield Facts ¶¶ 19, 26–31; Pls.’ Facts ¶¶ 31–41, 69–71. Perkins consented to imaging and bloodwork for C.S. 2 after a discussion in which she advocated for her son’s best interest. Butterfield Facts ¶¶ 19, 56; Resp. to Butterfield ¶¶ 19, 56.

DCF supervisor Aaron Griffin received the 51A at 5:35 p.m. on July 13. Butterfield Facts ¶ 2; Resp. to Butterfield ¶ 2. He dispatched emergency response workers Axel Rivera and Ana

Piedade, who interviewed medical staff, the Sabeys, and their children, and documented their findings in the 51B report. Butterfield Facts ¶¶ 13–16; Resp. to Butterfield ¶¶ 13–16. Rivera and Piedade also visited and inspected the Sabey home and did not observe any signs of abuse, neglect, or concerns with the home’s conditions. Butterfield Facts ¶¶ 35–36; Resp. to Butterfield ¶¶ 35–36. C.S. 2 remained at the hospital overnight.

July 14: Investigation Continues, No Emergency Removal

On July 14, Rivera contacted the children’s pediatrician, who expressed surprise at the rib fractures but concluded they raised no immediate safety concerns. Butterfield Facts ¶¶ 42–43; Resp. to Butterfield ¶¶ 42–43. Rivera also received an addendum from Dr. Shilpa McManus, estimating the fractures as two weeks old, with a possible range of 10 days to six weeks, and emphasizing that the injuries were *not* consistent with a new acute trauma. Butterfield Facts ¶ 50; Resp. to Butterfield ¶ 50.

That day, the family remained at the hospital and cooperated with all testing and investigation. Plaintiffs stayed until discharge, when doctors released C.S. 2 to return home with his parents. Butterfield Facts ¶ 60; Resp. to Butterfield ¶ 60. The Sabey family stayed alone that night at home, with DCF’s knowledge. *See id.*

Rivera prepared a written “safety plan” on behalf of DCF. The Sabeys cooperated with Rivera’s investigation and helped craft the safety plan. Butterfield Facts ¶¶ 58–59; Resp. to Butterfield ¶¶ 58–59.

July 15: Supervisory Involvement and Escalation

On July 15, Butterfield first learned of the case after a call from DCF attorney Leslie Martin. *See* Butterfield Facts ¶ 67; Resp. to Butterfield ¶ 67. Butterfield was told the fractures were ten days to six weeks old, that Plaintiffs had provided explanations (including a bed fall and

roughhousing by the older sibling), and that the parents were the children’s primary caregivers. Butterfield Facts ¶¶ 70–77. Butterfield reviewed the 51A and 51B reports that evening but did not meet the family. *Id.* ¶ 84. Concerned about the adequacy of the safety plan and noting the family’s plan to move away in two weeks, Butterfield ordered an additional visit to the home, which was done by Rivera and, again, did not reveal any concerns. *Id.* ¶¶ 79–83; Resp. to Butterfield ¶¶ 79–83.

At 7:26 p.m., Butterfield, Martin, and DCF general counsel discussed the case. Butterfield Facts ¶ 85. Butterfield then called Regional Director Gemski. *Id.* ¶ 87. Together, they decided to exercise DCF’s state statutory authority to take emergency custody of both Sabey children—C.S. 2 and his older brother, C.S. 1, about whom no one had suspicions of abuse. *Id.* ¶¶ 79–86. The two concluded that “the only option was to seek emergency temporary custody.” *Id.* ¶ 96. They did not seek a court order before the weekend. *Id.* ¶¶ 87–96. They did not believe any court order was necessary. *See id.*

July 16: Warrantless Midnight Removal

At approximately 1:00 a.m. on July 16, DCF workers Arruda and Kalvinek, under Griffin’s supervision, went to the Sabey home with local police. Arruda Facts ¶¶ 48–55; Resp. to Arruda ¶¶ 48–55. They entered the breezeway and refused to leave. Arruda Facts ¶¶ 63, 68; Resp. to Arruda ¶¶ 63, 68. After discussing next steps with their superiors, the officers told Josh and Sarah they would break down the door and use force if the children were not surrendered. Arruda Facts ¶¶ 69–87; Resp. to Arruda ¶¶ 69–87.

Faced with these threats, Plaintiffs turned over their children. They did not give any verbal consent or sign any consent form. Arruda Facts ¶¶ 88–89; Resp. to Arruda ¶¶ 88–89. Kalvinek

entered into the Sabeys' apartment as part of the removal process. Arruda Facts ¶ 91; Resp. to Arruda ¶ 91.

LEGAL STANDARD

Summary judgment is appropriate if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Uncle Henry's, Inc. v. Plaut Consulting Co.*, 399 F.3d 33, 41 (1st Cir. 2005). The Court considers the undisputed material facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Avery v. Hughes*, 661 F.3d 690, 693 (1st Cir. 2011).

ARGUMENT

The DCF Defendants attempt to redefine “exigent circumstances” and “objectively reasonable suspicion of abuse.” In their view, the warrantless, prehearing removal of children should be okay in *any* circumstance in which they *subjectively* suspect abuse. If the Court rejects this new standard (as it should), Defendants argue qualified immunity nonetheless shields them from liability. Butterfield and Gemski add that absolute immunity shields them in their decision-making roles. All Defendants then assert that—somehow—none of them were involved in removing the children. And, even if they were involved, Defendants argue the Sabeys consented to removal. These arguments all fail.

No reasonable social worker would believe that C.S. 2's healing rib fractures, after two days of cooperative investigation, with no other indications of abuse or danger to the children, created the necessary “exigent circumstances” and “objectively reasonable suspicion of abuse” to remove *both* Sabey children. It follows that qualified immunity is unavailable because Defendants violated a clearly established constitutional standard. Butterfield and Gemski cannot be absolutely immune because their conduct consisted of out-of-court decisions—ordering removal—rather than courtroom advocacy. Each of the DCF Defendants is therefore liable for their role in removing the

Sabey children. And consent is absent when parents hand over children after hours of negotiation involving escalating threats of force. In closing, Plaintiffs briefly address their state law claims.

I. Removal Violated the Fourth and Fourteenth Amendments

The constitutional questions in this case boil down to whether exigent circumstances justified the warrantless, prehearing removal of C.S. 1 and C.S. 2 based on an objectively reasonable suspicion of abuse. Under the Fourth Amendment, exigent circumstances would justify the absence of a warrant and, under the Fourteenth Amendment, exigent circumstances would justify immediate removal without a hearing. But there was no emergency. The warrant requirement therefore applied and the Sabey should have had a pre-deprivation hearing before a neutral judicial officer. And they in no way consented to these constitutional violations.

A. There Were No Exigent Circumstances

“To begin, ‘[t]he interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution.’” *Suboh v. Dist. Att’y’s Off. of Suffolk Dist.*, 298 F.3d 81, 91 (1st Cir. 2002) (quoting *Hatch*, 274 F.3d at 20). To overcome this weighty constitutional interest, social workers must have “an objectively reasonable suspicion of abuse” to justify the prehearing seizure of children. *Hatch*, 274 F.3d at 21 (Fourteenth Amendment); see *Suboh*, 298 F.3d at 94 (same). Exigency requires an objectively reasonable likelihood of danger. *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (Fourth Amendment).

There was no exigency here because:

- C.S. 2’s rib fractures were healing and were estimated to be at least 10 days old, possibly six weeks old. Butterfield Facts ¶ 50; Resp. to Butterfield ¶ 50.
- The Sabey cooperated with testing at the hospital, which revealed zero additional signs of abuse to C.S. 2. Butterfield Facts ¶¶ 19, 56; Resp. to Butterfield ¶¶ 19, 56; Pls.’ Facts ¶¶ 23–28.
- Doctors discharged C.S. 2 home in the care and custody of his parents. Butterfield Facts ¶ 60; Resp. to Butterfield ¶ 60.

- The Sabeys voluntarily had C.S. 1 evaluated for signs of abuse and none were found. Pls.’ Facts ¶¶ 51–53.
- They allowed DCF into their home for two separate inspections. Butterfield Facts ¶¶ 36, 83; Resp. to Butterfield ¶¶ 36, 83.
- They allowed DCF to speak with their three-year-old, C.S. 1. Pls.’ Facts ¶¶ 67–68.
- DCF investigators drew up a safety plan with the Sabeys’ cooperation and input. Pls.’ Facts ¶¶ 101–07.
- DCF determined the next step should be to “gather more information,” and the team specifically did not recommend removal. Butterfield Facts ¶ 39; Resp. to Butterfield ¶ 39.
- All the information that DCF relies on now to justify the “emergency” removal of the Sabey kids, DCF had no later than Thursday, July 14—allowing at least a full business day in which the agency could have applied for a warrant or arranged an “emergency” hearing in which a judge could have decided whether to authorize removal.
- No new information prompted DCF to order overnight removal on Friday, July 15.
- Instead, overnight removal became an “emergency” because it was already nearly close-of-business on a Friday when the case came to the attention of Butterfield and Gemski. Butterfield Facts ¶¶ 67–68, 87; Resp. to Butterfield ¶¶ 67–68, 87.

These circumstances—all conceded by Defendants—are not exigent because they do not show an objectively reasonable likelihood of danger to the Sabey children. *See Stuart*, 547 U.S. at 403, 406 (holding that exigent circumstances justified the warrantless entry into a home in the middle of the night where police witnessed a fistfight in progress between a child and an adult). No reasonable social worker would therefore look at these circumstances and form “an objectively reasonable suspicion of abuse.” *See Hatch*, 274 F.3d at 21.

When the First Circuit found exigent circumstances in *Hatch*, the facts were starkly different. The “objectively reasonable suspicion of abuse” was composed of far more evidence. *Hatch* involved a school-age boy (the opinion does not say how old, but certainly older than the Sabey children) who said his father struck him after he stumbled during a vigorous run that the

father insisted the boy go on to help him lose weight. When the boy told his principal and school nurse, they saw direct evidence of injuries on the boy's body and reported the suspected abuse to police. The boy repeated his claims of abuse to the police; he bore marks consistent with abuse; he expressed fear of going home; and a neutral doctor determined his injuries were consistent with abuse and put him under a "physician's hold"—placing the boy in immediate emergency custody for up to 72 hours awaiting a judicial hearing. *See Hatch*, 274 F.3d at 18. Based on these facts, the First Circuit believed there was "more than sufficient" evidence to "raise a reasonable suspicion of abuse (and, thus, to justify a temporary assumption of custody)." *Id.* at 24–25.

This case paints a different picture. Everyone agrees there is no direct evidence of abuse to C.S. 2. The infant had two-to-three unexplained rib fractures that could be seen on an x-ray, but while doctors disagreed how old the fractures were at the time, all agreed they were healing. All doctors agreed, also, there was no other physical evidence of abuse. Thus, there is no other evidence of abuse to C.S. 2 other than the rib fractures, and zero evidence of abuse to C.S. 1. Not one of the many doctors with whom the children interacted placed anything like a "physician's hold" on the children. Just the opposite: Doctors sent them home with their parents. In the days that followed, the Sabeys cooperated with DCF (and with doctors) to have the children examined several times. Each time, doctors deemed the kids in good health and sent them home, again, with their parents. DCF representatives visited the children in the hospital, interviewed the Sabeys, talked with their doctors, visited the Sabey home, and composed a safety plan. The investigators also found no emergency. The principal investigator specifically declined to recommend removal and opted instead to collect more information. Only then did off-site DCF officials—whom the Sabeys had never met and who were not part of the investigatory team—declare an "emergency." They did so late on a Friday night, when custody hearings are not available. DCF had no new

information at the time; this so-called “emergency” was based exclusively on information DCF had gathered over two days of investigation, and all of it was in hand by Thursday, July 14. In other words, the removal of the Sabey children was, in DCF’s view, an “emergency” due to internal delay that led management to review the case for the first time on Friday evening and reach a different conclusion than the DCF personnel who had been involved to that point. This is nothing like the direct evidence the First Circuit deemed to have raised an “objectively reasonable suspicion of abuse” in *Hatch*.

As a matter of law, there was no emergency in this case that would justify the warrantless, prehearing removal of children from their parents’ custody.

B. The Warrant Requirement Applied

Because “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,” *United States v. U.S. Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972), the Supreme Court “has drawn a firm line at the entrance to the house [and] absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Payton v. New York*, 445 U.S. 573, 590 (1980).

There was no warrant here. Arruda and Kalvinek entered the breezeway and remained there for over an hour despite being told to leave. DCF enlisted the police, who said they would remain at the Sabeys’ door until the children were taken away, by force if necessary, and that the next step would be the involvement of a hostage negotiation and SWAT team. Faced with violence, the Sabeys relented, and the officers assisted DCF in removing the children, which included DCF worker Kalvinek entering the Sabeys’ apartment.

Despite these facts, the DCF Defendants argue that they did not violate the Fourth Amendment because: (1) the breezeway was not within the curtilage of the home; (2) if it was within the curtilage of the home, there was an exigency justifying their presence; and (3) in any

event, it was the police who threatened violence, not DCF. In addition, Butterfield, Gemski, and Griffin argue that even if the Fourth Amendment was violated, they merely ordered the violation and were not at the home personally carrying it out. Butterfield Br. (Doc. 207) at 7–12; Arruda Br. (Doc. 218) at 3–4. These arguments each fail under the governing law.

1. The breezeway was within the home’s curtilage

The DCF Defendants make two primary arguments they say justify their presence in the breezeway. First, they assert that, under *Katz v. v. United States*, 389 U.S. 347, 360 (1967), individuals have no “reasonable expectation of privacy” in the common areas of an apartment building. Arruda Br. at 11. Since the upstairs tenant had the legal right to access the breezeway, they reason, there can be no Fourth Amendment violation. *Id.* Second, the DCF Defendants list a handful of facts that, they assert, indicate the area was a “common area,” including: the fact the door was unlocked, limitations in the Sabeys’ lease as to what the breezeway could be used for, and allowing the upstairs tenant to use the area. *Id.* at 11–12.

These arguments apply the wrong law. Since *Jones* and *Jardines*, “a person’s Fourth Amendment rights do not rise or fall with the *Katz* [reasonable expectation of privacy] formulation.” *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 (2012)). Rather, the *Katz* reasonable-expectations test has been added to a traditional property-based understanding of the Fourth Amendment. *Id.* Accordingly, reasonable expectations no longer factor into the analysis when the government physically intrudes on constitutionally protected areas—including the curtilage at issue in both *Jardines* and this case. The cases the DCF Defendants rely on—primarily *Katz*—predate *Jones* and *Jardines* and therefore do not discuss the relevant question.

The question presented by this case, then, is simply whether the Sabeys had a constitutionally protected interest in the breezeway. “At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted). The scope of the curtilage is defined by four factors:

[T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

The Sabeys’ breezeway is just like the front porch in *Jardines*. Directly appurtenant to the home, the breezeway was completely enclosed and was frequently used as an extension of the home; the Sabeys stored their children’s toys, stroller, athletic gear, car seat, and other household items there, prompting Josh’s mother to nickname it their “walk-out closet.” Pls.’ Facts” ¶¶ 99, 102.

Curtilage turns on proximity, enclosure, use, and shielding from public view—not formal title or exclusive possession. *See Dunn*, 480 U.S. at 301. For example, in *French v. Merrill*, the First Circuit ruled that police officers violated the Fourth Amendment and were not entitled to qualified immunity when they entered the curtilage of an apartment home that French shared with three other adult males and aggressively knocked on the front door and refused to leave. 15 F.4th 116, 122 (1st Cir. 2021). In line with *Jardines*, the Court did not consider whether the front porch was a “common area.”

As the Court explained in *Jardines*, the curtilage analysis “is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.” 569 U.S. at 8. There is no question that a Girl Scout at the Sabeys’ door at 1:00 a.m. for over two hours, after being told to leave, would

be trespassing. The facts emphasized by the DCF Defendants—such as the terms of the Sabey's lease and the fact that the door was unlocked that evening—play no role in the *Dunn* factors. See Arruda Br. at 11–12. And even if DCF representatives were permitted to enter the breezeway temporarily, that license was revoked when they were told to leave and return with a warrant. This is even worse than *French*—there police officers were simply ignored, not actively told they were unwelcome. The Court should reach the same conclusion here as in *French*.

It is also common sense that DCF was within the curtilage when the Sabey children were removed. To remove children from their parents' home, one must go to the home (as Kalvinek and Arruda did), knock on the door (as they did), and stand at the threshold demanding the children be handed over (as they did). They were within the curtilage when they did those things. In Defendants' words, Kalvinek "asked Sabey through the partially open door if they could come inside the apartment, but Sabey refused." Arruda Br. at 3. She later "took a few steps into [the Sabey's apartment] to assist Perkins with a bag for the children." *Id.* at 4. Those things are impossible without entering the curtilage.

2. DCF's excuses for being in the curtilage do not overcome the warrant requirement

Likely recognizing they were within the curtilage, the DCF Defendants argue that being in the curtilage does not matter for several reasons. First, they argue the children's removal was an emergency and thus exigent circumstances justified their warrantless presence in the curtilage. *But cf. Stuart*, 547 U.S. at 403, 406 (holding that truly exigent circumstances justified the warrantless entry into a home in the middle of the night where police witnessed a fistfight in progress between a child and an adult). The absence of any exigent circumstances has been addressed above.

Second, Defendants argue they did not threaten force—the police did. Arruda Br. at 13–14. Griffin separately argues that he merely floated the idea of using force consistent with previous

DCF cases. *Id.* at 14–15. But in his deposition, Griffin testified that he gave the police the suggestion that if they threatened to force entry, the Sabeys might cooperate because “sometimes when people understand what the consequences of their behavior might include . . . they’ll make better decisions to cooperate.” Pls.’ Facts ¶ 255. And by “consequences,” Griffin meant “[t]hat if the police felt like they needed to force entry, maybe the suggestion of it would stop them from having to force entry.” *Id.* ¶ 256. According to the police, Griffin “indicated that other police agencies in like circumstances both had breached doors or threaten[ed] to do so in order to accomplish DCF removals.” *Id.* ¶ 254.

Finally, Kalvinek argues she did not unlawfully enter the Sabey home without a warrant, because she only took a few steps inside to help Sarah collect essentials for the children once the Sabeys had agreed to turn over the children. *See* Arruda Br. at 17–18. This argument may have some rhetorical force with a lay audience, but it is legally irrelevant. The violation of the curtilage at issue in *Jardines* was merely a dog sniffing the threshold of a person’s home from their front porch. Still, the Supreme Court held that the sanctity of the home was violated and that police should have obtained a warrant. Kalvinek did far more than have her dog sniff the Sabeys’ door. She stood at the threshold for over an hour trying to persuade Josh and Sarah to hand over their children. She wouldn’t leave when the Sabeys asked her to leave. She then entered the house to effectuate the removal of the children. As a matter of law, Kalvinek should not have been there.

C. A Pre-Deprivation Hearing Was Required

The Supreme Court has held that “[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests” *Suboh*, 298 F.3d at 93 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). It is therefore “clearly established that a parent cannot be deprived of custody of a child absent notice and a hearing unless there are exigent circumstances of abuse or neglect.” *Suboh*, 298 F.3d at 94.

Put differently:

“[O]fficials may remove a child from the custody of the parent without consent or a prior court order only in “emergency” circumstances Emergency circumstances mean circumstances in which the child is immediately threatened with harm, . . . , or where the child is left bereft of care and supervision, . . . or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.”

Hurlman v. Rice, 927 F.2d 74, 80 (2d Cir. 1991); *cf. Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003) (acknowledging need for threat of “imminent harm” and “emergency circumstances”).

Under the correct standard, this prehearing removal fails. The only reason for removal late on a Friday night rather than Monday was a previously diagnosed rib fracture which was at least 10 days old and possibly several months old; there was no report of ongoing violence, no observation of present danger in the home, and no indication that the children were “immediately threatened with harm” or “bereft of care and supervision.” *See Hurlman*, 927 F.2d at 80. Rather than acting as they would in a true emergency, DCF waited two days before ordering the children’s removal—despite knowing they were home alone with their parents and a grandparent—and later occupied the Sabeys’ breezeway for over an hour, consulted supervisors, threatened forced entry and SWAT deployment, and never sought judicial process. *See Hatch*, 274 F.3d at 21 (prehearing removal requires an objectively reasonable basis to suspect abuse); *Suboh*, 298 F.3d at 94 (“clearly established” that custody cannot be taken without notice and hearing absent exigent circumstances). As discussed above, the absence of contemporaneous facts showing an *immediate* risk defeats any claim of exigency.

Furthermore, to the extent there were facts suggesting abuse, none of those facts related to C.S. 1. Indeed, the physical examination of C.S. 1 revealed nothing which might be indicative of child abuse, Pls.’ Facts ¶ 53, and his personal physician stated that he had “not shown any concerns” of child abuse or neglect, *id.* ¶ 51. Accordingly, the seizure of C.S. 1 was not supported

by anything but a mere and uncorroborated suspicion of abuse—violating the Sabeys’ due process rights. *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999).

D. Plaintiffs Did Not Consent

The DCF Defendants argue Plaintiffs consented by eventually opening their door and carrying out their children to be taken away. But “consent” is invalid when secured by threats. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). Here, Arruda and Kalvinek, with Waltham police, told Plaintiffs their door would be broken down and force used if they did not comply. The police were encouraged by Griffin to threaten the use of force. Faced with that coercion, Plaintiffs surrendered their children. No valid consent can be found.

It is well settled that officials leave no room for consent when they claim the lawful authority to search or seize or otherwise coerce compliance. *Bumper*, 391 U.S. at 548–50; *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973) (“[I]f . . . the consent . . . was coerced by threats or force, or granted only in submission to a claim of lawful authority[] then [the Court] ha[s] found the consent invalid and the search unreasonable.”). “When a law enforcement officer claims authority to search a home . . . he announces in effect that the occupant has no right to resist the search.” *Bumper*, 391 U.S. at 550; *see also Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 598 (1st Cir. 2019) (officers violated clearly established law by coercing consent to enter home based on falsehoods, such that a resident “felt he had no choice but to allow the agents access to his home and computer”). The presence of coercion is a question of fact based on the totality of the circumstances, including the consenting party’s knowledge of the right to refuse; the consenting party’s possibly vulnerable state; and evidence of inherently coercive tactics. *See United States v. Twomey*, 884 F.2d 46, 51 (1st Cir. 1989). Here there is, again, no question as to the facts—the DCF Defendants and police officers coerced the Sabeys into releasing their children using express threats to break the door down and take the children by force.

“The law is clear, for example, that consent to a search is invalid if given only because of an officer’s knowingly false assurance that there will soon be a lawful search anyway.” *United States v. Vazquez*, 724 F.3d 15, 22 (1st Cir. 2013). Even assuming the good faith of the DCF officials, “[c]onsent pried loose by such a claim of authority is merely acquiescence. As such, it serves poorly as an independent basis for sustaining the validity of the search.” *Id.* at 23. This rule makes clear that DCF cannot use the Sabeys’ ultimate acquiescence as an excuse for their unconstitutional actions.

II. Qualified Immunity Does Not Apply

Qualified immunity shields officials from damages liability unless (1) the facts show the violation of a constitutional right; and (2) the right was “clearly established” at the time of the conduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Courts may address the two prongs in either order, *id.* at 236, but at summary judgment the Court must credit the nonmovant’s version of the facts and draw reasonable inferences in their favor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

For the reasons explained above, the DCF Defendants violated the Plaintiffs’ constitutional rights. *See also* Pls’ Mem. in Supp. of Mot. for Summ. J., Doc. No. 208, at 3, 16. The only remaining question under qualified immunity is whether those rights were clearly established at the time.

By July 2022, the governing principles were clear:

- Warrantless home entry requires exigency. *Payton*, 445 U.S. at 586.
- Exigency must be determined case-by-case and cannot be based on speculation. *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).
- Child removals without imminent danger violate due process. *Hatch*, 274 F.3d at 23–24; *Suboh*, 298 F.3d at 93–94.

“It is clearly established that a parent cannot be deprived of custody of a child absent notice and a hearing unless there are exigent circumstances of abuse or neglect.” *Suboh*, 298 F.3d at 94; *see also Hurlman*, 927 F.2d at 80; *cf. Kearney*, 329 F.3d at 1293.

No reasonable official could believe that a few healing fractures, after two days of investigation, medical discharge, and full parental cooperation, created exigency. This Court has already denied qualified immunity at the pleading stage, holding the right was clearly established. Mem. & Order, Doc. No. 89, at 19–22. Nothing in the summary judgment record alters that conclusion.

III. Absolute Immunity Does Not Apply

Butterfield and Gemski next argue they are entitled to absolute immunity for their decision to exercise DCF’s temporary emergency removal powers over the Sabey children. Butterfield Br. at 19–20. That argument is, however, squarely foreclosed by Supreme Court precedent.

Absolute immunity protects only quasi-prosecutorial functions intimately associated with court advocacy. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Ordering a warrantless, midnight removal before judicial process is an executive act, not courtroom advocacy.

The burden is on the proponent of absolute immunity to show she was “engage[d] in conduct ‘intimately associated with the judicial phase of the criminal process.’” *Kovacik v. Cuyahoga Cnty. Dep’t of Child. & Fam. Servs.*, 724 F.3d 687, 694 (6th Cir. 2013) (quoting *Pittman v. Cuyahoga Cnty. Dep’t of Children & Fam. Servs.*, 640 F.3d 716, 724 (6th Cir. 2011), and citing *Holloway v. Brush*, 220 F.3d 767, 776 (6th Cir. 2000) (en banc) (holding that “out-of-court actions” are not covered by absolute immunity)). In other words, “social workers are absolutely immune only when they are acting in their capacity as *legal advocates*—initiating court actions or testifying under oath—not when they are performing administrative, investigative, or other functions.”

Kovacic, 724 F.3d at 694 (internal quotation omitted) (emphasis in original). Thus, “[w]hen the social workers removed the children from the home, they were acting in a police capacity rather than as legal advocates.” *Kovacic*, 724 F.3d at 694 (citing *Millspaugh v. Cnty. Dep’t of Pub. Welfare*, 937 F.2d 1172, 1176 (7th Cir. 1991) (“Sallying forth to collect the children is no different from seizing evidence on the authority of a warrant, which again is covered by qualified immunity only.”)).

Butterfield and Gemski do not attempt to make the required showing (nor could they) that their decision to remove the Sabey children in the middle of the night was anything other than an out-of-court action like the ones in *Kovacic* and *Halloway*. Absolute immunity only applies to their arguments on behalf of children in court. Absolute immunity does not apply to the other actions of social workers, such as the decision by Butterfield and Gemski to remove the Sabey children.

IV. Butterfield and Gemski Are Directly Liable

Butterfield and Gemski contend they “did not play any direct role in the physical removal” of the Sabey children. Butterfield Br. at 16. But they made the decision to order removal on a Friday night without any prior judicial involvement, setting in motion the unconstitutional seizure. Butterfield Facts ¶¶ 87–96; Resp. to Butterfield ¶¶ 87–96.

Section 1983 imposes liability where a defendant “intentionally engaged in a series of acts that would foreseeably result in some member of the team inflicting constitutional injury.” *Eldredge v. Town of Falmouth*, 662 F.3d 100, 106 (1st Cir. 2011). Yet, Gemski and Butterfield rely on *Eldredge* to show “their complete lack of involvement.” Butterfield Br. at 17. They claim that, under *Eldredge*, they cannot be liable under § 1983 because they “were not present and did not participate in any decisions made at [the Sabey’s] residence on July 16, 2022.” *Id.* But that is not what *Eldredge* says.

Eldredge involved two police officers responding to a 911 call, in which the caller warned that a drunken suspect was fleeing along a road. 662 F.3d at 102–03. Speeding toward the last known location of the suspect, the lead officer spotted two men walking along the road and, with the intention of approaching them to investigate, slammed on his breaks and ordered them to stop. *Id.* at 103. His cruiser stopped so quickly, however, that the officer following him crashed into the lead car and careened off, striking one of the two men on the side of the road and seriously injuring him. *Id.* When the injured man sued, the District Court dismissed his complaint on qualified immunity grounds, and he appealed. *Id.* at 102.

The First Circuit held that the two police officers were entitled to qualified immunity for different reasons. The officer driving the lead car was entitled to qualified immunity because there was enough evidence to support a *Terry* stop to investigate the two men on the side of the road—something wholly irrelevant to the issues in this case. *See id.* at 106–07. The officer whose cruiser careened off the other and struck the man was entitled to qualified immunity because he had not “seized” the pedestrian in the constitutionally nuanced way in which police seizures of persons are determined—something wholly irrelevant here. *See id.* at 105.

The relevant dimension of *Eldredge* is the First Circuit’s reasons for rejected the plaintiff’s argument that the trailing officer could be held liable as part of his “team effort” with the lead officer to carry out an allegedly unconstitutional *Terry* stop. *See id.* at 105–06; *see also* *Butterfield Br.* at 17 (discussing same). On that point, the First Circuit held that government officials are only liable under § 1983 for such “team effort” where every member of the team “intentionally engaged in a series of acts that would foreseeably result in some member of the team inflicting constitutional injury.” *Eldredge*, 662 F.3d at 106.

That is what happened in this case. On this record, each of the DCF Defendants “intentionally engaged in a series of acts that would foreseeably result in some member of the team inflicting” the Fourth Amendment and Fourteenth Amendment violations at issue. *Eldredge*, 662 F.3d at 106. Far from demonstrating “their complete lack of involvement,” Butterfield Br. at 17, the First Circuit’s decision in *Eldredge* shows that Gemski and Butterfield are liable as the leaders of the “team effort” that lead to seizing the Sabey children in the middle of the night without a prior hearing or judicial warrant. Gemski and Butterfield were the ones who overruled the DCF investigators on the ground. They ordered the emergency seizure of the Sabey children. It was their decision to move forward with emergency removal that was the “series of acts that would foreseeably result in” Griffin, Arruda, and Kalvinek “inflicting constitutional injury.” *Eldredge*, 662 F.3d at 106. Therefore, Gemski and Butterfield can and should be held liable for their off-site role.

V. Griffin, Arruda, and Kalvinek All Participated

Arruda, Griffin, and Kalvinek argue they were just following orders when they carried out the removal of the Sabey children. That is not a defense under the Fourth Amendment. When a police officer is ordered to enter a person’s home without a warrant, the officer (if not *also* his sergeant) can be liable for constitutional violations under § 1983. *All* government actors have constitutional obligations. *All* government actors have an obligation to obtain a warrant before intruding on the sanctity of the home and family. *All* the DCF Defendants can (and should) be held liable for their role in violating the Sabey family’s constitutional rights. Put differently, none of them would be here if they had not played some role in the chain of decisions that lead to the unconstitutional removal.

Griffin supervised the removal by phone and suggested the use of a threat. Arruda and Kalvinek carried out the removal, threatening forced entry. Arruda Facts ¶¶ 16–19; Resp. to Arruda

¶¶ 16–19. While the DCF Defendants are right that liability attaches only to officials who participate in constitutional violations, *see Wilber v. Curtis*, 872 F.3d 15, 21 (1st Cir. 2017), participation for purposes of § 1983 means that each team member “intentionally engaged in a series of acts that would foreseeably result in some member of the team inflicting constitutional injury.” *Eldredge*, 662 F.3d at 106. In carrying out the unconstitutional removal of the Sabey children, Arruda, Griffin, and Kalvinek all did just that.

VI. Plaintiffs’ State-Law Claims Should Prevail

A. Massachusetts Civil Rights Act

The MCRA prohibits interference with rights “by threats, intimidation, or coercion.” Mass. Gen. Laws ch. 12, §§ 11H–11I. Threatening to break down Plaintiffs’ door if they did not surrender their children falls squarely within this prohibition. *See Bally v. Ne. Univ.*, 403 Mass. 713, 719 (1989).

Here, after the Sabey revoked any implied license and refused entry, DCF communicated with police about next steps, which everyone agreed would involve calling NEMLEC to “breach the door,” asserting “exigent circumstances,” and refusing to leave without the children. Pls.’ Facts ¶¶ 144, 167–72, 287–92. Those express threats and claims of authority constitute “threats, intimidation, or coercion” independent of the underlying Fourth Amendment trespass, and they directly produced the coerced “consent” and handover. Defendants essentially argue that MCRA does not apply because their threats were lawful. But for all the reasons shown above, threatening midnight forced entry without a warrant or exigency is not lawful on these facts; it is precisely the sort of coercion MCRA forbids. Nor does qualified immunity bar the MCRA claim where the federal law was clearly established; Massachusetts accords public officials a qualified-immunity defense coterminous with federal standards, and for the reasons set out in Part II above, those standards are satisfied here. *See Duarte v. Healy*, 405 Mass. 43, 46–48 (1989).

B. Massachusetts Privacy Act

Finally, Gemski argues that common-law immunity bars Plaintiffs' Privacy Act claims. But the Supreme Judicial Court has rejected blanket immunity when the Legislature has created a statutory right of action. *Nelson v. Salem State Coll.*, 446 Mass. 525, 537 (2006). Plaintiffs' statutory privacy claims therefore remain.

* * *

Government officials have expansive powers to protect children from abuse and neglect. They do not have the power, however, to ignore constitutional commands protecting the sanctity of the home and family.

In summary, the DCF Defendants violated the Fourth and Fourteenth Amendments by forcibly removing Plaintiffs' children from their home in the middle of the night without a hearing, without a warrant, without exigent circumstances, and only after threatening to break down their door. The law forbidding such conduct was clearly established. Neither qualified immunity nor absolute immunity shield Defendants. Plaintiffs' state-law claims likewise survive.

CONCLUSION

The Court should deny the DCF Defendants' motions for summary judgment and grant Plaintiffs' cross-motion for summary judgment.

DATED: October 8, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2025, I served this document via the Court's electronic filing system to Defendants.

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